Janet T. Mills
GOVERNOR

STATE OF MAINE
OFFICE OF THE GOVERNOR
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AUGUSTA, MAINE
04333-0001

June 29, 2021

The 130th Legislature of the State of Maine
State House
Augusta, Maine

Dear Honorable Members of the 130th Legislature:

By the authority conferred by Article IV, Part Third, Section 2 of the Constitution of the State of Maine, I am hereby vetoing LD 675, *An Act to Protect Maine Consumers from Unsupported Price Increases on Prescription Medications.*

The high price of prescription drugs is an enormous problem for consumers in the State of Maine and nationally. It is unconscionable that lifesaving medications are often unavailable or difficult to access due to their cost. I have worked hard as Governor to expand health coverage to more Maine citizens – through MaineCare expansion, development of the State-based Marketplace for individual coverage, and reforms to make coverage more affordable for small businesses – thus increasing insurance coverage for prescription drugs. In my first year in office I restored the Maine Low-Cost Drugs for the Elderly and Disabled Program to cover an additional 1,800 Maine seniors. Additionally, I have supported a number of bills that shine a light on pricing practices of pharmaceutical companies so that the public and purchasers are more aware of drug pricing, as well as a bill to create the Prescription Drug Affordability Board, and bills to better regulate pharmacy benefit managers.

This bill is one five bills that comprised the *Making Health Care Work for Maine* package. Of these five, I was pleased to sign two into law (LDs 673 and 686), while a third, LD 120, which I support, is on the Special Appropriations Table. On LD 675, which received a divided report in the Health Coverage, Insurance and Financial Services Committee, I was prepared to support the Amendment advanced by the Committee Chairs. I remain committed to working with the Legislature to address these important issues in a way that will ultimately be legal and, as a result, allow us to make real and meaningful change for the people we represent, a goal I know we all share.

I commend the sponsor and supporters of LD 675 for bringing further attention to the high price of prescription medications. Unfortunately, I believe this bill, along with LD 1117, would not survive Constitutional scrutiny, would invite costly and protracted litigation, and, even if

unexpectedly upheld in court, would not have the intended effect of significantly lowering the price of medication for Maine citizens.

LD 675 aims to prohibit "unsupported price increases" of prescription drugs.[1] As structured, the bill requires the Maine Prescription Drug Affordability Board (MPDAB) to identify a list of up to 12 drugs with unsupported price increases based on data identified in the Maine Health Data Organization (MHDO) annual report. This list of medications must then be reported to the State Treasurer in order to collect fines from the manufacturers. The Attorney General can also bring an action on behalf of the Treasurer whereby the Superior Court may issue an order to collect these fines, which would be placed into a fund to offset Attorney General's costs of enforcing the law. It would not be until 2027-28 that the bill proposes any of this fund might be used to benefit consumers or to offset heath care costs to consumers.

This bill, and its complex structure, will undoubtedly invite litigation based on several potential Constitutional claims. First, because the bill applies state consequences (fines) to out-of-state prices, the bill is vulnerable to a challenge based on the dormant Commerce Clause, which precludes states from regulating transactions that occur wholly outside their borders.[2] Moreover, because the bill applies to both generic and *patented* drugs, the State may also be vulnerable to claims related to patent preemption. A Washington D.C. law prohibiting drug manufacturers from selling patented drugs for "excessive prices" (defined as prices paid by other high income countries) was overturned by the U.S. Court of Appeals for the Federal Circuit based on patent preemption – specifically that Congress has the exclusive authority to balance the interests between

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[1] To identify an "unsupported price increase" LD 675 relies on data collected and reported on MHDO that meets the notification requirements of Title 22 section 8732:

> A. Increased the wholesale acquisition cost of a brand-name drug by more than 20% per pricing unit;
> B. Increased the wholesale acquisition cost of a generic drug that costs at least $10 per pricing unit by more than 20% per pricing unit; or
> C. Introduced a new drug for distribution in this State when the wholesale acquisition cost is greater than the amount that would cause the drug to be considered a specialty drug under the Medicare Part D program.

LD 675 then in section 2036 (1)(B) further requires that the MPDAB use the data from MDHO to determine a list of drugs by:

> (1) Reviewing the report regarding prescription drug pricing under paragraph A and determining which drugs had price increases greater than the medical Consumer Price Index plus 2%;
> (2) Determining which drugs identified under subparagraph (1) had the largest net price increases in the past year;
> (3) Considering manufacturer data regarding any factors or reasoning in the price increases for the manufacturer's drugs in the past year;
> (4) Reviewing all relevant clinical literature regarding the drugs under consideration; and
> (5) Finalizing a list of 12 or fewer of the drugs that increased in price in the preceding calendar year without any support for that increase.

[2] Healy v. Beer Inst., 491 U.S. 324 (1989).

innovation and access to the patented medications.[3] Unfortunately, this legislation encounters the same fundamental problem.

I believe it is critical that the Federal government pass legislation to address the national concern of drug pricing and that the Federal government is best positioned to help our citizens achieve benefit from real and lasting drug pricing reforms. In particular, the federal government could use its purchasing power through the Medicare program, to negotiate prices of medications on behalf of seniors, for instance.

Whether as District Attorney, Attorney General, or as Governor, I have never shied away from a legal battle that I knew was right and that would benefit the people of Maine. This is not such an occasion. The risks associated with this legislation are high, and the potential reward is low.

In the meantime, for the reasons set forth above, I return LD 675 unsigned and vetoed and urge the Legislature to sustain this action.

Sincerely,

Janet T. Mills
Governor

[3] BIO v. District of Columbia, 496 F.3d 1362 (2007).