

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

MAINE INDEPENDENT COLLEGES  
ASSOCIATION, MAINE PRESS  
ASSOCIATION, NETCHOICE, and REED  
ELSEVIER INC.,

Plaintiffs,

v.

GOVERNOR JOHN BALDACCI and  
ATTORNEY GENERAL JANET MILLS, in  
their official and individual capacities, and  
JOHN DOE,

Defendants.

Civil Action No.:

**MEMORANDUM IN SUPPORT OF**  
**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

## **INTRODUCTION**

On June 2, 2009, Governor Baldacci signed Public Law 2009, Chapter 230 (“Chapter 230” or the “Law”). Chapter 230 is scheduled to take effect on September 12, 2009 unless enjoined by this Court. Chapter 230 is strikingly overbroad and reaches well beyond its stated and intended purpose to protect sensitive medical information of minors from marketers. Chapter 230 violates the First Amendment and the Commerce Clause of the United States Constitution, and is preempted by the Children’s Online Privacy Protection Act (COPPA) (codified at 15 U.S.C. § 6501 *et seq.*). This Court should therefore enter a preliminary injunction enjoining the defendants’ enforcement of Chapter 230.

Chapter 230 strikes at the heart of the Plaintiffs’ First Amendment rights to free speech. It prohibits Plaintiffs from collecting, transferring, or using information from or about minors or via non-commercial or commercial speech; it further subjects the Plaintiffs to private class action lawsuits for money damages for engaging in these protected activities. Even if the Attorney General of Maine elects not to enforce the Law and even if the Maine Legislature pledges to amend it, individuals such as defendant John Doe may sue at any time after the Law takes effect, thereby creating an impermissible chilling effect on constitutionally protected speech and on interstate commerce.

### **I. PROVISIONS OF THE STATUTE**

#### **A. Chapter 230 Prohibits the Collection of Information**

Chapter 230<sup>1</sup> (a copy of which is attached as Exhibit A) makes it unlawful to “knowingly collect or receive health-related information or personal information for marketing purposes from a minor without first obtaining verifiable parental consent of that minor’s parent or legal

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<sup>1</sup> Absent relief, Chapter 230 will be codified at 10 M.R.S.A. § 9551 *et seq.* Citations hereinafter refer to sections that will be codified if Chapter 230 becomes effective.

guardian.”<sup>2</sup> The term “personal information” is defined broadly to mean “individually identifiable information”, including (1) an individual’s first name, or first initial, and last name; (2) a home or other physical address; (3) a Social Security number; (4) a driver’s license number or state identification card number; and (5) information concerning a minor that is collected in combination with an identifier described above.<sup>3</sup> The use of the word “including” suggests that the data elements enumerated above are not exhaustive. An e-mail address, for example, would likely be encompassed by the definition of “personal information” as well.

The term “health related information” is defined to mean “any information about an individual or a member of the individual’s family relating to health, nutrition, drug or medication use, physical or bodily condition, mental health, medical history, medical insurance coverage or claims or similar data.”<sup>4</sup> The term “health-related information” includes “any information about an individual,” regardless of whether that information is personally identifiable health information. It also would include information regarding individual food preferences, individual performances in sports contests, and purchases of over-the-counter medicines.

## **B. Chapter 230 Prohibits the Transfer and Sale of Information**

Chapter 230 makes it unlawful to “sell, offer for sale or otherwise transfer to another person health-related information or personal information about a minor if that information”: (1) was unlawfully collected, as described in Section I(A) above; (2) individually identifies the minor; or (3) will be used to engage in “predatory marketing”, as described below.<sup>5</sup> This prohibition applies even where the information was obtained from someone other than the minor, such as a doctor, school or parent. It applies even where Plaintiffs have obtained, through great

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<sup>2</sup> § 9552(1).

<sup>3</sup> § 9551(4)(A-E).

<sup>4</sup> § 9551(1).

<sup>5</sup> § 9552(2)(A-C).

effort and expense, the verifiable parental consent of the minor's parent or legal guardian to collect or transfer the minor's personal information. Finally, this prohibition applies to information that was lawfully collected before the effective date of Chapter 230.

**C. Chapter 230 Prohibits the Use of Information for Commercial Purposes**

Chapter 230 makes it unlawful to “use any health-related information or personal information regarding a minor for the purpose of marketing a product or service to the minor or promoting any course of action for the minor relating to a product.”<sup>6</sup> Any such use is deemed “predatory marketing.”<sup>7</sup> This proscription applies even where the Plaintiffs obtain the verifiable parental consent of the minor's parent or legal guardian to recommend a course of action for a minor that may relate to a product. It applies even where such information is collected and/or used in compliance with the COPPA<sup>8</sup> and the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. § 1320 *et seq.* The Plaintiffs remain liable for “predatory marketing” regardless of whether the Plaintiffs themselves collected the personal information from a minor; the mere fact that Plaintiffs use “personal information regarding a minor” exposes them to liability, even if the information was collected before the effective date of the Law.

**D. Chapter 230 Creates a Private Right of Action for Statutory Damages**

Violations of Chapter 230 are enforceable through a private right of action with recovery of actual or statutory damages of up to \$250 per violation, whichever is greater, plus attorneys' fees.<sup>9</sup> The court “may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under paragraph B” where a defendant “willfully or

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<sup>6</sup> § 9553.

<sup>7</sup> *Id.*

<sup>8</sup> 15 U.S.C. § 6501 *et. seq.*

<sup>9</sup> § 9554(2)(B).

knowingly” violates the Law.<sup>10</sup> The Maine Rules of Civil Procedure permit class actions, which could be instituted for violations of Chapter 230.<sup>11</sup> Additionally, violations of the Law constitute an unfair trade practice under Maine law, which are also enforceable by private litigants. The liability risk that these provisions impose on the plaintiffs is such that they will be forced to either alter their business practices at great expense or cease operating in Maine. See Verified Complaint ¶ 44.

### **E. Chapter 230 Regulates Conduct Occurring Outside of Maine**

The Law’s prohibitions extend beyond Maine. They compel website operators, advertisers and marketers outside of Maine to conform their conduct to Maine’s overbroad regulatory scheme. The Law is framed so broadly that major businesses outside Maine, including Plaintiff Reed Elsevier, as well as member companies of Plaintiff NetChoice, are considering suspending their business operations in Maine. There is often no reliable way to ascertain whether much information that is being collected or used pertains to a Maine minor. The Law would thus chill collection and use of personal and health-related information, since each such individual collection and use of such information could expose individuals and entities to significant liability under the Law.

## **II. APPLICABLE STANDARD**

In deciding a motion for preliminary injunction, the Court weighs the following factors:

(1) the plaintiff’s likelihood of success on the merits; (2) the potential for irreparable harm in the absence of an injunction; (3) whether issuing an injunction will burden the defendants less than denying an injunction would burden the plaintiffs; and (4) the effect, if any, on the public interest.<sup>12</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> Maine R. Civ. P. 23.

<sup>12</sup> *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 11 (1st Cir. 2008), quoting *United States v. Welkert*, 504 F.3d 1,5 (1st Cir. 2007).

### **III. ARGUMENT**

#### **A. Plaintiffs Are Likely to Succeed on the Merits**

The Law’s prohibitions against collecting, transferring, or using information from or about minors violate the First Amendment by impermissibly regulating protected speech. The Law violates the Commerce Clause by subjecting Internet commerce to inconsistent regulatory rules for advertising and other commercial communications directed toward minors. Finally, the Law is preempted by COPPA.

#### **1. The Law Violates the First Amendment**

The Law violates the First Amendment because it imposes a content-based restriction on speech that is not narrowly tailored to serve a compelling state interest. The Supreme Court has held that “strict scrutiny” should apply to laws that suppress, disadvantage, or impose different burdens upon speech based on its content.<sup>13</sup> When a law limits the content of speech, courts will uphold the restriction only if it is narrowly tailored to serve a compelling state interest.<sup>14</sup> If a less restrictive alternative can serve the state’s interest, the government must use that alternative.<sup>15</sup>

#### **a. The Law Imposes a Content Based Restriction on Speech.**

As a general rule, laws that by their terms limit speech on the basis of ideas or views expressed are content-based.<sup>16</sup> The Law imposes a blanket prohibition on the use of “health related or personal information” collected from a minor for the purpose of “promoting any course of action for the minor relating to a product.”<sup>17</sup> This prohibition applies even with parental consent, even if the information was obtained from a parent or physician, and even if the

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<sup>13</sup> *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

<sup>14</sup> *McIntyre v. Ohio Elections Com’n*, 514 U.S. 334, 347 (1995).

<sup>15</sup> *U.S. v. Playboy Entertainment Group, Inc.*, 529, U.S. 803, 813 (2000).

<sup>16</sup> *Turner Broadcasting System, Inc.*, 512 U.S. at 643.

<sup>17</sup> See Chapter 230, § 9553.

information used does not identify a specific individual. This ban on the use of personal or health-related information prohibits the use of many communication outlets that are necessary to reach minors and thereby to communicate with them. The Law imposes enormous barriers to the collection of all personal information from minors, banning transfers of information about minors and banning a substantial range of communications to minors regarding use of products or services. Most of the speech restricted by the Law bears no relation to “predatory marketing” practices. The Law’s prohibitions constitute a content-based restriction on Plaintiffs’ speech.<sup>18</sup>

**b. Chapter 230 Will Unconstitutionally Restrict the Ability of Minors to Receive Information**

Chapter 230 also restricts the ability of minors to obtain health-related information, not because it could be harmful to them, but merely because they must supply an email address or other contact information to receive it. While the First Amendment rights of minors may not wholly be on par with those of adults, minors *do* have the right to access most information.<sup>19</sup> By prohibiting all “transfers” of personal information relating to minors, the Law bans transfers for a host of important and constitutionally protected purposes, such as adding teenagers’ names to political organizing lists, identifying high-risk teenage drivers for insurance purposes, and even for reporting information to law enforcement. Restricting such interactions violates the First Amendment’s protection of free speech and association.

**c. Chapter 230 Will Unconstitutionally Abridge the Speech of Individuals and Entities Collecting Personal Information About Minors**

Chapter 230 will hinder the ability of adults to access or receive content anonymously. As a result, Chapter 230 will effectively reduce the audience for the speaker’s message because it

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<sup>18</sup> See generally *Reno v. ACLU*, 521 U.S. 844 (1997)

will subject entities that collect such information to age verification mandates. Such mandates will encourage entities to self-censor themselves to avoid offering content that could be considered “directed at” minors, since doing so without attempting to screen out minors would expose them to class action liability for “knowingly” collecting information. The substantial costs of age verification could significantly chill many entities from collecting health-related or personal information. Indeed, the Third Circuit cited all of these burdens on the free speech rights of website operators in striking down the Child Online Protection Act.<sup>20</sup>

**d. Chapter 230 Is Not Narrowly Tailored to Serve a Compelling State Interest**

Although Chapter 230 appears to have been introduced to reduce the extent to which health companies can use coercive techniques to market drugs to minors, and otherwise reduce the likelihood of “predatory marketing,”<sup>21</sup> it was amended to apply the bill’s prohibitions to “personal information”, which exponentially expanded the universe of non-commercial and commercial speech that was significantly curbed or wholly prohibited.

The fact that a content-based speech restriction is adopted to protect children cannot protect the constitutionality of the restriction. While the protection of children is a compelling state interest,<sup>22</sup> the Supreme Court has carefully examined regulations purporting to rest on this ground, often finding that they sweep more broadly than their goal requires or that they do not serve their goal of child protection at all.<sup>23</sup> Chapter 230 falls into this category.

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<sup>19</sup> *United States v. American Library Ass’n*, 539 U.S. 194 (2003), (upholding the constitutionality of a filtering software system applicable to minors); *see generally Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503 (1969) (upholding students’ rights to wear protest armbands and affirming that minors have speech rights).

<sup>20</sup> *American Civil Liberties Union v. Ashcroft*, 534 F.3d 181, 196 (3d Cir. 2008). The Child Online Protection Act (47 U.S.C. § 231) is distinct from COPPA (15 U.S.C. § 6501 *et. seq.*).

<sup>21</sup> *See* Testimony of Rep. Sharon Treat (Co-Sponsor of Chapter 230) (April 9, 2009) *available at* [http://www.maine.gov/legis/housedems/news/ld\\_1183.htm](http://www.maine.gov/legis/housedems/news/ld_1183.htm) (last visited August 26, 2009).

<sup>22</sup> *See Denver Area Telecomm. Consortium v. F.C.C.*, 518 U.S. 727, 755 (1996).

<sup>23</sup> *See Reno v. ACLU*, 521 U.S. 844, 875-79 (1997) (“[T]he mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children ... does not foreclose inquiry into its validity.”); *Denver Area Telecomm. Consortium*,

It is clear that the Law sweeps more broadly than predatory marketing practices. The Law will have unintended, adverse consequences for minors that would otherwise be able to furnish health-related information for the purpose of obtaining treatment or advice that may involve the use of a commercial product. For example, minors will be cut off from registering to receive information about weight loss, AIDS treatment, and a host of other beneficial health care products and services. A doctor will be prohibited from using any health-related information about a minor patient to educate the patient or the patient's family about the safe use of an over-the-counter or prescription drug. Health care educators will be prohibited from presenting information targeted at an audience of Maine minors regarding the correct use of acetaminophen, contraceptives, or a host of other health-care products. Similarly, the Law's transfer ban will prevent schools from sharing information regarding minors infected by the H1N1 (swine) flu virus with public health authorities. Indeed, the law is so broad that it would prohibit members of the Plaintiff Maine Press Association from transferring information about minors within a particular newspaper for the purpose of publishing a list of honor students at local schools in that newspaper. Additionally, the Law would also preclude Plaintiff Maine Press Association members from transferring any personal information about a minor in the course of writing or publishing an article in a newspaper.<sup>24</sup>

Perhaps even more importantly, the Law will prohibit adults from effectively responding to a minor's inquiry about dietary tips or exercise regimes, or a request for assistance from a minor who is suffering from an eating disorder, since doing so may involve the recommendation

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518 U.S. at 755-60; *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126-27, 130-31 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-75 (1983); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975).

<sup>24</sup> Section 9552's prohibition against the "transfer" of personal information also constitutes an impermissible prior restraint. *See, e.g., Alexander v. United States*, 509 U.S. 544, 550 (1993). Exactly this kind of prior restraint - - on the publication of the name of an alleged juvenile delinquent - - has been held unconstitutional. *Smith v. Daily Mail Publishing Co.*; 443 U.S. 97 (1979).

of a product or service or course of action relating to a product. Accordingly, the Law must be enjoined to avoid encroaching upon the First Amendment.

**e. Chapter 230 Is Equally Infirm for Unconstitutionally Restricting Commercial Speech**

The Law impermissibly restricts commercial speech by drying up a major source of information used for commercial speech. Verifiable parental consent is expensive and difficult to obtain. While justified for the collection of personal information from children under 13 who may not understand the significance of providing personal information, this restriction is too broad to stand under the Supreme Court’s commercial speech case law as applied to teenagers.

Although the Constitution “accords a lesser protection to commercial speech than to other constitutionally guaranteed expression,”<sup>25</sup> the Government bears a significant burden in demonstrating that the restriction is warranted. The Supreme Court has “not suggested that the ‘commonsense differences’ between commercial speech and other speech justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech,”<sup>26</sup> and has repeatedly struck down regulations that categorically prohibited such speech.<sup>27</sup> Where a state “entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.”<sup>28</sup>

The Supreme Court applies a four-part test to determine whether a commercial speech restriction is permissible under the First Amendment. First, commercial speech must concern lawful activity and not be misleading. Second, the Court asks whether the asserted governmental

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<sup>25</sup> *Central Hudson Gas and Electric Corp. v. Public Service Comm’n*, 447 U.S. 557, 563 (1980).

<sup>26</sup> *Id.* at 578.

<sup>27</sup> See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381-83 (1977); *Carey v. Population Services Int’l*, 431 U.S. 678, 700 (1977); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 92-94 (1977); *Virginia Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-73 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 825 (1975).

<sup>28</sup> *44 Liquormart, Inc.*, 517 U.S. 484, 501 (1996).

interest is substantial. Third, if the interest is substantial, and the speech does concern lawful activity and is not misleading, the Court asks whether the regulation directly advances the governmental interest asserted. Finally, the Court determines whether the regulation is “not more extensive than necessary to serve that interest.”<sup>29</sup>

Where a commercial speech regulation is justified by a substantial governmental interest, the Supreme Court has made clear that the Government’s burden under the third and fourth parts of the *Central Hudson* test is substantial. “[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government *must do so*.”<sup>30</sup> Where a particular regulation broadly prohibits commercial speech, the government must show that the regulation advances a substantial governmental interest “to a material degree.”<sup>31</sup>

Here, Section 9552(1) places enormous obstacles to the collection of a wide range of information, much of it non-personally identifying, that falls within the definition of “health-related information.” For example, information regarding a minor’s or a minor’s family member’s “nutrition,” “physical or bodily condition” or non-prescription “drug use” would require “verifiable parental consent.” That definition, in turn, tracks the same definition of “verifiable parental consent” in the COPPA<sup>32</sup>, which has proven difficult and expensive to obtain. The term has been interpreted by the Federal Trade Commission (FTC) to require contacting a parent or guardian in a separate communication and requiring them to provide a credit card, mailing or faxing back a form, or supplying a digital signature.<sup>33</sup> In the more than ten years that COPPA has been in effect, remarkably few websites have attempted to obtain such consent, instead opting not to tailor their services to children under 13.

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<sup>29</sup> *Central Hudson*, 447 U.S. at 566.

<sup>30</sup> *Thompson v. Western States Medical Center et al.*, 535 U.S. 357, 371 (2002)(emphasis added).

<sup>31</sup> *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

<sup>32</sup> 15 U.S.C. § 6501(9).

Furthermore, the FTC has interpreted the term “collect” to mean *passive* receipt of information supplied voluntarily by a child.<sup>34</sup> Internet sites and services that do not want to collect health-related information or personal information from minors in Maine thus may be unable to avoid doing so and risk class action lawsuits. These Internet sites and services will effectively be barred from using information they obtain from minors to inform them or their parents about exercise programs, healthy nutrition options, sales of over the counter drugs, or to use any “health-related information” for non-personally identifying Internet advertising.

A State interest in protecting minors cannot justify overbroad regulation of non-commercial or commercial speech. In *Carey v. Population Services Int'l*,<sup>35</sup> a North Carolina corporation that advertised the availability of mail-order contraceptive devices in New York, challenged a New York statute that, in part, made it a crime to advertise or display contraceptives to any person, regardless of age. In overturning the law, the Court observed that “the statute challenged here seeks to suppress completely any information about the availability and price of contraceptives.”<sup>36</sup> Similarly, Chapter 230 would create extensive barriers to doctors, public health authorities, public health advocates, and pharmaceutical companies communicating directly with minors or their family members about entirely lawful, beneficial medical treatments, products, and services, and would otherwise preclude commercial entities from providing truthful information about lawful products to Maine minors.

In *44 Liquormart, Inc. v. Rhode Island*<sup>37</sup>, the Court struck down a Rhode Island law that prohibited advertisements about retail prices for alcoholic beverages. In that case, the Court observed that “complete speech bans...are particularly dangerous because they all but foreclose

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<sup>33</sup> 16 C.F.R. § 312.5(b)(2).

<sup>34</sup> § 312.2(c).

<sup>35</sup> 431 U.S. 678 (1977).

<sup>36</sup> *Id.* at 700.

alternative means of disseminating certain information.”<sup>38</sup> In determining that the Rhode Island law could not satisfy the requirement that speech be no more extensive than necessary, the Court noted that “[i]t is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal of promoting temperance.”<sup>39</sup> The Court thus concluded that “a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes.”<sup>40</sup>

Chapter 230 similarly categorically prohibits the transfer or use of “health-related information or personal information about a minor” “for the purpose of marketing a product or service to that minor or promoting any course of action for the minor relating to a product.” Unlike Section 9552(1), which prohibits the unlawful collection of health-related information or personal information “without first obtaining verifiable parental consent of that minor’s parent or legal guardian,” Section 9553 imposes a blanket prohibition on the use of such information for the purpose of “promoting any course of action for the minor relating to a product” *even with the verifiable parental consent of the minor’s parent or guardian*. Although Maine can articulate a substantial governmental interest in curbing *predatory* marketing, Chapter 230 effectively prohibits *all* direct marketing to or about minors, even where the marketing is truthful and non-coercive and a parent has consented to a minor receiving information about a product or service.

All operative prohibitions under the Law fail the fourth prong of the *Central Hudson* test, which requires the Government to regulate in a manner that is “not more extensive than necessary to serve” the substantial governmental interest. The Law also violates the Court’s admonition that “if the Government could achieve its interests in a manner that does not restrict

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<sup>37</sup> 517 U.S. 484 (1996).

<sup>38</sup> *Id.* at 501.

<sup>39</sup> *Id.* at 507.

<sup>40</sup> *Id.* at 510.

speech, or that restricts less speech, the Government must do so.”<sup>41</sup> Maine can advance its substantial interest through less extensive regulation of coercive marketing tactics aimed at minors. The Attorney General maintains authority *under current law* to enjoin unfair or deceptive marketing practices.<sup>42</sup> Additionally, the Maine Legislature could craft legislation prohibiting specific deceptive and/or misleading marketing practices targeted at minors.

First Amendment commercial speech protection not only serves the interests of the speaker, but also the interests of intended recipients, who are constitutionally entitled to receive truthful information about products and services. As the U.S. Supreme Court has observed:

The listener’s interest is substantial; the consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. . . . And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. . . . In short, such speech services individual and societal interests in assuring informed and reliable decisionmaking.<sup>43</sup>

The broad restrictions on the transfer or use of personal information contained in Chapter 230 deprive minors and their family members of valuable commercial information that they are entitled to receive under the First Amendment. For example, minors will be largely cut off from receiving recruiting information from members of Plaintiff Maine Independent Colleges Association, who will be prohibited from transferring any personal information that individually identifies a minor. Maine minors will also be deprived of information about college counseling services and college test preparation services that merely ask minors to provide a name and address to business entities advertising such services. Chapter 230 will also, for example, prevent the Boston Red Sox from sending e-mails to a 17 year-old who registers on the team’s

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<sup>41</sup> *Thompson v. Western States Medical Center et al.*, 535 U.S. 357, 371 (2002).

<sup>42</sup> 5 M.R.S.A. § 207 (declaring unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce").

website and asks to receive information about tickets or merchandise. Again, even if a parent consents to the use of the minor’s information for this purpose, the Red Sox may not communicate with this 17 year-old for any commercial purpose. All of the prohibitions imposed by Chapter 230, therefore, violate protected commercial speech under the First Amendment.

**2. Chapter 230 Violates the Commerce Clause by Subjecting Internet Commerce to Inconsistent Regulatory Rules**

**a. Chapter 230 Will Invariably Regulate Interstate Commerce That Occurs Wholly Outside Maine’s Borders**

The Commerce Clause of the U.S. Constitution provides that “Congress shall have power...[t]o regulate Commerce...among the several states.”<sup>44</sup> The negative implication of the Commerce Clause prohibits states from regulating commerce that impermissibly burdens interstate commerce.<sup>45</sup> The “Dormant Commerce Clause” prohibits two distinct forms of state regulation that impermissibly burden interstate commerce – (1) protectionist laws that discriminate against commerce from other states in favor of the enacting state and (2) state regulations that, although facially nondiscriminatory, unduly burden interstate commerce.<sup>46</sup>

In *Healy v. The Beer Institute*,<sup>47</sup> the Supreme Court identified three ways in which a state law may unconstitutionally regulate beyond the state’s borders:

First, the Commerce Clause...precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State....Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state....Third, the practical effect of the statute must be

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<sup>43</sup> *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977).

<sup>44</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>45</sup> See *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980) (“Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade.”); *Alliance of Auto Mfrs. v. Gwadowsky*, 430 F.3d 30, 35 (1st Cir. 2005).

<sup>46</sup> See, e.g., *Kassel v. Cons. Freightways Corp. of Del.*, 450 U.S. 662 (1981).

<sup>47</sup> 491 U.S. 324 (1989).

evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other states and what effect would arise if not one, but many or every, State adopted similar legislation.<sup>48</sup>

Chapter 230 violates each of these Dormant Commerce Clause principles.

First, it effectively regulates Internet commerce that occurs wholly outside of Maine, irrespective of whether such commerce has any effects within Maine. In order to comply with the COPPA, many websites do not collect information about a child's residency or address. These websites would nonetheless be subject to liability under Maine's regulatory regime, despite having no knowledge about a child's residency or address, because Chapter 230 imposes strict liability and statutory damages for *any* use of a Maine minor's personal information to recommend a course of action to a minor that relates to a product.

Second, as a corollary to its extraterritorial reach into interstate commerce, the bill has the "practical effect" of controlling conduct outside the state. In many instances, marketers will be compelled to comply with Maine's law, despite having no nexus to the state or its residents, in order to protect themselves from class action lawsuits brought by Maine trial lawyers.

Third, Chapter 230 conflicts with statutory regimes under both federal and other states' laws, rendering compliance with the resulting patchwork quilt of online marketing laws impracticable. Chapter 230 prohibits the use of a minor's personal information to market any product to that minor, even if it is entirely lawful. Chapter 230 also conflicts with COPPA, which, unlike Chapter 230, is limited to children under the age of 13 and permits the use of a child's personal information for marketing purposes with parental consent.

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<sup>48</sup> *Id.* at 336-37; see also *Pharmaceutical Research and Mfrs. of America v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001); *aff'd*, [538 U.S. 644](#) (2003).

**b. Chapter 230 Fails the Court’s Balancing Test Because It Imposes an Excessive Burden on Interstate Commerce**

Even where a state regulates in an evenhanded fashion to achieve a legitimate local interest, the law will nevertheless violate the Dormant Commerce Clause if “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>49</sup> Where a legitimate local purpose can be articulated, “then the question becomes one of degree.”<sup>50</sup> A state statute that burdens interstate commerce will be invalidated in this context if the legitimate local purpose “could be promoted as well with a lesser impact on interstate activities.”<sup>51</sup> Under these circumstances, the Supreme Court embraces a “balancing approach” to determine whether a state regulation impermissibly burdens interstate commerce.<sup>52</sup>

Dormant Commerce Clause concerns are particularly salient in the context of Internet commerce, for which the borderless nature of the Internet makes commercial Internet communications inextricably intertwined with interstate commerce. The Supreme Court has recognized that “[t]he internet is ‘a unique and wholly new medium of worldwide human communication’....located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.”<sup>53</sup>

Courts have repeatedly struck down state laws that impermissibly burden *Internet* commerce on Dormant Commerce Clause grounds. In *PSINet v. Chapman*, a Fourth Circuit panel observed that “[g]iven the broad reach of the Internet, it is difficult to see how a blanket regulation of Internet material...can be construed to have only a local effect.”<sup>54</sup> In *American Booksellers Ass’n v. Dean*, a Second Circuit panel opined that “[w]e think it likely that the

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<sup>49</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Reno v. ACLU*, 521 U.S. 844, 850-51 (1997).

<sup>54</sup> 362 F.3d 227, 240 (4th Cir. 2004).

internet will soon be seen as falling within the class of subjects that are protected from State regulation because they ‘imperatively demand[ ] a single uniform rule.’ ”<sup>55</sup> In *American Libraries Ass’n v. Pataki*, the court observed that “[t]he Internet is wholly insensitive to geographic distinctions,”<sup>56</sup> and that “no aspect of the Internet can feasibly be closed off to users from another state.”<sup>57</sup> The court thus held that “[t]he inescapable conclusion is that the Internet represents an instrument of interstate commerce, albeit an innovative one; the novelty of the technology should not obscure the fact that regulation of the Internet impels traditional Commerce Clause considerations.”<sup>58</sup> In *ACLU v. Johnson*, the Tenth Circuit overturned a New Mexico law prohibiting the dissemination of harmful material to a minor by computer. The court observed that “the Supreme Court has long recognized that certain types of commerce are uniquely suited to national, as opposed to state, regulation.”<sup>59</sup>

Like the statutes at issue in *American Library Ass’n* and *Johnson*, Chapter 230 imposes burdens on interstate commerce that exceed any putative local benefits, despite the fact that other means are available to prevent predatory marketing. There can be little doubt here that, under *Pike*, Maine’s laudable goal of preventing predatory marketing may be promoted with a lesser effect on interstate activities. The degree to which this law will disturb interstate commerce is exemplified by Plaintiff Reed Elsevier’s and Plaintiff NetChoice’s members’ need to curtail their operations in Maine under threat of class action lawsuits, and it will clearly impose substantial, new compliance burdens on any commercial entity whose products or services conceivably reach

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<sup>55</sup> 342 F.3d 96, 104 (2d Cir. 2003); *see also* *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (stating that a New Mexico statute did not contain a limitation of its reach to in-state conduct and therefore constituted “an attempt to regulate interstate conduct outside New Mexico’s borders, and is accordingly a per se violation of the Commerce Clause.”); *American Libraries Ass’n v. Pataki*, 969 F.Supp. 160, 168-69 (S.D.N.Y. 1997) (“The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed.”).

<sup>56</sup> *American Libray Ass’n*, 969 F. Supp. at 170.

<sup>57</sup> *Id.* at 171.

<sup>58</sup> *Id.* at 173.

Maine minors. On the Internet, where the age and residency of individuals is often not ascertainable, Chapter 230 will require all website operators and marketers across the United States to develop procedures to somehow ensure that the personal information of Maine minors will not be used for marketing purposes.

### **3. Chapter 230 Is Inconsistent With, and Thus Preempted by, COPPA**

Significant portions of Chapter 230 are preempted by The Children’s Online Privacy Protection Act (COPPA). COPPA’s preemption provision states that:

No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce in connection with an activity or action described in this chapter that is inconsistent with the treatment of those activities or actions under this section.<sup>60</sup>

COPPA requires parental consent before personal information may be collected online from a child under the age of 13. It does not allow a private right of action and does not require parental consent for collection of health-related information that is not personally identifying or for collection of personal information from minors who are over age 12. All these aspects of Chapter 230 are inconsistent with COPPA and likely preempted by that federal law.

#### **B. Plaintiffs Will Suffer Irreparable Harm Absent The Requested Injunction**

Because Chapter 230 abridges First Amendment rights, irreparable harm is presumed. The Supreme Court has stated that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”<sup>61</sup> For the reasons discussed above, the Law would unambiguously implicate First Amendment freedoms, chilling protected speech and thus causing irreparable injury to Plaintiffs. This will remain true even if the Attorney General refrains from enforcing the Law. As set forth above, see supra Part II(D),

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<sup>59</sup> *Johnson*, 194 F.3d at 1160. Although it held that the law in *Johnson* constituted a *per se* violation of the Commerce Clause, the Tenth Circuit also held that the law impermissibly burdened interstate commerce under the *Pike* balancing test.

<sup>60</sup> 15 U.S.C. § 6502(d).

Chapter 230 includes multiple private enforcement mechanisms, and the potential liability that the Plaintiffs face from enforcement by individuals such as defendant John Doe is such that they will suffer real and irreparable injury even in the absence of government enforcement. Verified Complaint ¶ 44.

**C. Issuing The Requested Injunction Will Not Burden The Defendants**

While the injunction is in force, the Maine Attorney General can continue to protect minors from unfair or deceptive marketing practices under its Unfair Trade Practices Act (UTPA).<sup>62</sup> Maine already has the statutory authority to vindicate the interests of Maine minors adversely affected by predatory marketing practices under the UTPA, even absent Chapter 230.<sup>63</sup> Conversely, denying the preliminary injunction would unambiguously discourage, if not effectively preclude, Plaintiffs from communicating with minors in Maine about a variety of constitutionally protected subject matter. Denying the preliminary injunction would provide powerful incentives for Plaintiffs and other commercial entities to depart the Maine market, thus depriving both Maine minors and other Maine residents of the ability to receive non-commercial and commercial messages that they are constitutionally entitled to receive.

**D. The Requested Injunction Serves the Public Interest**

In any event, the public interest in free speech outweighs whatever public interest there may be in immediately enforcing the Law. This is a case where “there are public interests beyond the private interests of the litigants that would be affected by the issuance or denial of injunctive relief.”<sup>64</sup> The Law severely intrudes not only on the First Amendment rights of businesses and non-profits like the Plaintiffs, but also on the First Amendment rights of the very

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<sup>61</sup> *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1, 21 (1st Cir. 2007); *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 15 (1st Cir. 2004).

<sup>62</sup> See 5 M.R.S.A. § 209.

<sup>63</sup> And, as noted above, health information of minors already is protected by, among others, HIPAA.

minors the Law was intended to protect. A preliminary injunction will ensure that Maine minors and also Maine residents continue to receive messages that they are constitutionally entitled to receive while affording the Maine Legislature additional time to craft statutory language that does not implicate constitutionally protected activity.

#### **IV. CONCLUSION**

For the foregoing reasons, the Maine Independent Colleges Association, Maine Press Association, Reed Elsevier Inc., and NetChoice respectfully request that this Court grant their Motion for Preliminary Injunction and issue a preliminary injunction, **finding:**

- A. That plaintiffs have shown a likelihood of success on their claims that Chapter 230 violates the First Amendment and Commerce Clause of the United States Constitution and is preempted by the Children’s Online Privacy Protection Act (codified at 15 U.S.C. § 6501 *et seq.*); and
- B. That plaintiffs have shown that they will suffer irreparable harm absent an injunction; that an injunction will not burden the defendants; and that the public interest in free speech weighs in favor of the injunction;

**and therefore enjoining:**

- C. Defendant Governor Baldacci and Attorney General Mills from enforcing Public Law 2009, Chapter 230 (“Chapter 230”); and
- D. Defendant John Doe from enforcing any private right of action under Chapter 230.

Respectfully submitted,

MAINE INDEPENDENT COLLEGES  
ASSOCIATION, MAINE PRESS  
ASSOCIATION, REED ELSEVIER INC.,  
and NETCHOICE,

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<sup>64</sup> *Everett J. Prescott, Inc. v. Ross*, 383 F. Supp. 2d 180, 193 (D. Me. 2005).

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