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 *AMICUS CURIAE* OF AMERICAN BUSINESS MEDIA; THE CONSUMER DATA INDUSTRY ASSOCIATION; FIRST ADVANTAGE SAFERENT, INC; THE NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS; REED ELSEVIER INC.; AND THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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Interest of the Amici*

Amici collect, aggregate and publish databases containing truthful information acquired from public records and other lawful sources. Their products include databases such as LexisNexis, which contains news articles, case law, statutes, and public records used by lawyers, business professionals, and journalists, and App Alert, a specialized collection of lawfully collected information used to inform landlords and employers whether a prospective tenant or employee has outstanding warrants. *Amici* file this brief because of the First Circuit's apparent conclusion (1) that the aggregation, compilation and publication of lawfully acquired truthful information for commercial purposes is "conduct," not "speech," and (2) that, if that activity *is* protected speech, it is not fully protected speech, but is entitled only to the more limited protection accorded by the Constitution to "commercial" speech. These conclusions are clearly incorrect and will, unless reversed, seriously threaten the ability of *amici* and others to provide accurate information services to the public.

American Business Media is a not-for-profit association serving business-to-business information providers. Its 236 members currently produce 1,500

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* No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their counsel, or their members, made a monetary contribution to its preparation or submission. The parties were notified of *amici's* intention to file more than ten days before the date that this brief was due, and they have consented to its filing via consent lodged with the Clerk of this Court.

business and professional periodical publications such as *Oil and Gas Journal*, *Prairie Farmer*, and *Computer World*.

The Consumer Data Industry Association is an international trade association of more than 500 companies that publish databases containing consumer credit and other information used to prevent fraud, assess credit risk, evaluate prospective employees and tenants, locate witnesses, apprehend fugitives, and locate non-custodial parents.

First Advantage SafeRent compiles and maintains a database of public record filings of landlord tenant court proceedings and criminal history records obtained from public records and/or government agencies, and provides consumer reports to clients for tenant screening purposes. It also furnishes both criminal history reports and credit reports obtained from the main nationwide credit bureaus, Equifax, Experian and Trans Union, to the multifamily housing industry for employment and tenant screening purposes.

The National Association of Professional Background Screeners represents over 600 pre-employment background screening firms across the United States. Its members provide pre-employment background screening information to employers and the managers of apartment buildings in every state, who use that information to decide whether or not to extend a job offer or to rent an apartment.

Reed Elsevier Inc. and its several business units collect and aggregate public record and other information for a large number of commercial, educational, and governmental purposes. Their

products, such as LexisNexis, which has more than 3.6 million private and governmental subscribers, contain databases of judicial opinions, local, state and federal statutes and regulations, bankruptcy filings, property-title records and liens, and tax assessor records.

The Software & Information Industry Association is a trade association of software creators and information providers. Its approximately 500 member companies publish databases, and related software tools used by researchers, journalists and business professionals.

REASONS FOR GRANTING THE PETITION

The First Circuit's Holding That Commercial Publishing of Informational Databases Enjoys Either No, or Reduced, First-Amendment Protection Raises Questions of National Importance.

As the author of the majority opinion below correctly understood, this case "raises important constitutional questions that lie at the intersection of free speech and cyberspace." *IMS Health v. Ayotte,* 550 F.3d 42, 44 (1st Cir. 2008). *Amici* and others have invested billions of dollars in the creation, organization, and publication of easily searchable databases that make large quantities of accurate, useful and often essential information available to private and governmental users. The information in these databases is used for a variety of beneficial and important purposes, including legal and scientific research, risk analysis, and detection of

fraud. These publications fulfill the promise of the digital age by facilitating the acquisition of accurate information in efficient, complete and user-friendly ways.

The First Circuit has held that, for purposes of constitutional analysis, the information in these databases is a "commodity," the publication of which is "conduct" rather than constitutionally protected speech, thereby completely depriving the publication of the information of First Amendment protection. In the words of the majority opinion below:

> We say that the challenged elements of the Prescription Information Law principally regulate conduct because those provisions serve only to restrict the ability of data miners to aggregate, compile, and transfer information destined for narrowly defined commercial ends. In our view, this is a restriction on the conduct, not the speech, of the data miners. … In other words, this is a situation in which information itself has become a commodity. 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. … We believe that … New Hampshire has adopted a form of conduct-focused economic regulation that does not come within the First Amendment's scope.

IMS Health, 550 F.3d at 53-54.

In the alternative, the opinion below has held that, "[i]f speech at all" these publications constitute "commercial speech," that receives, at most, the protection offered by "intermediate" constitutional scrutiny. *See id.* at 54.

In reaching these two conclusions, the Court below committed the critical error of denying full constitutional protection to the aggregation and publication of lawfully acquired, truthful information because of the way in which that information is used by those to whom it is communicated. That approach is wrong and constitutes an extremely dangerous threat to First Amendment values. The compelling reasons for giving special constitutional protection to speech apply at least as strongly to publications containing accurate factual information as they do to any other constitutionally protected publication. If truthful information is used for improper or criminal purposes, the proper (and constitutionally required) course is to regulate or prohibit the unacceptable or criminal conduct, not to censor the public's access to truthful, lawfully acquired, and useful information.

I. The Publication of Lawfully Acquired Truthful Information is Constitutionally Protected Speech, Not "Conduct."

Section 318:47-f of the New Hampshire Statutes prohibits the petitioners in this case from "transferring," "using" or "selling" legally obtained,

truthful information because recipients of the information use the information for the purpose of promoting commercial products.[1] N.H. Rev. Stat. Ann. § 318:47-f. Section 318:47-f clearly bans speech protected by the First Amendment: "If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category… ." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (internal quotation omitted). That protection is not lost because the information is used by one or more of its recipients for an improper or even illegal purpose. *See*, *e.g., Fla. Star v. B. J. F.,* 491 U.S. 524, 538 (1989) (holding it unconstitutional to prohibit the media from communicating an alleged rape victim's identity because some might use the information to harass the victim); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 104 (1979) (holding unconstitutional a state statute prohibiting the publication of the name of a juvenile offender on the basis that employers will refuse to hire him); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700-701 (1977) (finding that the fact that teens might engage in sexual activity is not a basis for banning the advertising of contraceptives);

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[1] Section 318:47-f of New Hampshire's statutes outlaws any "electronic transmission intermediary" or "similar entity" from "selling, transferring, or using" physician-identifiable information for any non-exempted commercial purpose. N.H. Rev. Stat. Ann. § 318:47-f. Under the statute, "commercial purpose" includes not only "advertising, marketing or promotion," but also "any activity that *could be used* to influence sales or market share of a pharmaceutical product, influence or evaluate the prescribing behavior of an individual health care professional, or evaluate the effectiveness of a professional pharmaceutical detailing task force." Thus, although ostensibly directed at pharmaceutical sales practices, the statute's reach is substantially broader.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975) (holding unconstitutional a state statute barring release of a rape victim's identity because of the effect on privacy). Similarly, information does not become a commodity—like "beef jerky," as the court below put it—because of the way in which it is used by those to whom it is communicated. If a state wishes to prohibit or regulate what it believes to be a misuse of truthful information, the First Amendment requires that it regulate that misuse directly, rather than censoring the collection and communication of the information so as to make it unavailable to everyone. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 770 (1975).[2] The First Circuit's decision that the information collected, organized and communicated by the plaintiffs in this case becomes a commodity, rather than protected speech because it is used for a commercial purpose is flatly inconsistent with these well-established principles.

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[2] The First Circuit invoked this Court's cases, holding First Amendment protection inapplicable to conduct, such as "agreements in restraint of trade, communications in furtherance of crimes, or statements or actions creating hostile work environments, and promises of benefits made by an employer during a union election." *IMS Health*, 550 F.3d at 52 (internal citations omitted). These cases are inapposite. They deny First Amendment protection because the prohibited speech *itself* is criminal. *E.g.,* 15 U.S.C. § 1 (preventing anti-competitive activity through agreements in restraint of trade); 15 U.S.C. § 158 (prohibiting unfair labor practices through including employer interference with the right to organize).

Full First Amendment protection for the collection and publication of truthful information is essential in a democratic society. The freedom to publish accurate, lawfully acquired information is "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting,* 420 U.S. at 495. That freedom applies not only to the publication of public records, which "by their very nature are of interest to those concerned with the administration of government," *id.* at 495, but also to information acquired through "routine newspaper reporting techniques." *Daily Mail,* 443 U.S. at 103.

Since the *Daily Mail* decision, the information demands of both government and private industry have become increasingly complex. The ability to provide that information is greatly enhanced by the use of digital technology. *Amici* collect public record and other information by querying businesses, visiting courthouses and other record depositories, and interviewing private parties and public officials. The information thus collected is invaluable for many purposes: for example, *amicus* American Business Media's city business journals compile, organize and publish extensive useful information about local businesses – lists of the largest public and private companies, the largest employers, the fastest growing companies, etc. These compilations enable the public to obtain information about their communities, which groups, individuals, governments and businesses would never be able to obtain on their own.

These aggregate sources of information create enormous efficiencies for almost any kind of

research. Instead of searching the records of every local public records custodian, or having to survey individual businesses about their activities, journalists, law enforcement agencies, or law firms and others may use comprehensive databases obtain prompt, up-to-date information for a variety of important purposes such as investigating political corruption, screening job applicants, locating parents who default on child support obligations, or verifying that borrowers have sufficient assets to collateralize a loan. Databases can be "mined" in order to locate witnesses, confirm the validity of professional licenses, assist in fraud prevention, or locate blood, bone marrow or other organ donors. Informational databases are frequently used by the government itself.

For example, in 1999, FBI Director Louis Freeh testified that:

> The FBI subscribes to various commercial on-line databases, such as Lexis/Nexis, Dun & Bradstreet, and others, to obtain public source information regarding individuals, businesses, and organizations that are subjects of investigations. Information obtained includes credit records, real property and tax records; boat, plane, and motor vehicle registration records; business records.... In 1998, more than 53,000 inquiries were made of these databases. Information from these inquiries assisted in the arrests of 393 fugitives wanted by the FBI, the identification of more than $37 million

> in seizable assets, the locating of 1,966 individuals wanted by law enforcement, and the locating of 3,209 witnesses wanted for questioning. Over 97 percent of the inquiries made produced new investigative information for follow-up action by agents and investigators. Subscription to these databases allows FBI investigative personnel to perform searches from computer workstations and eliminates the need to perform more time consuming manual searches of federal, state, and local records systems, libraries, and other information sources. Information obtained is used to support all categories of FBI investigations, from terrorism to violent crimes, and from health care fraud to organized crime.[3]

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[3] *Hearing on the 2000 Budget* before the Senate Committee on Appropriations, Subcommittee for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies, at 280 (Prepared Statement of Louis Freeh, Director, FBI) (Mar. 24th, 1999), *available online,* www.gpo.gov (visited April 23, 2009). *See also* The Privacy Office, Department of Homeland Security, Privacy and Technology Workshop, Official Transcript at 19 (Sep. 8, 2005) ("[I]f you look back 23 years ago, if I wanted to gather information about a subject, ….We would have to physically go down to the courthouse to get real estate records, we would have to be sending these to another state to go get a driver's license record or a picture, we would have to go to a lot of different places, and manually gather this information .... So, I looked at commercial databases as a way to efficiently gather information....

II. The Publication of Information Does Not Become Commercial Speech Because the Information Is Used For Advertising or Other Commercial Purposes.

Not only is the activity of organizing, compiling and selling lawfully obtained, truthful information constitutionally protected speech, rather than conduct, that speech does not become less-protected "commercial speech" because those who obtain the information might use it for advertising or other commercial purposes. Newspapers, books and periodicals do not lose their fully protected First Amendment status because purchasers and subscribers use information contained in them for advertising or other commercial purposes. No basis exists for reaching a different conclusion with respect to digital informational databases.

Rationales that permit greater government regulation of commercial advertising have no application to the creation and publication of informational databases that have none of the characteristics associated with commercial speech. Activities like *amici*'s and those of the plaintiffs in this case pose no "risk of fraud," *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992) (cited in *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525, 576 (2001)

(comments of Chris Swecker, Assist. Director of the Criminal Investigative Division for the FBI), *available online*, http://www.dhs.gov/xlibrary/assets/privacy/privacy_wkshop_09- 2005_transcript_panel1.pdf (last viewed Apr. 23, 2009).

(Thomas, J., concurring)), nor do they involve "misleading, deceptive, or aggressive sales practices," *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, Kennedy, & Ginsburg, J.J., concurring) that have in the past permitted more robust regulation of commercial speech. *E.g., Florida Bar v. Went For It*, 515 U.S. 618, 635 (1995) (upholding 30 day ban on lawyer direct-mail solicitation to accident victims). *Cf. Lowe v. SEC*, 472 U.S. 181, 210 (1985) (noting that the dangers of "fraud, deception and overreaching" are "not replicated in publications [such as newspapers] that are advertised on the open market"). Unless the information in a database is accurate, it is of no value to those who use it.[4] A land title document, for

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[4] The sole instance in which the rationales supporting commercial speech regulation apply is when solicitation or advertising occurs as an integral part of the message that the *speaker* wishes to communicate. Thus, although the Court has adopted different tests to determine whether commercial speech is present (*cf.* Pet. at 21-23), the presence of advertising *by the person regulated by the statute* is the *sine qua non* that ties these cases together. *See also, e.g., Thompson v. Western States Medical Center*, 535 U.S. 357, 366 (2002) (parties conceding that advertising and solicitation constitute commercial speech); *Lorillard Tobacco*, 533 U.S. at 534-37 (tobacco advertising); *44 Liquormart*, 517 U.S. at 489 (ban on advertising liquor pricing); *Edenfield v. Fane*, 507 U.S. 761, 764 (1992) (face-to-face solicitation by certified public accountant); *Bd. Of Trs. Of the State Univ. of New York v. Fox,* 492 U.S. 469, 472-74 (1989); *Bolger v. Youngs Drugs Prod. Corp.,* 463 U.S. 60, 62 (1983); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 559 (1980)(ban on advertising during energy shortage); *Bates v. State Bar of Ariz.,* 433 U.S. 350, 355 (1977) (attorney advertising); *Virginia Pharmacy*, 425 U.S. at 750-51 (ban on drug prices in advertisements). These cases do not support application of the commercial speech doctrine to

example, is useless to a prospective land buyer if it contains erroneous information in the same way that an inaccurate list of commodity prices is useless to a futures trader. There is absolutely no incentive for *amici* or any other database producer to falsify the contents of their databases because to do so would destroy the economic viability of the database.

III. The First Circuit's Incorrect Decision Threatens *Amici's* Materials With a Host of New, Debilitating Regulation That Would Interfere Seriously with the Accuracy and Completeness of Informational Databases.

It is impossible to predict with certainty the particular legislative destructive enactments likely to be encouraged by the First Circuit's incorrect First Amendment analysis. The potential to do real harm to First Amendment values, however, is real. The conclusion that the collection and publication of truthful, lawfully obtained information is conduct, not speech, and thus entitled to no protection under the First Amendment, would give state and local legislatures unprecedented leeway to enact legislation inhibiting the free flow of that information. And even if the First Circuit's speech/conduct reasoning were rejected, its improper application of the commercial speech doctrine could result in denying necessary First Amendment protections.

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cases in which the speaker is not *directly* engaging in advertising *of any kind*.

The First Circuit's conclusion that the gathering and publication of lawfully acquired, truthful information is "conduct" rather than speech, would subject laws governing these activities to the lowest level of judicial scrutiny, under which laws must be upheld if there is "any conceivable set of facts that could provide a rational basis" for their enactment. *See FCC v. Beach Communications,* 508 U.S. 307, 313-14, 315 (1993). At this level of scrutiny, the existence of any plausible policy justification will validate a statute with no requirement that a court either balance the strength of the asserted justification against the value to the public of the information that is suppressed, or consider whether the regulation excessively constrains expressive activity. This highly deferential standard of judicial review enables the government to enact regulations that would directly affect both *amici's* activities and the welfare of the customers that they serve. The First Circuit's alternative "commercial speech" holding would afford informational databases somewhat greater, but nonetheless inadequate, protection.

In the present case, New Hampshire has interfered with the availability of useful information, valuable for many non-"detailing" purposes, because of its attempt to regulate detailing. Instead of addressing its concerns directly, the state has cut off the free flow of useful information. Other legislatures could use the same technique to prohibit publication of data on embryonic stem cell research or abortion.

Amici have seen initiatives in various places that are harbingers of what may come if the First Circuit decision is upheld. One example of the kind

of regulation that would apparently be permitted if informational databases were to receive less than full First Amendment protection might be designed to produce state or local government revenue. State legislatures might be tempted to follow the lead of California's Santa Clara County, which attempted to raise revenue by prohibiting commercial re-use of digital real estate tax maps by requiring any commercial provider to pay substantial license fees far greater than the cost to the state of making these records available and prohibiting parties that acquire information from the government from making that information available to others. *See* Bruce Joffee, Case File: Santa Clara County, Ensuring Public Access to Geospatial Data, *GEO World* (Sept. 1 2007) (describing litigation over the county's charging of license fees and prohibition against redistributing the data). *County of Santa Clara v. Superior Court (California 1st Amendment Coalition)*, No. H031658, 2009, Cal. App. LEXIS 274 (Cal. App. 6th Dist. Feb. 27, 2009). This ill-advised policy might have resulted in revenue for the state, but would have resulted in incomplete databases of California public records. *Compare also Microdecisions v. Skinner*, 889 So. 2d 871, 872-73 (Fla. App. 2004) (rejecting attempt by property appraiser to demand royalty for commercial republication of public records under state law).

Last year, a special commission of the American Bar Association proposed a resolution that called upon state legislatures to enact laws that would bar *amicus* National Association of Background Screeners' members from disseminating

certain conviction records.[5] The proposal was driven by concerns that criminal background checks may prevent ex-offenders from obtaining employment. Such concerns are legitimate, but preventing the distribution would almost certainly result in an inability to know whether convicted felons are being hired for appropriate occupations. The solution to this problem is not to dam the flow of information, but to use less speech-destructive tools such as tax incentives for employers who hire ex-offenders and/or to strengthen applicable anti-discrimination laws.

As individual jurisdictions carve out niches of information they wish to suppress, the result will be incomplete, fractured databases of little value and use. Suppose, for example, that a state wished to stop the rapid sales of homes in an area to prevent civic blight. To that end, the government would be tempted to make it illegal to collect and publish readily available real estate information for the purpose of engaging in real estate transactions because the government was aware that the information would subsequently be used to engage in home sales. Despite the fact that the information is lawfully acquired and disseminated, the collection and sale of that information under the First Circuit's speech/conduct line drawing or its interpretation of the First Amendment would receive reduced or no

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[5] *See* ABA Commission on Effective Criminal Sanctions, Limiting Access to Criminal History Information (August 2007), *available online*, www.abanet.org/dch/committee.cfm?com=CR209800 (visited 24 April December 2009). That proposal was withdrawn in part due to First Amendment concerns. *See id.* (press release from Reporter's Committee).

First Amendment protection because the purchasers of the information used it for purposes deemed "improper" by the government—irrespective of the fact that the state could have addressed its "blight" concerns through various other means such as new zoning requirements.

Under the First Circuit's analysis, regulations of this kind could be upheld regardless of the negative impact on information availability and flow, and despite the fact that there is a broad First Amendment right to receive such information and even though alternatives exist that do not do violence to the free speech rights of the publisher.

If a "marketplace of ideas" means anything, it must mean that the *users* of information, not the government, are to determine the value of truthful information in all but the most compelling cases. Consequently, the government must censor speech only as a last resort. By reducing or eliminating the First Amendment protection on the collection and publication of truthful, lawfully acquired information in the absence of any of the traditional indicia for such treatment, the First Circuit's decision has turned the First Amendment on its head.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be GRANTED.

Respectfully submitted,

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