No. 08-1202

IN THE
# Supreme Court of the United States

IMS HEALTH, INC. *et al.*,

*Petitioners*,

*v.*

AYOTTE,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## BRIEF OF THE COALITION FOR HEALTHCARE COMMUNICATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## INTEREST OF *AMICUS CURIAE* [1]

*Amicus* the Coalition for Healthcare Communication ("CHC") comprises trade associations and their members who engage in medical education, publishing, and marketing of prescription products and services, including drugs, devices, and biologics. Trade association members include the American Association of Advertising Agencies and the Association of Medical Media. These members make extensive use of prescriber-identifable data that enable them to increase the effectiveness and efficiency of education and communication programs on behalf of the manufacturers of prescription products. The suppression of these data would interfere substantially with the ability of member companies to meet their clients' needs, educate prescribers, and improve patient care. Moreover, a ban on commercial use of these data will effectively eliminate their availability for the non-commercial research, public policy planning, and safety uses in which CHC members participate. Thus, the CHC has a considerable interest in the outcome of this case.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. Counsel for *amicus* also represent that counsel of record for all parties received notice of *amicus*'s intention to file this brief at least 10 days prior to the due date. The parties have filed written global consent to the filing of *amicus* briefs with the Clerk of the Court.

## SUMMARY OF ARGUMENT

New Hampshire's Prescription Restraint Law (or "new law") prohibits, with important and discriminatory exceptions, the sale or use of prescriber-identifiable prescription data "for any commercial purpose," including "*advertising*, *marketing*, *promotion*, or any activity that could be used to influence sales or market share of a pharmaceutical product." N.H. Rev. Stat. Ann. §§ 318:47-f , 318-B:12, IV (2006) (emphasis added). The legislative intent and purpose of the new law is to limit the efficiency and effectiveness of pharmaceutical marketing by innovator, branded drug manufacturers by denying them access to the tools that help them shape effective messages, without overtly restricting their access to the medical community. The State speculates that this restraint might cause New Hampshire physicians to more often prescribe older, generic drugs instead of newer, branded drugs, and thereby reduce total prescription drug costs borne by individual New Hampshire residents. The State seeks to advance this paternalistic interest by blunting the effectiveness of truthful and non-misleading commercial speech whose objective the State disfavors.

Not only does the new law infringe upon the CHC members' and pharmaceutical manufacturers' commercial speech rights, it also has the (perhaps unintended, but still very real) effect of potentially curtailing non-commercial communications among and between numerous other entities that have no discernible impact on cost containment. As Petitioners explain, *see* Pet. 3, and as the CHC has maintained throughout this litigation, the revenue generated by the

sale of presciber-identifiable data to pharmaceutical companies for the purpose of detailing enables data collection companies to provide the same data at little or no cost to a variety of public health and research entities. Pet. 3. More directly, the scope of the new law's prohibition includes use by CHC's members to craft marketing and other communications to physicians to promote privately administered continuing medical education ("CME") programs, public relations, and advertising in medical journals. Thus, the new law outruns the State's alleged cost containment rationale by sweeping within its ambit an unreasonably broad array of constitutionally protected and socially valuable communications.

The district court held, consistent with this Court's First Amendment jurisprudence, that the new law imposes an unconstitutional restraint on commercial speech. *See* Pet. 5-6. The First Circuit reversed, basing its decision on two alternative—and equally suspect—holdings. *See id.* at 5-9. *First*, the First Circuit reviewed the new law outside the ambit of the First Amendment based on its ostensible regulation only of conduct, *i.e.*, the sale of prescriber-identifiable data to pharmaceutical companies for purposes of detailing, and not speech. *Id.* at 6-7. In order to shut its eyes to the new law's intended effect on manufacturer speech, the majority chose to seize upon the absence of manufacturer plaintiffs to employ an erroneous and pernicious theory of prudential standing and cabin the First Amendment inquiry to the upstream sale of prescriber-identifiable data. *See IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 64-65 (1st Cir. 2008) (Lipez, J., concurring and dissenting). Thus, the First Circuit's primary majority holding refused to take

account of the fact that the purpose of the new law is to use a restraint on the upstream sale of data to curb the speech of detailers—and that it has succeeded in having this nefarious impact. *Second*, the First Circuit held, in the alternative, that even if the new law were viewed as regulation of commercial speech, it would survive intermediate scrutiny. Pet. 7. Judge Lipez concurred in part and dissented in part, taking the view that the purpose and impact of the new law on pharmaceutical company speech triggers First Amendment scrutiny, but concurring in the majority's conclusion that the new law passes constitutional muster under the analysis established by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). *See* Pet. 9-10.

CHC believes that the First Circuit committed fundamental errors in upholding the new law against the Petitioners' constitutional challenge. Unless, contrary to 40 years of Supreme Court constitutional precedent, the State may suppress commercial speech at its whim, it cannot constrain truthful and non-misleading speech simply because it has become, in the State's view, too persuasive in delivering a disfavored commercial message to physician audiences. The fact that the State seeks to achieve its goal by depriving commercial speakers of the information necessary to tailor their messages to audience concerns, rather than to deny access to the audience itself should not—and under the Supreme Court's precedent, does not—shield it from First Amendment scrutiny.

For four decades, the Supreme Court has repeatedly struck down under the First Amendment government

attempts to place restrictions on advertising, marketing, and commercial solicitation.[2] In doing so, the Court has explained that:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

*Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). Contrary to the judgment of the First Circuit, New Hampshire's new law violates this fundamental constitutional tenet and thus must suffer a similar fate. By seeking to hobble speakers who wish to effectively introduce truthful communications into the marketplace

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2. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (soliciting of compounded pharmaceutical drugs); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (tobacco and cigar advertisements near schools and playgrounds); *Greater New Orleans Broad. Ass'n, Inc. v. United* States, 527 U.S. 173 (1999) (legal gambling advertisements); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (alcoholic beverage advertisements); *Edenfield v. Fane*, 507 U.S. 761 (1993) (in-person solicitation by accountants); *Va. Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (advertising and marketing of pharmaceutical drugs).

of ideas, the new law strikes at the very heart of the First Amendment. *See id.* at 366-67.

## REASONS FOR GRANTING THE PETITION

*Amicus curiae* the CHC agrees with the Petitioners' arguments as to why the First Circuit's judgment upholding the new law warrants review. *See* Pet. 11. Additionally, CHC submits that review is warranted because the First Circuit's judgment is in two critical respects in direct and irreconcilable conflict with the Supreme Court's First Amendment jurisprudence.

### I. The First Circuit's Holding, Contrary To This Court's Precedent, That A State May Avoid First Amendment Scrutiny Of Speech Restraints By Targeting The Tools That Make Disfavored Speech Effective Warrants Review.

The First Circuit's primary holding—that the new law is not subject to the strictures of the First Amendment because it bans only the sale of the data that enable detailers to make their disfavored commercial speech effective—perniciously insulates the state's goal of indirectly suppressing speech based on its content. This holding is both deeply troubling and contrary to this Court's precedent.

On its face, the new law restricts the commercial speech of detailers by banning access to a tool that makes their speech more effective, *i.e.*, the use of prescriber-identifiable data to tailor targeted commercial communications to the interests and patient

populations of New Hampshire physicians.[3] The new law provides that prescription records containing such data "shall not be licensed, transferred, used, or sold . . . for any commercial purpose," where "commercial purpose" is defined to include, among other things, "*advertising*, *marketing*, *promotion*, or any activity that could be used to influence sales or market share of a pharmaceutical product . . . or evaluate the effectiveness of a professional pharmaceutical detailing sales force." N.H. Rev. Stat. Ann. § 318:47-f (2006) (emphasis added). By its terms—"advertising," "marketing," and "promotion"—the new law thus directly targets commercial speech and forecloses access to prescriber-identifiable data to tailor marketing communications.

The purpose of the new law is not to protect the privacy of patients, who are not identified in the relevant data. *See* Pet. 2-3. Nor is the new law aimed at preventing the dissemination of false or misleading information about prescription drugs—an interest vindicated by other laws. 21 C.F.R. § 202.1(e)(5)-(6); *see also New Hampshire v. Moran*, 861 A.2d 763, 765-66 (N.H. 2004) (explaining New Hampshire legal restrictions on unfair

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3. Indeed, even as between the sales representative and prescriber, the communications at issue are at the very least a mix of commercial speech and fully protected scientific communications. *See*, *e.g.*, *Miller v. California*, 413 U.S. 15, 34 (1973) ("The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or *scientific* value." (emphasis added)); *Bd. of Trs. of Leland Stanford Junior Univ. v. Sullivan*, 773 F. Supp. 472, 474 (D.D.C. 1991) ("It is . . . settled . . . that the First Amendment protects *scientific expression and debate* just as it protects political and artistic expression." (emphasis added)).

or deceptive actions); *see generally* 21 U.S.C. §§ 332-337. Rather, and as the State has consistently admitted, the purpose, design, and effect of the new law is to hamper targeted marketing to prescribers. As the text and legislative history of the new law demonstrate, and the State conceded below, the provision is clearly aimed at "the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products;" it is a restriction focused on the content of commercial speech. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001); s*ee also Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, *Inc.*, 425 U.S. 748, 771 (1976) (singling out speech of a particular content (pharmacist price advertising) and seeking to prevent its dissemination completely cannot be given reduced scrutiny as a time, place, and matter restriction); *Greater New Orleans Broad. Ass'n*, *Inc. v. United States*, 527 U.S. 173 (1999) (legal gambling broadcast advertisements); *44 Liquormart*, *Inc. v. Rhode Island*, 517 U.S. 484 (1996) (alcoholic beverage prices); *Edenfield*, 507 U.S. 761 (in-person solicitation by accountants); *W. States*, 535 U.S. 357 (solicitation of compounded pharmaceutical drugs).

The First Circuit majority's myopic insistence on analyzing the new law as a regulation of conduct, notwithstanding the State's express goal of undermining the effectiveness of detailers' marketing speech, is possible only because of the majority's unprincipled manipulation of prudential standing principles. *See IMS Health*, 550 F.3d at 48-49; *see also id.* at 65-69 (explaining how "[t]he majority's use of standing principles is . . . doubly wrong"). The majority explained that the new law regulates the acquisition of prescriber-identifiable

data and the sale of that data to pharmaceutical companies, but does not directly regulate the use of the data by detailers to tailor messages to their physician audiences. *Id.* at 48-49. Because "[n]o pharmaceutical company, detailer, or physician is a party to this case," *id.* at 49, the majority confined its constitutional analysis to the first two transactions, without regard to the legislature's avowed intent to restrict the speech of detailers or the fact that the new law has succeeded in having its desired impact. As Judge Lipez ably explains, the majority's use of prudential standing principles is unjustified, *see id.* at 67, and results in an imprudent avoidance of facts material to full consideration of the constitutional issues, *see id.* at 68.[4]

When the First Circuit's allegedly prudential analytical restriction is removed, it is apparent that the new law runs directly contrary to Supreme Court precedent, which has "explicitly held that commercial speech receives First Amendment protection." *W. States*, 535 U.S. at 366. Indeed, the First Amendment incontrovertibly protects the type of speech explicitly targeted by the new law, including the right of pharmaceutical manufacturers to specially tailor direct-mail and in-person solicitations through detailers. *See*, *e.g.*, *Edenfield*, 507 U.S. at 765-67 (invalidating state's attempt to ban personal solicitation of clients by accountants); *W. States*, 535 U.S. at 365-66 (holding unconstitutional FDCA amendments requiring prescriptions for compounded drugs to be "unsolicited"

4. This Court should grant *certiorari* to make clear that when a provider of tools essential to effective speech is directly injured by a restraint targeted on the content of that speech, First Amendment scrutiny is prudentially essential.

and that pharmacists "not advertise or promote the compounding of any particular drug, class of drug, or type of drug" (quoting 21 U.S.C. § 353a(c))); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005) (noting that "[t]he Supreme Court has recognized that personal solicitation is imbued with important First Amendment interests" and enjoining restriction on door-to-door solicitations (citations omitted)).

The new law also infringes upon the right of willing listeners, here prescibing physicians, to receive targeted commercial communications. As this Court has recognized, "[f]reedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy*, 425 U.S. at 756-57; *see also U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) ("Effective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech."). As the Supreme Court has explained time and again, "'the free flow of commercial information is indispensable' . . . [and] a 'particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'" *W. States*, 535 U.S. at 366-67 (quoting *Va. Bd. of Pharmacy*, 425 U.S. at 763).

The fact that the State has attacked the tools through which marketers make their communications effective, rather than barring access to the audience, does not remove the new law from constitutional

scrutiny. *See*, *e.g.*, *Boos v. Barry*, 485 U.S. 312, 321 (1988) (explaining that "[r]egulations that focus on the direct impact of speech on its audience" are subject to First Amendment scrutiny); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249 (1936) (invalidating taxes on press and explaining that the Court has been "careful not to limit the protection of the right [to free speech and press] to any particular way of abridging it"). Indeed, New Hampshire's law is conceptually no different from denying an unpopular political group access to polling data. *See*, *e.g.*, *R.I. Ass'n of Realtors*, *Inc. v. Whitehouse*, 51 F. Supp. 2d 107, 111 (D.R.I. 1999) (acknowledging that "[c]ommercial solicitation is a form of commercial speech protected by the First Amendment" and invalidating prohibition against use of information obtained from public records "to solicit for commercial purposes" (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983))); *U.S. West*, *Inc.*, 182 F.3d 1224 (striking down on First Amendment grounds the FCC's restriction on communications carriers' ability to use a customer's information to target market services to that customer); *Verizon Nw.*, *Inc. v. Showalter*, 282 F. Supp. 2d 1187, 1191 (W.D. Wash. 2003) (same for Washington law).

The new law is also conceptually similar to a restriction on the use of a forum or medium of communication. *See*, *e.g.*, *Schneider v. New Jersey*, 308 U.S. 147 (1939) (holding that government may regulate conduct in public fora provided it does not regulate conduct that "bears [a] necessary relationship to the freedom to speak, write, print or distribute information or opinion"). This Court has consistently held that even a generally applicable, content neutral regulation of a

forum may run afoul of the First Amendment if it has the practical effect of wholly depriving speakers of an effective medium of communication with willing listeners. *See*, *e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (invalidating sign ordinance because government had "almost completely foreclosed a venerable means of communication that is both unique and important"); *Saia v. New York*, 334 U.S. 558, 561 (1948) (invalidating law requiring permit for the use of sound amplification equipment, explaining that "[l]oud-speakers are today indispensable instruments of effective public speech"). The constitutional violation in this case is more stark than in many forum regulation cases because New Hampshire has not only deprived detailers of "a venerable means of communication that is both unique and important," *Gilleo*, 512 U.S. at 54, but has done so in a manner that is transparently content-based, *see*, *e.g.*, *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 429-30 (1993) ("It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral.").

As Petitioners explain, *see* Pet. 10-11, the First Circuit's failure to faithfully adhere to this Court's precedent subjecting indirect content-based commercial speech restrictions to First Amendment scrutiny poses significant dangers to the freedom of speech. Thus, review is warranted to vindicate decades of established First Amendment jurisprudence and prevent the proliferation of laws suppressing disfavored speech by depriving the targeted speakers of the tools necessary to make their message most effective.

## II. The First Circuit's Alternative Holding, Contrary To This Court's Precedent, That Limiting The Effectiveness Of Disfavored Commercial Speech Is A Substantial State Interest Independently Warrants Review.

The First Circuit's alternative holding that the new law passes constitutional muster under the intermediate scrutiny applicable to commercial speech regulations is also contrary to this Court's precedent. *See* Pet. 24-37. In particular, it stands as a novel and dangerous sanction of the notion that the State has a substantial interest in preventing or inhibiting speakers from persuading their audiences of a truthful but disfavored message. New Hampshire's asserted interest in "cost containment" is not proprietary. The State has unquestioned alternatives for directly limiting its prescription drug expenditures. Rather, the State is asserting a paternalistic interest to justify restraining truthful and non-misleading speech as a means of controlling individual citizen behavior. That is the essence of censorship, and censorship is no less pernicious when it forecloses informed commercial choices than it is when it forecloses informed political choices.

Under *Central Hudson*, if commercial speech is not misleading and does not concern unlawful activity, "it can only be limited if the restriction (1) is in support of a substantial government interest, (2) 'directly advances the governmental interest asserted,' and (3) 'is not more extensive than is necessary to serve that interest.'" *El Día, Inc. v. Puerto Rico Dep't of Consumer Affairs*, 413 F.3d 110, 113 (1st Cir. 2005) (quoting *Central*

*Hudson*, 447 U.S. at 566). The CHC agrees with the Petitioners' articulation of why the First Circuit erred in its evaluation of the new law under this well-established test, *see* Pet. 24-37, and further urges that the First Circuit's treatment of the substantial government interest prong of the test is sufficiently erroneous in itself to warrant review.

As explained above, the motivation behind the new law is to affect prescriber behavior by inhibiting the flow of information to them. A State's interest in removing truthful information from the marketplace of ideas because it is persuasive is simply not a constitutionally legitimate one, regardless of whether the purpose is characterized as eliminating effective drug "detailing" or effectuating indirect cost controls. *44 Liquormart*, 517 U.S. at 501; *Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects [the speaker's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 473-74 (1988) ("[T]he First Amendment does not permit a ban on certain speech merely because it is more efficient . . . ."); *U.S. West*, 182 F.3d at 1232 ("[A] restriction on speech tailored to a particular audience, 'targeted speech,' cannot be cured by the fact that a speaker can speak to a larger indiscriminate audience, 'broadcast speech.'"); *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 639 (9th Cir. 1991) ("[O]ptions that involve 'more cost and less autonomy' to the seller, that are less likely to reach those persons 'not deliberately seeking sales information,' and that may be less effective media for communicating the message, 'are not satisfactory substitutes for speech that is prohibited.'" (quoting

*Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977))).

This Court has never permitted the inhibition of commercial speech on the ground that it is too persuasive. To the contrary, the Court has repeatedly "rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information," and has adhered to this position specifically with respect to restrictions in the medical and pharmaceutical realm. *W. States*, 535 U.S. at 374 (explaining that fear that advertising compounded drugs would put people who do not need such drugs at risk by causing them to convince their doctors to prescribe the drugs anyway "rests on the questionable assumption that doctors would prescribe unnecessary medications" (citing *Va. Bd. of Pharmacy*, 425 U.S. at 769 (rejecting restriction on pharmacist price advertising supported by purported interests in preventing people from choosing "the low-cost, low-quality service and driv[ing] the 'professional' pharmacist out of business" and preventing the destruction of the "pharmacist-customer relationship"))); *see also Lorillard*, 533 U.S. at 565 ("[A] speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products."). In short, the First Circuit's judgment fails to heed this Court's admonition that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart*, 517 U.S. at 503.

Prior to the First Circuit's judgment in this case, there was not a single case that could be cited in support of the notion that a speech restriction can be upheld because the speech at issue is too effective at persuading a consumer—here an educated and licensed medical care provider—to engage in permissible activity. A paternalistic desire to have consumers, let alone industry professionals, make different market choices among goods and services is not the type of interest that can sustain a restriction on truthful and non-misleading commercial speech. As the Court explained three decades ago in striking down an advertising measure in which cost-control was identified as an interest served, *Va. Bd. of Pharmacy*, 425 U.S. at 767-68, the significance of the proffered interest must not be judged in a vacuum but in light of the protections of the First Amendment, *id.* at 768-69. "This casts the Board's justifications in a different light, for on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." *Id.* at 769.

Review is thus warranted to prevent the proliferation of laws that "completely suppress the dissemination of concededly truthful information about entirely lawful activity, [merely out of] fear[] of that information's effect upon its disseminators and its recipients." *Id.* at 773; *cf. Hill v. Colorado*, 530 U.S. 703, 716 (2000) ("The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience."). In short, the fact that the State does not like the market choices consumers, here licensed prescribers, are

making in response to the commercial speech activities of detailers has never been—and should not now be—recognized as a substantial government interest.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the decision of the First Circuit.

Respectfully submitted,

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