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Testimony in Support of L.D. 1636
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Senator Sanborn, Representative Tepler, and Members of the Committee, my name is Peter Brann, and I submit this testimony in support of L.D. 1636. I was asked by the National Academy for State Health Policy to review L.D. 1636 and evaluate, based on applicable case law, whether the bill would likely withstand a challenge that it is unconstitutional under the dormant commerce clause. In my opinion, I think it should withstand such a challenge, and it *ought* to withstand such a challenge.

By way of background, I spent 18 years in the Maine Attorney General's Office, ending up as the Maine State Solicitor handling and supervising constitutional challenges up to and including the U.S. Supreme Court. I am currently a litigation partner at Brann & Isaacson handling matters across the country, and I have filed briefs on behalf of companies and organizations on constitutional questions in the Supreme Court and elsewhere. For the past 12 years, I have also co-taught seminars at Columbia, Yale, and Harvard law schools on the role of state attorneys general.

This is not the first time that opponents have claimed an innovative Maine health care policy violates the dormant commerce clause. On the contrary, opponents of the Maine Rx program took their challenge all the way to the Supreme Court. The Court unanimously rejected the dormant commerce clause challenge, finding:

> [T]he Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices.

Pharmaceutical Research & Manufacturers of America v. Walsh, 538 U.S. 644, 669 (2003). So, too, here.

There is a serious question whether a majority of the current Supreme Court would even recognize the legitimacy of a dormant commerce clause challenge. By definition, a "dormant" commerce clause challenge means that it is not based on the express language of the commerce clause, U.S. Const. art. I, § 8, cl. 3, and a majority of the Court have stated that they are "textualists," *i.e.*, they rely solely on the text of the applicable statute or constitutional provision. Thus, two Justices have explicitly questioned the validity of the dormant commerce clause. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018) (Gorsuch, J., concurring); *Comptroller of Treasury of Md. v. Wynne,* 575 U.S. 542, 578 (2015) (Thomas, J., dissenting). It is an open question whether the dormant commerce clause is even a viable theory today.

Even if the dormant commerce clause retains viability, it should not prohibit the Legislature from enacting legislation that aims squarely at regulating drug prices paid in Maine by Maine consumers under health plans approved in Maine. Furthermore, the proposed legislation does not concern itself with the drug prices paid by other people in other states.

In considering two recent dormant commerce clause challenges to state price gouging statutes, we can see why the proposed legislation falls on the constitutional side of the ledger. In *Online Merchants Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021), the Sixth Circuit recent upheld Kentucky's price gouging statute, even though Amazon prohibited the sellers from selling their products at a different or lower price in Kentucky, which the sellers argued meant that the statute necessarily affected prices out-of-state:

> The dormant commerce clause prevents a state from "project[ing] its legislation" into another state, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935), but it does not invalidate a state law when some private third-party has done the projecting of its own accord.

Cameron, 995 F.3d at 559. Kentucky's statute had a much more obvious and direct impact on prices in other states than this proposed Maine legislation, which is entirely agnostic about what prices are charged in other states. If Kentucky's pricing statute is constitutional, then Maine's proposed statute certainly passes muster.

Although opponents to L.D. 1636 no doubt will point to the sharply split decision in *Ass'n for Accessible Meds.* v. *Frosh,* 887 F.3d 664 (4th Cir. 2018), *cert. denied*, 139 S. Ct.

1168 (2019), that is a thin reed to support the notion of doing nothing to try to control drug prices in Maine. Over a vigorous dissent, the court invalidated Maryland's statute prohibiting price gouging in the sale of prescription drugs.

The majority repeatedly drew a distinction between the Maryland statute and the Maine Rx program upheld in *Walsh*. In contrast to the Maryland law, "[t]he Maine program challenged in *Walsh* directly affected only transactions in Maine and did not impact the prices drug manufacturers could charge elsewhere." *Id*. at 670. Likewise, "the Act is not triggered by any conduct that takes place within Maryland." *Id*. Indeed, the court concluded that the statute "does not require a nexus to an actual sale in Maryland." *Id*. at 671. In other words, the principal failing of the Maryland law was that it sought to regulate conduct in other states.

To repeat, however, the proposed legislation takes dead aim at conduct in Maine, which is permissible under the dormant commerce clause, even as interpreted by the majority in *Frosh*. Maine's approach differs from Maryland's approach, and that makes all the difference from a constitutional perspective.

Furthermore, this discussion assumes that the majority in *Frosh* got it right, which I do not accept. As the dissent persuasively argues, there is no constitutional entitlement "to impose conscience-shocking price increases on Maryland consumers." *Id*. at 692 (Wynne, J., dissenting). I note that numerous commentators have likewise concluded that the majority in *Frosh* incorrectly held that the dormant commerce clause stopped Maryland in its tracks from acting to prevent prescription drug price gouging.

In sum, the proposed legislation is constitutional under the Supreme Court's interpretation of the dormant commerce clause upholding the Maine Rx program, under the better reasoned recent decisions applying the dormant commerce clause, and even under the incorrectly decided majority opinion in *Frosh.* Stated differently, the U.S. Constitution does not handcuff the Legislature in enacting innovative legislation aimed at regulating drug prices paid in Maine by Maine consumers under health plans approved in Maine without regard to drug prices paid by other people in other states.