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Chairman Lawrence Bliss
Chairman Charles Priest
Committee on Judiciary
Maine State Legislature
100 State House Station
Augusta, Maine 04333

Dear Chairmen and Committee Members,

My name is Sean Flynn and I am the Associate Director of the Program on Information Justice and Intellectual Property at American University Washington College of Law. I hope to provide you with information that will clarify the analysis of the current bill under the First Amendment, as well as place it in a framework of similar bills for your analysis.

I have served as counsel for consumer organizations and states in a number of recent cases involving First Amendment challenges to health privacy regulations, including in litigation in the First Circuit upholding New Hampshire's prescription privacy regulation and the current litigation in the second circuit regarding a similar prescription record privacy law in Vermont.

Like other bills restricting the use of private information for marketing purpose, this law should be subject to a very low level of First Amendment scrutiny, where the First Amendment is implicated at all. While drafting changes should be made to clarify the scope of the bill, correctly crafted, this bill would serve the important state interest of preventing the collection of data from minors without parental permission, when that data was to be used for marketing a prescribed product.

I share the views of Professor Outterson submitted to you that the committee should build a full record documenting the interests that this legislation serves, should evaluate options to meet those interests, and should choose the option that best serves the state's goals while regulating the least First Amendment protected speech possible. I do not agree with Professor Outterson that an amendment limiting the law's effect to children under 13 and only regulating covered entities under HIPAA is likely to meet the state's interests.

How is this legislation analyzed under the First Amendment?

It is important to start any First Amendment analysis with recognition that the ultimate aim of the right to free speech is to protect and promote public speech that creates a marketplace

of ideas and contributes to the creation of opinions that aid self-government.¹ Less protection is afforded to communication that is private in either of two ways.

First, communication is less deserving of First Amendment protection when it is private in the sense of being delivered to highly restricted audiences for purely commercial interests.²

Second, communication can be private in relation to the source of the information it transfers. Governments have a much greater interest, and speaker's interest is concomitantly diminished, when the information sought to be disseminated is not already in the public domain and is of a traditionally confidential nature. When governments act to keep closely held information confidential, they rarely transgress the First Amendment.³

Where government regulations seek to protect the confidentiality of information, like minor's identities, that is not generally in the public domain and is used only for targeting purposes rather than releasing information into the public domain, the First Amendment is rarely applied by courts to strike the legislation.⁴ Accordingly, one step the legislation can take to bolster its defensibility under the First Amendment is to meet its aims through confidentiality protections that apply only to marketing uses and do not prohibit any substantive commercial message and do not regulate the use of the information for non-commercial purposes or release into the public domain.

As described by Professor Outterson, where the state seeks to regulate commercial speech – the conveying of sales messages to consumers – then the state must only do so for a “substantial” interest and must choose regulations that “reasonably fit” the state's interest.

Substantial State Interest: As discussed by the testimony of Sharon Treat and others, given the health impact of direct-to-consumer advertising of prescribed products⁵, the vulnerability of teens to advertising messages⁶, and the lower tendency of teens to evaluate possible risks⁷, there is a strong state interest in regulating the targeted marketing of prescribed products to teens. The Supreme Court has frequently recognized that targeted marketing poses increased

¹ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 n. 7 (1985), see *Stromberg v. California*, 283 U.S. 359, 369 (1931) (describing the primary purpose of the First Amendment as the “maintenance of the opportunity for free political discussion to the end that government may be responsive to the people”).

² *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (credit report delivered to five clients under contractual non-disclosure requirements).

³ *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999), *Florida Bar v. Went For It, Inc.* 515 U.S. 618, 632 (1995).

⁴ For an extended discussion of the regulation of private commercial use of private information see attached Brief of AARP, et al., as Amici Curiae Supporting Appellees, *IMS Health, Inc. v. Sorrell*, No. 09-1913-cv(L) (2d Cir. Sept. 15, 2009).

⁵ 71% of the active members of the American Academy of Family Physicians “believe that direct-to-consumer advertising pressures physicians into prescribing drugs that they would not ordinarily prescribe. Meredith Rosenthal, et al., *Promotion of Prescription Drugs to Consumers*, 346 NEW ENG. J. MED. 498-505 (2002) (citing Martin Lipsky, *The Opinions and Experiences of Family Physicians Regarding Direct-To-Consumer Advertising*, 45 J. FAM. PRACT. 495-499 (1997)).

⁶ See, e.g., Tamara Mangleburg & Terry Bristol, *Socialization and Adolescents Skepticism Toward Advertising*, 27 J. ADVERTISING 11 (1998) (discussing the factors that influence the development of skepticism to advertising over the course of adolescence).

⁷ See, e.g., *ADOLESCENT RISK TAKING*, (Nancy Bell & Robert Bell eds., 1993)

risks of undue influence and therefore states have greater latitude to regulate this kind of marketing than it does for impersonally broadcast advertisements, such as newspaper ads⁸ Such targeted marketing has more potential to harm when directed at teens.⁹

Although legislatures are permitted to rely on common sense conclusion and reasoning when regulating commercial speech, the state's case will be strongest where specific factual findings are made that are supported by the record before it. I urge you to consider making such findings and ensuring that you have a full factual record demonstrating the interests you are seeking to regulate.

No Impact on Speech to Adults: When the Supreme Court examines legislation designed to protect minors, a primary concern is the degree to which that legislation restricts speech to adults.¹⁰ The age verification and parental permission provisions of this legislation leaves marketing to adults unimpeded, a fact that should bolster the defensibility of the law.¹¹

What drafting changes could be made?

Your main task is to decide upon a set of amendments that will better tailor the legislation to its intended purpose.

My understanding is that the primary purpose of this legislation is to regulate the use of identifying information about minors to market prescribed medical products to minors. As such, the bill should be carefully limited to this end.

Nothing in that legislation should prevent the publication of information in a public source, such as a newspaper or in a school sports review. No liability should exist if information were collected for any purpose other than to market a prescribed product. It should not, for example, bas the use of identifying information to market university admissions information or some of the other benign purposes canvassed in comments on the bill.

I advise that the structure of the bill mirror the federal Children's Online Privacy Protection Act (COPPA), but extend the regulation to cover the collection of personal information from minors 13-17 years old when that data is to be used for the promotion of a prescribed product. Currently, COPPA prohibits the collection of personal information from children under the age of 13 without parental permission.¹² Extensive public notice and comment has supported the implementation of this law, and industry compliance has proved feasible.¹³

Professor Outterson's recommendation that the statute be limited to children under 13 would leave this statute with little actual effect. COPPA already regulates such uses of information about children under 13. And the record before the legislature suggests heightened problems with marketing growth hormones, prescribed acne medications and

⁸ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

⁹ See *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291 (2007).

¹⁰ *American Booksellers Foundation v. Dean*, 342 F. 3d 96, 101 (2d Cir. 2003)(stating that protections aimed at minors could not silence speech to adults).

¹¹ *Rockwood v. City of Burlington*, 21 F. Supp.2d 411, 423 (D.Vt. 1998).

¹² Children's Online Privacy Protection Act, 15 U.S.C. § 6501-6506 (2006).

¹³ Children's Online Privacy Protection Act; Retention of Rule Without Modification, 71 Fed. Reg. 13,247 (Mar. 15, 2006).

other potentially harmful products to 13 to 17 year old minors. This record should be carefully created and examined and the legislation tailored to the precise state interest identified.

I also oppose the reliance on HIPAA for the model of regulation. The concept of personal health information in HIPAA applies only to covered entities that have a health care relationship with the patient. In that context, almost all personally identifiable information is found to be within “the provision of health care to an individual” and so is given confidentiality protection. But most of the prescribed product marketers that the bill seeks to cover are not covered entities because they do not provide care for the individuals. So modeling this bill on a HIPAA amendment will not regulate the main activities by web marketers that are the subject of much of the testimony before the legislature.

Why are opponents’ fears ungrounded?

While a broad range of parties have expressed concern that this law would restrict publishing, educational, and a broad range of public marketing activities, with the suggested amendments above, few of these concerns would remain. The law would not regulate publication of names in newspapers or college recruitment communications because these do not involve marketing prescribed products to teens.

Thank you for your attention to this important issue. Please feel free to contact me with any questions, at 202-274-4157.

Sincerely,

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