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Admitted in: ME, MA, NY

April 29, 2025

Hon. Donna Bailey, Senate Chair
Hon. Kristi Mathieson, House Chair
Joint Standing Committee on Health Coverage, Insurance, and Financial Services
100 House State House Station
Augusta, ME 04333

Re: L.D. 1018, *An Act to Protect Health Care for Rural and Underserved Areas by Prohibiting Discrimination by Participants in a Federal Drug Discount Program*

Dear Senator Bailey and Representative Mathieson:

I write on behalf of Pharmaceutical Research and Manufacturers of America ("PhRMA") in opposition to L.D. 1018, *An Act to Protect Health Care for Rural and Underserved Areas by Prohibiting Discrimination by Participants in a Federal Drug Discount Program* (the "Proposed Legislation").

I am a partner with the law firm Pierce Atwood, where I serve as co-chair of the firm's appellate litigation group. In the course of my practice, I have argued constitutional issues numerous times before the Law Court and the United States Court of Appeals for the First Circuit, and have authored amicus briefs submitted to the United States Supreme Court. I also have litigated the constitutionality of Maine legislative and administrative actions—both challenging such actions and defending them. Prior to entering private practice, I served as a law clerk for the United States Court of Appeals for the Third Circuit.

I have reviewed the testimony submitted by Joanne Rawlings-Sekunda from the Bureau of Insurance as well as by Senator Bailey, both of which remarked on the status of existing legal challenges to legislation like L.D. 1018 adopted in other states. I agree with the Bureau of Insurance that the legal landscape concerning the Proposed Legislation is unsettled. Indeed, I view the existing and numerous challenges to this type of legislation as closer to their infancy than to their conclusion.

PhRMA has filed suit challenging legislation similar to the Proposed Legislation in numerous states where such legislation has gone into effect. PhRMA's challenges

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raise complex issues concerning the Supremacy Clause and preemption, the Commerce Clause, and Due Process. In total, there have been nine such challenges, each in a different state, only one of which has been litigated to a substantive conclusion. Seven of the nine challenges were filed in 2024 or 2025, which, in the life of a lawsuit, is quite recent. In short, the relevant legal challenges are almost all new, on-going, and unresolved, notably with federal courts reaching differing decisions as to the preemption claim raised by PhRMA in those actions.

I noted Senator Bailey's statement that the United States Supreme Court declined to grant certiorari with respect to a decision of the United States Court of Appeals for the Eighth Circuit, where the Eighth Circuit upheld legislation similar to the Proposed Legislation. Of note, the Proposed Legislation provides for a private right of action, which is in even greater conflict with a prior decision from the Supreme Court that explicitly rejected the use of a common law cause of action to enforce 340B requirements. In other words, the Proposed Legislation contains legal flaws not considered by the Eighth Circuit. In any event, it would be unfounded to conclude that the Supreme Court has approved of this type of legislation simply because the Court denied certiorari in the Eighth Circuit case. The Supreme Court grants certiorari in only 1% of all cases, so a denial of certiorari is the norm for almost all litigants.

What *can* whet the appetite of the Supreme Court is a "circuit split"—situations where two different federal courts of appeals have reached different conclusions in similar cases. The most likely explanation for the Supreme Court's denial of certiorari in the Eighth Circuit litigation is that the Court concluded a circuit split had not yet arisen—not that the Court substantively approved of this type of legislation. That said, there very well may be a circuit split on the horizon. The United States District Court for the District of West Virginia granted PhRMA's motion for preliminary injunction in December, enjoining the implementation of similar legislation adopted in West Virginia. That decision is now on appeal to the United States Court of Appeals for the Fourth Circuit. If the Fourth Circuit upholds the district court's decision, then a circuit split with the Eighth Circuit may emerge. Additionally, the Fifth Circuit heard argument on February 25, 2025, in a similar case and is expected to issue its decision in the coming months, which could also create a circuit split with the Eighth Circuit. Overall, where there is litigation pending across the country in multiple different judicial circuits, there is a very strong possibility that a circuit split will develop and that the Supreme Court ultimately will take up the matter. The legal challenges to this type of legislation are in their early stages.

Legal challenges to legislation similar to the Proposed Legislation are on-going and likely to continue for some time. I respectfully suggest there is no reasonable basis

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to conclude that the complex legal issues arising from the Proposed Legislation are "settled" or that a challenge to the Proposed Legislation would be quickly denied.

Thank you for your consideration of these issues.

Sincerely,



Nolan L. Reichl

cc:

Senator Joseph Baldacci
Senator David Haggan
Representative Poppy Arford
Representative Michelle Boyer
Representative Marygrace Cimino
Representative Sally Cluchey
Representative Paul Flynn
Representative Robert Foley
Representative Anne-Marie Mastraccio
Representative Joshua Morris
Representative Rolf Osen