

Laura M. O'Hanlon, Esq.  
Topsham, Maine 04086  
[l.ohanlon@aol.com](mailto:l.ohanlon@aol.com)

---

March 9, 2020

Joint Standing Committee on Health and Human Services  
c/o Legislative Information Office  
100 State House Station  
Augusta, ME 04333

Testimony Re: LD 2117, *An Act to Expand and Rename the Controlled Substances Prescription Monitoring Program* (Public Hearing: March 10, 2020)

Dear Senator Gratwick, Representative Hymanson, and  
Members of the Health & Human Services Committee:

LD 2117, which enables massive government surveillance of Maine citizens and the tracking of individuals' personal medical information on a scale not seen before, represents an unprecedented and unwarranted invasion of the privacy of Maine citizens. It also intrudes impermissibly on the sanctity of the confidential physician-patient relationship.

This bill vastly expands the amount of very sensitive health information collected by the State, then it authorizes the disclosure of this information to others (within and outside the state) without the need for specific justifications or any meaningful restrictions on use, and without any safeguards to protect the information from unwarranted access or loss.

Without establishing a substantial state interest or compelling justification for the invocation of broad police powers, and the implementation of effective safeguards, LD 2117 is simply an unconstitutional invasion of privacy under the United States and Maine Constitutions.

LD 2117 does not even come close to meeting the criteria for passing muster as constitutional as set forth in *Whalen v. Roe*, 429 U.S. 589 (1977). In that case, the United States Supreme Court examined the constitutionality of a New York law designed to help stop certain controlled substances from being diverted into unlawful channels. The statute at issue required prescribers to submit paper forms containing personal information, including name and address, about the recipients of certain drugs. Once received at the New York Department of Health, the information was logged into a private computer, and the forms were locked in a vault for five years and then destroyed. A group of patients brought suit alleging the statute was an unconstitutional violation of a patient's right to privacy protected by the Fourteenth Amendment. The district court held the statute unconstitutional, and New York appealed to the United States Supreme Court.

The Supreme Court upheld the statute, finding that the State had satisfied its duty to protect from unwarranted disclosure the sensitive prescription information collected and used by New York in the exercise of its police powers because its “carefully designed program include[d] numerous safeguards intended to forestall the danger of indiscriminate disclosure,” and that the State had been “successful [in its] effort to prevent abuse and limit access to the personal information at issue.” *Id.* at 606-07 (Brennan, J., concurring). However, the Court was careful to explain that its holding was limited to the specific facts presented, recognizing that the “*central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information.*” *Id.* (emphasis added)

Beyond federal protections, the Maine Constitution has an existence separate from the U.S. Constitution. While containing no express provisions protecting an individual’s right to privacy, its Natural Rights Clause, Article I, section 1, provides a basis for recognizing privacy as an independent and distinct constitutional right. It provides: “[a]ll people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.” ME. CONST. art. I, § 1. This expansive language, which has no federal analogue, supports an argument that the Maine Constitution provides broader privacy protections for individuals than does the U.S. Constitution.

Collecting data without adequate justification, making it readily available, and failing to require effective safeguards certainly will likely result in a legal challenge under either the federal or Maine constitution or both. Furthermore, beyond the very real constitutional infirmities, this type of legislation has the potential to erode patients trust in their doctors making people hesitant to seek out or delay necessary medical care. Additionally, it will contribute to the large diverse sets of information that grow at an ever-increasing rate, that are aggregated, analyzed, and sold for noble and dangerous purposes. Most distressing, this kind of government overreach will reinforce citizens’ growing lack of confidence in government resulting from its unwillingness to protect fundamental rights of citizens.

As elected officials, the people of Maine are counting on you to recognize the real risks and harms that result from indiscriminate data collection and sharing, and to stop the creation of this deep pool of sensitive information and unfettered access into our lives. Please reject LD 2117, by voting Ought Not to Pass. Thank you.

Respectfully submitted by me in my personal capacity not on behalf of any organization or client.

Sincerely,

*Laura O’Hanlon*

Laura M. O’Hanlon, Esq.  
Topsham, Maine  
[l.ohanlon@aol.com](mailto:l.ohanlon@aol.com)