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before the Joint Committee on Business, Research, and Economic Development
Maine State Legislature

COMMENTS ON LD 1677: AN ACT TO PROTECT MINORS FROM PHARMACEUTICAL MARKETING PRACTICES

March 4, 2010

Chairman Schneider, Chairman Smith, and Members of the Joint Committee:

On behalf of the Center for Democracy & Technology (CDT), I thank you for the opportunity to testify today. Although we appreciate the concerns that have motivated the legislature to consider this issue, and recognize the efforts by Senator Schneider and others to narrow the focus of the bill before the Committee today, we continue to have concerns about the constitutional implications of restricting minors' online access to health-related information.

As a note of introduction, I am an attorney and serve as General Counsel for CDT, which is one of the leading civil liberties organizations in the United States focused on the application of the First Amendment to speech on the Internet. In 1996, CDT led one of the consolidated legal challenges to the federal Communications Decency Act that resulted in the 1997 decision by the U.S. Supreme Court that speech on the Internet warrants the highest level of First Amendment protection. Since then, CDT has brought and litigated constitutional challenges to a number of state laws that sought to regulate or restrict speech over the Internet.

Last fall, CDT was actively preparing to pursue a constitutional challenge against PL 2009 Chapter 230. Once a separate legal challenge was filed, we put our planned lawsuit on hold. We applaud the Legislature's decision to revisit that law, and to avoid further litigation we urge this Committee to act to repeal the prior statute.

Unfortunately, although narrower than Chapter 230, LD 1677 continues to have many of the same significant constitutional problems that led to the court injunction last fall. In addition to the First Amendment concerns regarding minors' access to constitutionally protected speech, the proposed law would impinge on the rights of online speakers as well. LD 1677 seeks to extend the federal Children's Online Privacy Protection Act of 1998 (COPPA) to cover some teenagers, which raises a host of both constitutional and implementation difficulties. Further, a state-level Internet content-regulation would almost certainly violate the Commerce Clause of the U.S. Constitution. For these reasons, we recommend that the Committee repeal Chapter 230, and in its stead direct the Attorney General to examine her current authority under the Maine Unfair Trade

Practices Act to address the predatory marketing practices that motivated this legislation in the first place.

LD 1677 Violates the First Amendment

Rights of Minors

By prohibiting the collection and use of personal information collected from minors age 13 to 16, LD 1677 infringes upon minors' own First Amendment right to receive information. The U.S. Supreme Court has made clear that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to [minors]." ¹ Permissible content-based restrictions on minors' access to information typically relate to a narrow category of sexual content; otherwise, minors have a right to receive information just as adults do. ²

LD 1677 would effectively prohibit minors from requesting information about a broad range of health concerns, both regarding their own health as well as the health of family or friends. Because the proposed Act instructs the Attorney General to define "pharmaceutical marketing" to include "advertising or *otherwise promoting the sale of* prescription and over-the-counter drugs," it would cover a broad range of speech, including traditional advertisements, coupons for discounts on medication already prescribed by the minor's physician, material that discusses the efficacy of various cancer treatments, and text messages that remind teens with asthma to use their inhalers, just to name a few examples.

Further, LD 1677 instructs the Attorney General to adopt rules consistent with COPPA, which requires verifiable parental consent before an online service provider can collect information from a minor. Thus, minors could not request to receive information on sensitive health topics without first receiving their parents' consent, a proposition that both infringes on their First Amendment rights and runs counter to Maine's own progressive stance on mature minors' right to make informed medical decisions on their own behalf. ³ The proposed Act would also hinder minors' ability to make responsible health-related decisions: while the age of consent for sexual activity is 16 in Maine, the Act would prevent 16-year-olds from providing their email address or phone number in order to receive information about pharmaceutical methods of birth control, Plan B, STI prevention and treatment, and other pharmaceuticals related to their own sexual health and well-being.

LD 1677 would also threaten the ability of web sites to offer free information to users in Maine. The extent to which advertising supports the dissemination of information over the Internet cannot be overstated: the vast majority of websites, search engines, and

¹ *Erznoznick v. City of Jacksonville*, 422 U.S. 212-13 (1975).

² *Board of Education v. Pico*, 457 U.S. 853, 867-868 (1982) (plurality opinion).

³ See, e.g., *In re Chad Eric Swan*, 569 A.2d 1202 (Me. Sup. Jud. Ct. 1990); 22 M.R.S. 1908 (permitting physicians to render family planning services to minors without parental consent in cases where the minor is a parent, married, or "may suffer . . . probable health hazards if such services are not provided"); 32 M.R.S. 3293 (holding physicians under no obligation to obtain parental consent to render medical care to a minor for treatment of venereal disease or abuse of drugs or alcohol).

social networking platforms display some type of advertising, and LD 1677 has the potential to interfere with minors' and even adults' access to all of these. The proposed Act could prevent minors from joining a discussion forum relating to their own medical conditions (or those of family and friends) if that forum displayed ads for pharmaceuticals or included discussions of the efficacy or side effects of different treatments. It could even prevent minors from being able to use the email service GMail, which might display an advertisement for a particular brand of insulin to a minor who has been discussing her juvenile diabetes via email with her parents.

Rights of Speakers

LD 1677 would also violate the First Amendment rights of those speakers collecting personal information from users online. This statute reaches far beyond commercial sites or sites that seek to advertise or make sales; any site that hosts ads, which may include ads for pharmaceuticals, or merely reports that a drug is effective, could be "promoting the sale of" that drug. The proposed Act would chill speech on such sites in several ways. In order to comply with the law, these service providers would have to collect more information from their users, including state of residence and birth date. This may lead adults who do not want to disclose increasing amounts of personal information to stop accessing the site. Online service providers would also have to implement age verification and verifiable parental consent processes, which are time-consuming and expensive (and of dubious effectiveness, in any event), with the likely result that some websites would decide to attempt to bar *all* visitors from Maine.⁴

The proposed Act would also bar advertisers from engaging in constitutionally protected speech. The U.S. Supreme Court has repeatedly struck down commercial speech regulations that prohibit truthful, non-misleading speech.⁵ Speech restrictions, even on commercial speech, must be "narrowly drawn" to advance the government's substantial interest.⁶ The impetus for LD 1677 is the state's interest in protecting minors from predatory and misleading marketing practices, but the statute fails the requirement for narrow tailoring, because it broadly prohibits advertisers from collecting and using minors' information for any type of advertisement or promotion, even though not all forms of marketing are necessarily predatory.⁷

Extending COPPA Creates Significant Constitutional Concerns

LD 1677 directs the Attorney General to adopt rules "consistent with and to the extent possible the same as those established under the federal Children's Online Privacy Protection Act," but to apply those rules to minors ages 13 to 16. Congress's decision to limit COPPA's application to minors under the age of 13, however, was not arbitrary.

⁴ See *American Civil Liberties Union v. Ashcroft*, 534 F.3d 181, 196 (3d Cir. 2008) (discussing burdens on free speech that implementing these procedures involves); see also *Center for Democracy & Technology v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004) (overturning private censorship that resulted from compliance with state law).

⁵ See, e.g., *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

⁶ *Central Hudson Gas & Electric Corp. v. Public Service Commission of NY*, 447 U.S. 557, 564-565 (1980).

⁷ *Thompson v. Western States Medical Center et al.*, 535 U.S. 357, 371 (2002).

Rather, it was an intentional move made in recognition of the need to respect the First Amendment rights of minors, and the difficulty of making bright-line rules regarding access to information where older minors are concerned.

This is demonstrated in the way that COPPA regulates collection of information: it prohibits operators of websites or online services *directed to children* from collecting information from children.⁸ Websites that are not directed at children do not have to take on the onerous burdens of COPPA compliance. When enforcing COPPA, the Federal Trade Commission can fairly easily distinguish sites directed to children from those intended for a general audience – if for no other reason than the fact that most sites aimed at children under 13 use cartoons and child-oriented animations. LD 1677, on the other hand, would require the Attorney General to distinguish sites directed at 16-year-olds, which would be covered under the proposed Act, from those directed at 17-year-olds, which would not. Many websites that provide health information are aimed at “teens” or “youth”, broad categories that encompass both those covered under the Act and legal adults.⁹ These websites would be subject to expanded COPPA-type regulations, and would face the costly prospect of implementing age verification and verifiable parental consent processes.

COPPA requires operators to obtain “verifiable parental consent” before collecting or using children’s information.¹⁰ This is a significant burden to website operators: age verification systems are expensive, require the collection of a great deal of information from every user, and yet cannot guarantee accurate results. Verifiable parental consent requires parents to contact site operators by telephone, through the mail, or to use a credit card to establish their age and identity. The result of COPPA has been that the vast majority of website operators bar minors under 13 from accessing their sites and services. If Maine were to impose COPPA-type regulations on the collection of information from minors ages 13 to 16, website operators and service providers would likely attempt to bar all minors under the age of 17, or more likely all residents of the state of Maine, from accessing their services. This would greatly limit the amount of speech available to teens and adults, while increasing the overall amount of information that websites collect about their users (thereby harming everyone’s privacy).

State-level Regulations of the Internet Violate the Commerce Clause

Courts across the country routinely strike down state laws that seek to regulate online speech as unconstitutional burdens on interstate commerce.¹¹ As a leading case applying the Commerce Clause to the Internet explained:

⁸ 15 U.S.C. 6502(1).

⁹ See, e.g., Advocates for Youth, www.advocatesforyouth.org, which promotes activist networks for both high school and college students.

¹⁰ 15 U.S.C. 6502(b)(1)(A)(ii).

¹¹ See, e.g., *PSINet v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Ass’n v. Dean*, 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999); *American Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997).

The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. *The Internet represents one of those areas*; effective regulation will require national, and more likely global, cooperation. Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations.¹²

If LD 1677 were enacted, websites around the country would have to redesign their sites to comply with Maine law. Then, if New Hampshire were to pass a conflicting law (perhaps a law protecting a minor's right to access medical information privately), the website could not comply with both states' laws. This potential for conflict is precisely why the Commerce Clause would bar LD 1677 as unconstitutional.

There Are Other Strategies Maine Can Use to Combat Predatory Marketing

It is unlikely that the Attorney General could draft rules in compliance with the proposed Act that did not violate the Commerce Clause and the First Amendment. The rules would have to apply only to speech originating in Maine, directed to residents of Maine, and actually accessed by residents while within the state's borders, with the entity collecting and using the information having actual knowledge of all of these facts. But this type of rule, while affecting Maine website operators and limiting Mainers' access to speech, would fail to capture predatory advertising originating outside of Maine, either in another state or another country, thus failing to achieve the state's interest. For these reasons, regulating Internet-based communications themselves will never be successful; there are other approaches, however, that Maine can take to target predatory marketing.

Maine Unfair Trade Practices Act

The aim of LD 1677, and its predecessor PL 2009 Chapter 230, is to protect minors from predatory and deceptive marketing practices. Maine already has a robust unfair trade practices law, which prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce."¹³ The Attorney General of Maine is already empowered to make regulations interpreting this section,¹⁴ and may seek temporary and permanent injunctions against advertisers using unfair or deceptive trade practices.¹⁵ The Attorney General's office could conduct a study of their current unfair trade practices rules and determine whether any of them apply to the type of marketing targeted by the proposed Act. If needed, the Legislature could grant the Attorney General the power to promulgate rules that specifically target deceptive practices employed by some drug companies, whether those practices involve online collection of information or not.

¹² American Library Association v. Pataki, 969 F. Supp. 160, 181 (S.D.N.Y. 1997) (emphasis added)

¹³ 5 M.R.S. §207(1).

¹⁴ 5 M.R.S. §207(2).

¹⁵ 5 M.R.S. §209.

Federal Agency Regulation of the Content of Pharmaceutical Advertising

The Attorney General could also consider working with the Food & Drug Administration and the Federal Trade Commission to combat predatory pharmaceutical advertising. The FDA already regulates the content of pharmaceutical marketing and has strict requirements for drug companies to accurately present the risks and benefits of drugs in their marketing materials. The Attorney General can work with the FDA to identify and prosecute companies that violate these regulations. The Attorney General could also work with the FTC to identify fraudulent contests and other marketing campaigns that prey on minors.

To best address the concerns that underlie LD 1677, the Legislature should consider directing the Attorney General to take the above actions, and to – after one year – report to the Legislature both on the progress of her efforts, and on any recommendations for further legislation that might be needed.

Conclusion

We appreciate your consideration of our concerns, and we thank you for the opportunity to discuss them with you. As a parent of a 14- and an 11-year old, I share your strong concern to protect our children from unsavory and inappropriate marketing efforts. But we must do so in a manner that complies with our Constitution, and preserves our liberties for future generations.