No. 08-1202

In the Supreme Court of the United States

IMS HEALTH, INC. AND VERISPAN LLC,

Petitioners,

v.

KELLY M. AYOTTE, AS ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF ACADEMIC RESEARCH SCIENTISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

STEPHEN SANDERS
GEORGE J. TZANETOPOULOS
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

RODNEY A. SMOLLA
Counsel of Record
Washington and Lee University School of Law
Sydney Lewis Hall
Lexington, VA 24450
(540) 458-8502

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

BRIEF OF ACADEMIC RESEARCH SCIENTISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The *amici* are research scientists at leading academic research universities. They perform extensive research in numerous scientific fields. They rely for their research on basic data obtained from many different sources, including data from databases that are created for commercial purposes but which are made available to academic researchers at little or no cost because the database owners recognize the value inherent in such research. The *amici* include researchers who have utilized the specific commercial databases produced by IMS Health, Inc., one of the petitioners, for the purposes of conducting research and publishing results analyzing pharmaceutical practices in the United States. A list of the *amici* and their credentials appears in the Appendix.

SUMMARY OF ARGUMENT

The First Circuit's holding—and more profoundly, the First Circuit's reasoning—threatens the free flow of basic data information that is vital to society. In the most immediate sense, the First Cir-

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. Petitioners have filed with this Court a blanket consent to *amici* participation. Respondent's communication consenting to the filing of this brief has been lodged with the Clerk's office.

cuit's holding and rationale threaten the free flow of information regarding medical prescription practices and health care. Beyond that, however, the holding and rationale threaten the free flow of a broad range of basic scientific, technical, sociological, and economic information. The First Circuit's decision empowers a state to interdict the free flow of information which is of enormous value to academic researchers, authors, policymakers, journalists, and the public, in two fundamentally objectionable ways.

The decision excludes from the ambit of First Amendment protection information that is gathered, synthesized, analyzed, and stored in large databases that are of use to a wide range of researchers on a virtually infinite array of subjects. This information, which should be properly understood as constitutionally protected speech, was demoted by the First Circuit to a mere commodity beneath the dignity of the First Amendment. The dissemination of this "commodity" was then transformed by the First Circuit from an exercise in the expression of speech to the mere performance of ordinary "conduct."

A large part of contemporary research in virtually all fields of intellectual endeavor—including science, technology, economics, business, law, education, sociology, and politics—involves the gathering, synthesizing, organizing, and analyzing of thousands, millions, or even billions of discrete transactions and events. This data is "crunched" for what it may illuminate or reveal, thereby advancing creativity and innovation in all realms of learning.

The analysis of such data is valuable in the aggregate, for what it may reveal about large patterns and trends, and in the particular, for what it may reveal about specific actors or enterprises. The produc-

tion and use of such data serves all of the worthy purposes that animate the First Amendment's protection of the free flow of information, including the advancement of discovery and invention, the free play of the marketplace of ideas, and the service of transparency and accountability.

The decision below also threatens the free flow of information by permitting the government to transform otherwise constitutionally protected speech into an unprotected "commodity" merely because the speech is sold for a commercial purpose, thereby eliminating the commercial incentive to gather and make available to the marketplace information of great value. By eliminating the economic incentive to engage in the labor-intensive task of gathering and organizing such information and making it available in databases for sale in the marketplace, the First Circuit's ruling strongly diminishes the likelihood that such databases will be created at all. Academic researchers thus would be deprived of access to this information, which is often made available by the producers of such databases to academic researches at little or no cost.

The underlying data at issue here is not properly understood as "commercial speech." Rather, it is scientific and medical information produced for profit motive. Speech does not become "commercial speech," with diminished constitutional protection, merely because it is produced and sold for profit, any more than speech *about commerce* is commercial speech.

Regardless of whether the underlying information here is treated as speech receiving full First Amendment protection or as commercial speech, however, the sole interest advanced by New Hampshire and the First Circuit to justify the speech

ban—reduction of health care costs—is insufficient as a matter of law to justify the speech restriction. That justification is simply too weak and too attenuated to sustain a regulation on any theory other than mere "rational basis" review, which is inappropriate here. Whatever brand of speech New Hampshire's law may regulate, it surely is regulating speech. Accordingly, the restriction must receive either strict scrutiny or intermediate scrutiny. Under either standard of review, the law must fail.

At its core, the New Hampshire law is an exercise in paternalism. The law is grounded in the assumption that doctors exposed to the marketing practices of pharmaceutical detailers who are aware of the doctors' past prescribing habits will be persuaded to make bad prescription decisions when treating patients. The indulgence of this paternalistic assumption is constitutionally forbidden.

ARGUMENT

I. BASIC DATA IS VALUABLE INFORMATION DESERVING OF FULL FIRST AMENDMENT PROTECTION

A. The Importance of Basic Data

Researchers such as the *amici* have a powerful interest in fighting the pernicious effects of any regulation that empowers the government to treat information as contraband. The First Circuit's decision allows New Hampshire to do exactly that. By targeting information related to medical prescriptions and health care practices, such a regulation menaces the free flow of basic data relevant to a vast array of subjects, thereby exerting a chilling effect on research in

science, technology, economics, business, law, education, sociology, and politics.

The First Circuit's opinion treated the information gatherers and publishers in this litigation dismissively, characterizing them pejoratively as "data miners." Pet. App. 3. The First Circuit's opinion also treated the information itself pejoratively, describing it as an ordinary article of commerce, a commodity akin to beef jerky. *Id.* at 23 ("The plaintiffs, who are in the business of harvesting, refining, and selling this commodity, ask us in essence to rule that because their product is information instead of, say, beef jerky, any regulation constitutes a restriction of speech."). This mindset permeated the opinion below, leading the First Circuit to hold initially that the New Hampshire law did not regulate constitutionally protected speech *at all*, and thus triggered no heightened First Amendment scrutiny of any kind. *Id.* at 19 ("[W]e nonetheless believe that what the state seeks to regulate here is conduct, not expression.").

To academic researchers, authors, and journalists, the data produced by information providers such as the petitioners is not a "commodity." Nor is it "commercial speech." It is data describing real-world events and practices; data that informs researchers as they study and evaluate medical practices and health care policies—issues of vital interest to society, and information squarely within the core of constitutionally protected speech.

Commercial databases such as those compiled by petitioner IMS Health often have unique value to the academic world because they provide a broad, unbiased view of data that is not available from smaller or noncommercial databases. The IMS Health databases, for example, include collections of prescription

information relating to all prescriptions, without regard to the identity of the entity paying for the prescription. Other databases, such as those maintained by Medicare and Medicaid agencies, or the claims databases of individual insurers, provide only incomplete information that can lead to erroneous conclusions.

For example, IMS Health's data has been used in research into physician-prescribing patterns in underserved urban areas to determine patterns of undertreatment of patients with asthma; in a pediatric study on the use of antibiotics to assess the impact of patient and clinician education on antibiotics; and in many other non-commercial scientific or academic projects. The importance of this research is underscored by the fact that it has been funded by grants from the federal government. See Surrey M. Walton, et al., *Prioritizing Future Research on Off-Label Prescribing: Results of a Quantitative Evaluation*, 28 PHARMACOTHERAPY 1443 (2008) (results of federally funded research based on data obtained from an IMS Health database that provided ongoing estimates of drug prescribing practices of office-based physicians in the United States). Such studies have in turn been cited in mainstream media reports on drug prescribing practices. All of this research is jeopardized by the First Circuit decision.

B. The New Hampshire Law Regulates Fully Protected Speech, Not Conduct

The attempt by the First Circuit to convert information into a commodity, and in turn to convert the publication of speech into mere conduct, cannot be squared with established First Amendment doctrine. The regulation of "speech" is *never* simply the regulation of "conduct" when the *justification for the*

law is grounded in the perceived harm that will be caused by the content of the message. See*, e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (regulation is content-neutral only if it is "*justified* without reference to the content of the regulated speech"). See also *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984).

C. Basic Data Is Entitled to Full First Amendment Protection

The underlying data at issue here is information entitled to the *full* protection of the First Amendment, protection that is routinely extended to a wide range of information on matters relating to science, politics, economics, religion, or culture. The protections of the First Amendment "are not confined to any field of human interest." *United Mine Workers* v. *Ill. State Bar Ass'n*, 389 U.S. 217, 223 (1967). As this Court has recognized, "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940). Under the First Amendment it is immaterial whether matters "sought to be advanced * * * pertain to political, economic, religious or cultural matters." *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958).

Speech is speech; information is information; speakers are speakers; information providers are information providers. First Amendment protection cannot be avoided by the mere manipulation of labels, so that information is dismissed as mere "data" and then further dismissed as a mere "commodity." To dismiss those who gather, organize, synthesize, and analyze data, packaging it and presenting it to

the marketplace, as mere "data miners" does not make their status as speakers or their speech "entirely invisible to the Constitution." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 383 (1992).

To the contrary, many researchers, academics, authors, and journalists are "data miners," in the sense that they gather raw information, sort and categorize and organize it, and then package and market it in forms useful to information consumers. Their activities fall well within the core protections of the First Amendment. Business journalists writing in-depth about the performance of publicly traded companies, sports journalists writing about the earned-run averages of baseball pitchers, real estate journalists writing about trends in housing sales or mortgage rates, education journalists writing about the test scores of students, political journalists writing about the voting patterns of different precincts in a state presidential primary—all these people laboriously gather and analyze raw data and then present that data to the marketplace.

Basic data is also the essential stuff of basic science. There is no loophole in First Amendment relieving government of its constitutional obligations to avoid the abridgment of speech merely because the information is pure data. See *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 762 n.8 (1985) (plurality opinion); *Id.* at 787 (Brennan, J., dissenting); *Universal City Studios, Inc.* v. *Corley*, 273 F.3d 429, 446-447 (2nd Cir. 2001) (the First Amendment protects "[e]ven dry information").

The gathering and analysis of basic data serves the marketplace of ideas in both its aggregate and specific forms. Basic data is valuable in the aggregate for what it may reveal about large patterns and

trends. Basic data is valuable in the particular for what it may reveal about specific actors or enterprises. The production and use of such data serves the vital purposes that animate the First Amendment's protection of the free flow of information, including the advancement of discovery and invention, the free play of the marketplace of ideas, and the service of transparency and accountability.

II. THE INFORMATION BANNED BY THE NEW HAMPSHIRE LAW IS NOT COMMERCIAL SPEECH

A. The Constitutional Meaning of Commercial Speech

As a secondary and alternative theory, the First Circuit held that, at most, the information at issue in this case was "commercial speech," deserving only the intermediate scrutiny applicable under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), and its progeny.

This Court has not yet clearly defined what is meant by "commercial speech." In *Nike, Inc.* v. *Kasky*, 539 U.S. 654 (2003), the Court dismissed a writ of certiorari as improvidently granted in a case that might have helped clarify that term. Among the reasons supporting a grant of certiorari in this case is the extremely pernicious impact of the First Circuit's alternative holding that would treat the pharmaceutical data banned by the New Hampshire law as commercial speech.

This Court has generally confined "commercial speech" to advertising or marketing activity, speech "that does no more than propose a commercial transaction." *United States* v. *United Foods, Inc.*, 533 U.S.

405, 409 (2001); *Bd. of Trustees* v. *Fox*, 492 U.S. 469, 473-474 (1989). The Court has at times suggested a modestly broader definition, treating "commercial speech" as "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson,* 447 U.S. at 561.

B. Commercial Speech Should Not Be Conflated with Commercial Purpose

Regardless of whether this Court eventually decides that the appropriate definition of commercial speech should be narrower or broader than advertising and marketing in the classic sense, the treatment of the basic data at issue here as commercial speech would work great mischief for all of First Amendment law, reversing the settled principle that the mere existence of a *commercial motive* or the use of speech for a *commercial purpose* does not render the speech itself "commercial speech." Companies such as petitioners serve as information middlemen. They advance the free flow of information by gathering and synthesizing data and then selling that data to those who find it valuable. As such, they are not conceptually different from mainstream media companies that gather raw data and package it for commercial consumption, enterprises that operate for profit but that have always been understood as falling within the core purpose and protection of the First Amendment.

A law preventing the *Wall Street Journal* from harvesting raw data from corporate reports and packaging that data to sell it for "commercial purposes," for example, would plainly violate the First Amendment. The stock transactions reported by the *Wall Street Journal*, whether reported in aggregate form to present conclusions about large economic

trends or presented in highly specific form to analyze the past performance of specific economic players, is understood as *speech* protected by the First Amendment. More than that, such data is understood as speech *about commerce*, but not itself *commercial speech*. The fact that data has value in the marketplace and can be bought and sold does not render it a "commodity" that is something less than speech. And the fact that the speech might be exploitable for a "commercial purpose" by investors, stock advisors, marketers, and advertisers does not render the *data itself* "commercial speech."

If this is true of the *Wall Street Journal* reporting on economic transactions, *Sports Illustrated* reporting on baseball, or *USA Today* reporting on presidential politics, then it is also true of the myriad specialized information providers who gather and sell information in niche markets to willing buyers with specialized interests and needs.

In all of these examples, the Constitution is agnostic as to whether the motivation to gather and disseminate the speech is driven in whole or in part by profit. This Court has repeatedly admonished that constitutional protection of speech is not diminished merely because the speech is sold for commercial gain. "Speech * * * is protected even though it is carried in a form that is 'sold' for profit." *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). See also *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Smith* v. *California*, 361 U.S. 147 (1959); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

Our constitutional tradition treats the marketplace of ideas and the marketplace of commerce not as antagonistic but as complementary. Our entire tradition of intellectual property protection, itself enshrined in the Copyright and Patent Clauses, for example, is grounded in the supposition that the economic incentive created by intellectual property protection enhances the marketplace of ideas. See U.S. Const. art. I, § 8, cl. 8 ("Congress shall have power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."); *Eldred* v. *Ashcroft*, 537 U.S. 186 (2003).

III. THE COST REDUCTION INTERESTS ADVANCED BY THE STATE ARE INSUFFICIENT TO JUSTIFY THE SPEECH BAN UNDER ANY STANDARD OF FIRST AMENDMENT REVIEW

A. The New Hampshire Law Fails Any First Amendment Standard

The sole interest advanced by New Hampshire and the First Circuit to justify the speech ban is the reduction of health care costs. This interest is insufficient, as a matter of law, to justify the speech restriction. The justification proffered by New Hampshire is simply too weak and too attenuated to sustain a regulation on any theory other than mere "rational basis" review. Whatever brand of speech New Hampshire's law may regulate, it surely is regulating speech, thereby triggering either strict scrutiny or intermediate scrutiny review. Under either standard of review, the law must fail.

B. Cost Reduction Will Not Justify the Law Under Strict Scrutiny Review

This Court has acknowledged that there may be rare occasions in which compelling governmental interests justify restrictions on the dissemination of truthful information, such as the protection of national security secrets, individual privacy, or intellectual property. See *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) ("No one would question but that a government might prevent * * * publication of the sailing dates of transports or the number and location of troops"); *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989) (accepting as an interest of the highest order the protection of the privacy of a rape victim's identity); *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539 (1985) (rejecting the argument that the First Amendment gave a magazine the right to infringe copyright through the unauthorized publication of material from a not-yet released autobiography of President Ford).

Even when interests proffered by the government to justify the banning of information have been recognized by this Court as potentially compelling in principle, however, this Court has in practice almost always struck down such regulation. The Court has typically found that the actual vindication of the interest offered by the government was speculative, or that the law was not narrowly tailored to accomplish the objective. See, *e.g., Bartnicki* v. *Vopper*, 532 U.S. 514 (2001) (holding that the First Amendment barred imposition of liability for the publication by the media of illegally intercepted private phone conversations when the media outlets were not themselves complicit in the interception and did not know the source of the material); *Butterworth* v. *Smith*,

494 U.S. 624 (1990) (refusing to enforce the traditional veil of secrecy surrounding grand jury proceedings against a reporter who wished to disclose the substance of his own testimony after the grand jury had terminated, holding the restriction inconsistent with the First Amendment principle protecting disclosure of truthful information); *Florida Star*, 491 U.S. 524 (1989) (holding unconstitutional the imposition of liability against a newspaper for publishing the name of a rape victim in contravention of a Florida statute prohibiting such publication in circumstances in which a police department inadvertently released the victim's name); *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 104 (1979) (finding unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender, where the newspapers obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor, and stating that the "magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty"); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978) (overturning criminal sanctions against a newspaper for publishing information from confidential judicial disciplinary proceedings leaked to the paper).

No interests of comparable gravity are implicated here. The data describing prescription practices is "patient-anonymized," meaning that no patients are identified and no privacy rights are implicated. The *only* interest identified by the opinion below as support for the New Hampshire Law—the hypothesis that the law will reduce health care costs by hampering the effectiveness of detailers who market phar-

maceuticals to doctors—comes nowhere close to the level of importance that would justify an abridgment of speech and cannot satisfy the demanding fit between means and ends that is required to satisfy the narrow tailoring requirement imposed by strict scrutiny review. By the First Circuit's own admission, there was no direct evidence that the New Hampshire law would lower health care costs, and what little showing there was "that health care costs would lessen should prescriber histories be denied to detailers was not overwhelming." Pet. App. 33.

C. The Analysis Below Was "Rational Basis by Any Other Name"

Conceding that New Hampshire had little evidence to support its cost-reduction claims, the First Circuit speculated that the lack of evidence could be attributed to the fact that New Hampshire was the first state to enact such a law and ought not to be penalized for being the first to give it a try. Pet. App. 35-36.

The notion that courts should defer to social policy experimentation by legislatures is a well established principle of constitutional law when applying the minimal rational basis standard of review applicable to ordinary economic and social legislation. See *Fitzgerald* v. *Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 107 (2003). In that arena, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955). In such cases the government need have only a "plausible policy reason for the classification." *Nordlinger* v. *Hahn*, 505 U.S. 1, 11 (1992).

This was the standard that once applied to the regulation of commercial speech, when it was still deemed outside the protection of the First Amendment. See *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942); *Railway Express Agency* v. *New York*, 336 U.S. 106 (1949). But it is the law no longer. Under any form of heightened First Amendment review—whether it is the strict scrutiny test applicable to content-based regulation of speech, or the intermediate level of scrutiny afforded commercial speech under *Central Hudson* and its progeny—the one-step-at-a-time approach of rational-basis deference is not appropriate. The Constitution does not give New Hampshire a free pass merely because it is the first out of the gate with a bad law.

New Hampshire turned the First Amendment on its head. "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try." *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

The First Circuit's dismissive attitude toward the medical prescription information subject to the state's ban initially caused it to hold that the speech being regulated was entitled to no First Amendment protection at all. This same attitude infiltrated and poisoned its commercial speech analysis. While purporting to apply *Central Hudson*, the decision was rational basis review in disguise. The First Circuit's application of *Central Hudson* was not the serious and searching analysis of commercial speech that has evolved in this Court over the past three decades, but rather a pallid version of *Central Hudson* that effectively demoted the standard of review to little more than a rational basis test, as if the informa-

tion at issue was not to be taken seriously as speech worthy of any true First Amendment protection. This blind spot clouded the First Circuit's analysis, causing it to fail to properly perceive that the entire cost-reduction hypothesis was steeped in paternalism.

The trajectory of modern commercial speech law is impressive in its manifest hostility toward paternalism. Paternalism is the enemy of the First Amendment. See, *e.g.*, *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 554-555 (2001) (striking down some and sustaining some restrictions on tobacco advertising); *Greater New Orleans Broad. Ass'n, Inc.* v. *United States*, 527 U.S. 173 (1999) (striking down casino gambling advertising limitations); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 497, 503 (1996) (striking down liquor advertisement restrictions, noting "a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it. * * * [B]ans against truthful, nonmisleading commercial speech * * * usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. The 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"); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995) (striking down beer advertising regulations); *Ibanez* v. *Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 147 (1994) (striking down restrictions on accountancy advertising); *Edenfield* v. *Fane*, 507 U.S. 761 (1993) (striking down commercial speech limitations on accountants); *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993) (striking down restrictions on newsracks for commercial flyers and publications); *Peel* v. *ARDC of Ill.*, 496 U.S. 91 (1990)

(regulation banning lawyer advertisement of certification by the National Board of Trial Advocacy as misleading was unconstitutional); *Shapero* v. *Ky. Bar Ass'n*, 486 U.S. 466 (1988) (regulation banning solicitation for legal business mailed on a personalized or targeted basis to prevent potential clients from feeling undue duress to hire the attorney unconstitutional); *Zauderer* v. *Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626 (1985) (striking down some and upholding some restrictions on lawyer advertising); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (statute banning unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control unconstitutional); *In re R.M.J.*, 455 U.S. 191 (1982) (regulations limiting the precise names of practice areas lawyers can use in ads and identifying the jurisdictions lawyer is licensed in as misleading unconstitutional); *In re Primus*, 436 U.S. 412 (1978) (striking down restrictions on solicitation of legal business on behalf of ACLU); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (regulation banning lawyer advertisement of prices for routine legal services as misleading unconstitutional); *Linmark Assocs., Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977) (regulation banning placement of "for sale" signs in the front lawns of houses in order to prevent the town from losing its integrated racial status unconstitutional); *Va. State Bd. of Pharmacy*, 425 U.S. 748 (1976) (striking down restrictions on pharmaceutical advertising); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975) (striking down restrictions on abortion advertising).

Many doctors find the information provided by detailers regarding their prescribing habits useful, because they gain insight or new knowledge from the

information that detailers provide. Some doctors appreciate the free samples of new products that often accompany such visits, which they pass on to patients. Others simply will have nothing to do with detailers, because they find the practice unethical or distasteful. Doctors are not children—they can fend for themselves in making these choices.

In *Thompson* v. *Western States Medical Center*, 535 U.S. 357 (2002), the Court held that provisions in the Food and Drug Modernization Act of 1997 that restricted physicians and pharmacists from advertising compounding drugs violated the First Amendment. The Court refused to make the "questionable assumption that doctors would prescribe unnecessary medications" and rejected the government's argument that "people would make bad decisions if given truthful information about compounded drugs." *Id.* at 374. Indeed, the entire arc of this Court's modern commercial speech jurisprudence is against "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." *Ibid.* (citing *Va. State Bd. of Pharmacy,* 425 U.S. at 769).

The Constitution allows advertisers to proclaim that seven out of ten doctors prefer "brand x," just as it allows politicians to proclaim that seven out of ten voters favor "position y." More pointedly, the Constitution protects the right to disseminate data about the particular prescribing habits of a specific doctor, just as it protects the right to disseminate data about the particular voting patterns of a specific candidate. The presumption of the First Amendment is that the

free flow of information facilitates quality decision-making and enhances accountability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEPHEN SANDERS
GEORGE J. TZANETOPOULOS
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

RODNEY A. SMOLLA
Counsel of Record
Washington and Lee University School of Law
Sydney Lewis Hall
Lexington, VA 24450
(540) 458-8502

Counsel for Amici Curiae

APRIL 2009

APPENDIX

APPENDIX

The *amici curiae* are as follows[1]:

Ernst R. Berndt, Ph.D., is the Louis E. Seley Professor in Applied Economics at the MIT Sloan School of Management and Co-Director of the Harvard-MIT Biomedical Enterprise Program. In the last decade, much of Professor Berndt's research has focused on economic issues in health care, with a strong emphasis on measurement of costs, outcomes, and prices. He serves as Director of the National Bureau of Economic Research Program on Technological Progress and Productivity Measurement, and until recently was Chair of the Federal Economic Statistics Advisory Committee, an interagency committee formed by the Bureau of Labor Statistics, the Bureau of Economic Analysis, and the U.S. Census Bureau. He also served as a member of the National Science Foundation Panel on Measurement, Methodology, and Statistics. Currently he serves on the Editorial Board of *Health Affairs*. Professor Berndt's health care research has been published in peer-reviewed journals such as the *New England Journal of Medicine*, *American Journal of Psychiatry*, *Journal of Mental Health Policy and Economics*, *Journal*

---

[1] This brief reflects the views of the *amici* professors as individuals, and may or may not reflect the views of their institutions. The names of their institutions are included only for identification purposes. The *amici* have joined in this brief due to their concern that important information that is made available to them by commercial data providers such as petitioners may no longer be available if prohibitions on commercial use of the information are allowed to stand. The legal analysis herein is that of their counsel.

of Health Economics, and *Health Affairs*. Professor Berndt received his Ph.D. in economics from the University of Wisconsin-Madison in 1972, and was awarded an honorary doctorate from Uppsala University in Sweden in 1991. He is an elected Fellow of the Econometric Society.

J. Lyle Bootman, Ph.D., Sc.D., is Dean of the College of Pharmacy and Professor of Pharmacy Practice, Pharmaceutical Sciences, Medicine, and Public Health at the University of Arizona. He is Founding and Executive Director of the Center for Health Outcomes and PharmacoEconomic Research (HOPE research center) at the Arizona Health Science Center. Dean Bootman served as the 1999-2000 president of the American Pharmaceutical Association and the Pharmacy and Therapeutics Society. He has received numerous scientific awards and national honors and was elected a member of the Institute of Medicine of the National Academies. His current research efforts include outcomes and pharmacoeconomics research, pharmacoepidemiology, and international pharmacy systems. Specifically, Dr. Bootman investigates the incidence and drug-related morbidity and mortality from a clinical and economic perspective.

Frank R. Lichtenberg, Ph.D., is Courtney C. Brown Professor of Business at the Columbia University Graduate School of Business and a Research Associate of the National Bureau of Economic Research. Professor Lichtenberg's research has examined how the introduction of new technology arising from research and development affects the productivity of companies, industries, and nations. Recently he has performed studies of the impact of pharmaceutical innovation on longevity, the effect of computers on productivity in business and government organi-

zations, and the consequences of takeovers and leveraged buyouts for efficiency and employment. His articles have been published in numerous scholarly journals and in the popular press. He was awarded the 1998 Schumpeter Prize for his paper, *Pharmaceutical Innovation as a Process of Creative Destruction*, and a 2003 Milken Institute Award for Distinguished Economic Research for the paper *Pharmaceutical Knowledge: Capital Accumulation and Longevity*. He is a director of the economics consulting firm LECG, LLC. He received a B.A. with honors in history from the University of Chicago and an M.A. and Ph.D. in economics from the University of Pennsylvania. Dr. Lichtenberg has served as an expert for the Federal Trade Commission, the U.S. Department of Justice, and state attorneys general, and has testified before Congress.

David B. Nash, M.D., M.B.A., is the Founding Dean of the Jefferson School of Health Policy and Population Health at Thomas Jefferson University in Philadelphia. He is also the Dr. Raymond C. and Doris N. Grandon Professor of Health Policy. Dr. Nash is internationally recognized for his work in outcomes management, medical staff development, and quality-of-care improvement; he has published more than 100 articles in major journals. In 1995, he was awarded the Latiolais Prize by the Academy of Managed Care Pharmacy for his leadership in disease management and pharmacoeconomics. In 2006, he received the Elliot Stone Award for leadership in public accountability for health data from NAHDO. Dr. Nash is a consultant to organizations in both the public and private sectors including the Technical Advisory Group of the Pennsylvania Health Care Cost Containment Council (a group he has chaired for the last decade). Dr. Nash received his B.A. in

economics (Phi Beta Kappa) from Vassar College, his M.D. from the University of Rochester School of Medicine and Dentistry, and his M.B.A. in health administration (with honors) from the Wharton School at the University of Pennsylvania.

Glen T. Schumock, Pharm.D., M.B.A., is Director of the Center for Pharmacoeconomic Research, Associate Professor of Pharmacy Practice, and Adjunct Professor of Pharmacy Administration at the University of Illinois at Chicago. His research interests include clinical and economic outcomes evaluations of pharmaceutical products and drug classes, evaluation of progressive pharmacy services, medication safety, and assessment of medical-use policy in large provider groups and integrated delivery networks. Dr. Schumock was named a Fellow of the American College of Clinical Pharmacy in 2003. His research interests include clinical and economic outcomes evaluations of pharmaceuticals, evaluation of progressive pharmacy services, and assessment of medical use policy in large provider groups and integrated delivery networks.

Lee C. Vermeulen, Jr., R.Ph., M.S., is the Director of the Center for Drug Policy in the Department of Pharmacy at the University of Wisconsin Hospital and Clinics, and Clinical Associate Professor at the UW-Madison School of Pharmacy. Mr. Vermeulen conducts health services research with a focus on studies that measure the value of both medication therapy and clinical pharmacy services. He is involved in the evaluation of technology development and diffusion, particularly in the pharmaceutical market, and he publishes annual forecasts of the medication development pipeline and forecasts of the rising cost of medications. His previous scholarly

work has focused on measuring the impact of various health-system medication use policies and programs. He received a bachelor's degree in pharmacy from the University of Buffalo, and a master's degree in pharmacy administration from the University of Wisconsin-Madison. He completed residency training in pharmacy practice and pharmacy administration at the University of Wisconsin Hospital and Clinics, and served a fellowship in medical technology assessment at the University Healthsystem Consortium. In his role at the UW Hospital and Clinics, he leads a large team of pharmacists responsible for drug policy analysis and drug formulary management for both his academic medical center and for Unity Health Insurance, an 85,000-member managed care organization owned by the UW Health system.

William B. Weeks, M.D., M.B.A., is a psychiatrist who has focused his research on understanding the health needs of and delivery of health care services to veterans who live in rural settings. Dr. Weeks is Associate Professor of Psychiatry and of Community and Family Medicine at Dartmouth Medical School and Associate Professor and Course Director at the Dartmouth Institute for Health Policy and Clinical Practice. He has published more than 100 manuscripts examining economic and business aspects of rural veterans' health care services utilization and delivery, physicians' return on educational investment, patient safety, and quality improvement. He received his M.D. from the University of Texas Medical Branch at Galveston and his M.B.A. from Columbia University.