



**Testimony of Kimberly McCullough, Policy Director
Concerning HB 2303A and Supporting the –A10 Amendments
Senate Judiciary Committee
May 8, 2019**

Chair Prozanski and Members of the Committee:

The American Civil Liberties Union of Oregon¹ opposes HB 2303A in its current form due to deep concerns about its implications for the privacy of Oregonians. However, we agree with the proponents of HB 2303A that pseudoephedrine should be more easily available to Oregonians who need it for legitimate medical purposes. **Fortunately, the goal of HB 2303A can be achieved in a way that also addresses our concerns by adopting the – A10 amendments.**

As currently written, HB 2303A Raises Serious Privacy Concerns

Oregon has a long and proud history of protecting Oregonians’ privacy, and the ACLU of Oregon is grateful for the partnership of this legislature and key stakeholders in crafting policy that has made Oregon a leader in the privacy realm.

The laws that pertain to our state Prescription Drug Monitoring Program (PDMP) are a great example of this. We have worked with stakeholders for years now to balance the functions of the PDMP with the privacy rights of Oregonians. The result is a framework for our state PDMP that has the strongest privacy protections in the entire nation, while also achieving the various goals of the PDMP for health care providers, the Oregon Health Authority, and patients.

Currently, information about a person’s pseudoephedrine purchases is documented in the PDMP and subject to its many privacy protections. Most importantly, this information is not accessible to law enforcement without a warrant.

¹ The American Civil Liberties Union of Oregon (ACLU of Oregon) is a nonpartisan, nonprofit organization dedicated to preservation and enhancement of civil liberties and civil rights, with more than 45,000 members and supporters statewide.

HB 2303A would undermine our current pro-privacy regime by documenting pseudoephedrine purchases in a privately-operated, nationwide database (NPLeX). This database is accessible to law enforcement without a warrant and does not include numerous carefully-crafted privacy protections applicable to the PDMP.

The following protections which are applicable to the PDMP are not applicable to NPLeX under HB 2303A:

- **Law enforcement must obtain a warrant or court order based on probable cause to obtain information in the PDMP**, and the data obtained must be limited to the individual who is the subject of the warrant or court order.² This is a much higher bar than a subpoena, which does not require probable cause or judicial review. Note that even the apparent subpoena requirement in HB 2303A is undermined by other provisions in the bill that allow unfettered law enforcement access across state lines and potential preemption by federal law.
- **Access to data in the PDMP by third parties is extremely limited**, data in the PDMP is protected health information (subject to additional laws related to protection, retention, and disclosure), and data is not subject to disclosure (exempt from public records requests)
- **Our current statutes applicable to the PDMP ensure data security** and confidentiality of data in the PDMP by requiring agency rules that protect against the possibility of data breaches. These security rules implementing these statutes were adopted after significant consultation with stakeholders (including the ACLU of Oregon) and privacy experts.
- **Cross-state sharing of data in the PDMP is extremely limited**, in order to ensure that the security and privacy of our data is not undermined by being merged with other state databases with insufficient privacy protections.
- **Disclosure of aggregated and de-identified data from the PDMP is also extremely limited** under our current statutes. This data is expressly restricted from being used for commercial purposes.

² Note that the proponents of HB 2303A have suggested that Oregon law enforcement actually has access to data in the PDMP related to pseudoephedrine. This is false. The proponents have cited ORS 475.973(b), which is an old law that applied before it was superseded by the PDMP and its stricter privacy requirements. In order to clear up any future confusion on this issue, the -A10 amendments delete the applicable provisions in ORS 475.973(b).

- **Unauthorized disclosure of data from the PDMP is subject to enforcement actions** by the Attorney General, along with civil penalties. Data breaches must be reported to the Attorney General.
- **Patients have a right to access their personal data in the PDMP** and correct errors.
- **Patients are allowed to request information about each instance a third party was granted authorized access to their PDMP data**, which is information that must be maintained by the PDMP.

These numerous privacy protections reflect a long, thoughtful process of policy development that sought to balance the needs of the PDMP and the privacy of Oregonians. We urge this committee not to undo the many years of hard work and compromise reflected in current law.

HB 2303A Also Raises Concerns for Oregon Law Enforcement

Our colleagues in law enforcement are deeply concerned NPLEx can't stop group smurfing, which feeds local toxic meth labs. Group smurfing is where numerous people each purchase pseudoephedrine for later resale on the local black market. That's how people who manufacture meth got around Oregon's logging and tracking system prior to 2006, and still today get around NPLEx in other states.

We understand that this puts law enforcement and drug endangered children at great risk of injury, too many of whom sustained permanent injuries prior to this state moving pseudoephedrine back to a prescription drug, as it was prior to 1976.

There is a Better Solution: Allow Pharmacists to Prescribe Pseudoephedrine

Because we have concerns about undermining Oregonians' privacy by adopting the NPLEx system, and our colleagues in law enforcement have concerns about the ineffectiveness of NPLEx to curb meth production in Oregon, we put our heads together to craft a better solution: simply move the point of prescription from a doctor to a pharmacist. This policy is reflected in the -A10 amendments.

Under the -A10 amendments, all a consumer will need to do to obtain pseudoephedrine is go to a pharmacy and speak to a pharmacist before obtaining their medicine. There will be a limitation on the amount of pseudoephedrine and individual can obtain, which will be tracked in the PDMP.

This will address our concerns and those of Oregon law enforcement. All of the privacy protections included in the PDMP will continue to apply to pseudoephedrine prescriptions, maintaining our high standards for the privacy of Oregonians. And requiring individuals to obtain a prescription from a pharmacist will create a barrier to “smurfing” by individuals who wish to manufacture methamphetamine, addressing law enforcement’s concerns.

Speaking to a pharmacist prior to prescription will also have the added health benefit of a pharmacist’s consultation on potential contraindication and health risks, and people with prescription drug coverage could receive access to a reduced price. For example, pseudoephedrine is contraindicated for those with high blood pressure.

For these reasons, the ACLU of Oregon urges this committee not to pass HB 2303A in its current form, and to instead adopt the -A10 amendments prior to moving this bill out of committee. Please feel free to contact us if you have any questions, comments, or concerns.