

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

BRIEF AMICUS CURIAE
OF THE DATAMONITOR GROUP
IN SUPPORT OF PETITIONERS

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**STATEMENT OF INTEREST
OF AMICUS CURIAE¹**

¹ Pursuant to Sup. Ct. R. 37.6, amicus notes that 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, its members, or its counsel made a monetary contribution to its preparation or submission. All parties were notified of this amicus brief pursuant to Rule

The Datamonitor Group (“Datamonitor”) is one of the world’s leading providers of global business information. Datamonitor analysts collect and examine raw data gathered from a worldwide network of sources, applying extensive industry experience to assess and advise on market trends and conditions. Datamonitor’s thousands of customers, which include Fortune 100 businesses and financial services organizations across the automotive, consumer markets, energy and utilities, financial services, logistics, pharmaceutical and healthcare, retail, technology, and telecommunication areas, rely on Datamonitor’s reports to make informed business decisions. Datamonitor also provides its analyses to libraries and academic centers across the globe.

All of Datamonitor’s divisions rely extensively on the collection and analysis of data obtained from a variety of sources. Most pertinently here, approximately eighty percent of the business of Datamonitor’s Pharmaceutical and Healthcare division involves synthesizing “raw” mined data—including data provided by Petitioner IMS Health, Inc.²—with information from other sources to develop reports on market conditions, which are then broadly disseminated to pharmaceutical and other healthcare companies. The Pharmaceutical and Healthcare division is Datamonitor’s largest, serving

37.2(a). The parties have consented to the filing of this brief through consent letters filed with the Clerk’s Office.

² IMS Health obtains raw data about prescriptions, groups them by prescriber, and cross-references each prescribing physician’s history with physician-specific information available through the American Medical Association. Pet. App. 5.

over 450 clients, including twenty-four of the thirty largest innovator pharmaceutical companies and many generic pharmaceutical manufacturers.

Datamonitor has a substantial interest in this case. If allowed to stand, the First Circuit's erroneous decision would render Datamonitor unable to obtain the raw pharmaceutical data critical to the development of its analyses of the market for prescription drugs in New Hampshire—not to mention any other state in the First Circuit now emboldened to pass a law like New Hampshire's.³ That prohibition would in turn make Datamonitor's analyses less useful for its customers—and thereby reduce the value of its products—with attendant financial harm to Datamonitor. Further, the First Circuit's holding that the transmittal of data that has been gathered, analyzed and repackaged (sometimes called “data mining”) is not protected speech has implications across *all* of Datamonitor's businesses; for under the First Circuit's rationale, a state may lawfully prohibit the mining of data involving any industry. The petition thus presents an issue of exceptional importance to Datamonitor and to the industries that rely on its services to make informed, cost-effective business decisions. The First Circuit's decision warrants this Court's review.

³ Indeed, Maine passed a law like New Hampshire's before the district court decision below. That statute was invalidated in *IMS Health Corp. v. Rowe*, 532 F. Supp. 2d. 153 (D. Me. 2008) prior to the First Circuit's decision here. Vermont also passed such a law, which was recently upheld. *IMS Health, Inc. v. Sorrell*, No. 1:07-CV-188 (D. Vt. Apr. 23, 2009). That court nonetheless disagreed with the First Circuit and held that prescriber information data is speech. Slip Op. at 13-14.

SUMMARY OF ARGUMENT

The free exchange of commercial information has been a key feature of American culture as long as there has been an America. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996). New Hampshire’s Prescription Information Law, however, makes it a crime for a pharmacy, insurer, or “similar entity” to “transfer” or “use” prescription data for the purpose of “any activity that could be used to influence sales or market share of a pharmaceutical product.” N.H. Rev. Stat. § 318:47-f. The First Circuit upheld the statute against petitioners’ First Amendment challenge, holding that the dissemination of information developed through the collection and analysis of raw data is not speech, but merely unprotected conduct. Pet. App. 26.

The First Circuit’s holding should be reviewed and reversed, for it conflicts with multiple decisions from this Court and other circuit courts of appeal. This Court has held repeatedly that even the transmittal of *unprocessed* information is First Amendment speech. And it is similarly commonplace that the dissemination of *processed*—or, as referred to here, “mined”—information is the very essence of protected speech. Consider, for example, news organizations; they gather, analyze, and report data to inform, influence public opinion, and create sales every day.

But the First Circuit ignored all this, instead focusing on the actions of the *recipient* of the mined data—in this case, pharmaceutical sales representatives (“detailers”) who use the data to market pharmaceuticals to physicians. But the speech here falls well outside the narrow category

that may be restricted because it may incite an unwelcome action or reaction on the part of the recipient. This is quite plainly not a case where a state seeks to regulate fraud or to prevent incitement to violence. Indeed, detailer speech is already regulated by federal statute, which prohibits false medical advertisements, and New Hampshire has never contended that the Prescription Information Law is necessary to curb such illegal activity. Legitimate speech—that of petitioners, Datamonitor, and other companies engaged in data mining—cannot be restricted when the listener then uses the content to engage in *more* legitimate speech.

If allowed to stand, the First Circuit’s ruling will make it harder for businesses to obtain the information and analysis on which they rely to make informed, cost-effective decisions every day. Further, companies that mine and analyze data, like Datamonitor, provide this information to research institutions, universities, non-profits, and other organizations which would otherwise be unable to access the data. The importance of data mining is especially pronounced in the healthcare field; pharmaceutical companies make enormous research and development expenditures based on disease and market models derived from mined data, and academics and non-profits rely on such data to do work that benefits society in a variety of ways, including researching the spread of new diseases. And the First Circuit’s rationale, of course, is not limited merely to the vast healthcare field; it will be invoked to broadly limit the use of mined data in other sectors of the economy. The First Circuit’s decision thus undermines the fundamental exchange

of truthful information that is at the root of a free market system. This Court should grant certiorari.

ARGUMENT

I. THE FIRST CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND ITS SISTER CIRCUITS.

The First Circuit readily acknowledged that New Hampshire's Prescription Information Law would "restrict the ability of data miners to aggregate, compile, and transfer information." Pet. App. 23-24. And the First Circuit recognized "that pure informational data can qualify for First Amendment protection." *Id.* 19. But the court nonetheless dismissed petitioners' claims that the transfer of this aggregated data constituted speech: According to the First Circuit, the aggregated information was a mere "commodity" like "beef jerky." *Id.* 23.

That holding conflicts with multiple decisions of this Court, as petitioners have thoroughly explained *See* Pet. 12-24. Petitioners' act of aggregating, compiling, and transferring information, after all, is fundamentally the same as the acts of gathering information, editing and analyzing it, and reporting it done each day by myriad news organizations around the country and the world. Such activity is at the very heart of the First Amendment's protections. *See Near v. Minnesota*, 283 U.S. 697, 707 (1931).

Contrary to the First Circuit's flip characterization of mined data as akin to a processed food, Pet. App. 23, moreover, data mining is a sophisticated exercise that involves synthesizing data and performing

statistical analyses to discover meaningful patterns that in turn can be used to predict future trends and behavior. Jeffrey W. Seifert, Congressional Research Serv., *Data Mining: An Overview* 1 (2004); Paul Decoff, *The Bottom Line on Data Mining*, 15 Mortgage Technology Magazine 1 (2008). After the data is analyzed, companies like petitioners and Datamonitor convey their findings and conclusions to their customers, sometimes through reports and sometimes by providing particular “slices” of the data. The ultimate product—the speech at issue here—thus necessarily reflects considered judgments as to what the data means, which data is significant, and how it should be interpreted and conveyed to customers. A data miner’s expert analysis and opinion are thus imbedded in the very transmittal of data; and it is that “product”—that speech—that clients pay for, and rely on, in making proactive and informed business decisions. See O. Folorunso & A. O. Ogunde, *Data Mining as a Technique for Knowledge Management in Business Process Redesign*, 13 Information Management and Computer Security 2 (2007). And a seller marketing to a buyer—here, a data miner marketing to a detailer—is classic commercial speech. 44 *Liquormart*, 517 U.S. at 496; see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). The First Circuit’s characterization of that speech as unprotected “conduct” is in deep tension with this Court’s precedents and those of other circuits. See Pet. 12-20.⁴

⁴ As noted above, although the United States District Court for the District of Vermont recently upheld a law similar to New Hampshire’s, it nonetheless disagreed with the First

The First Circuit also contravened settled Supreme Court precedent by focusing not on the *act* of speech that the New Hampshire law purports to prohibit—petitioners’ transfer of prescriber-identifiable information—but instead on the ultimate end use of that information by pharmaceutical company sales representatives. According to the First Circuit, the rights of data mining companies are not implicated by the Prescription Information Law because data mining companies may still gather, analyze, publish and sell information “to whomever they choose so long as that person does not use the information for detailing.” Pet. App. 24 (emphasis in original). But a *listener’s* later actions (here, those of the sales representatives) implicate the rights of the speaker (here, petitioners) only in very limited circumstances—such as, for example, where the speaker’s statement is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). Such speech can be regulated because it carries a great and inherent risk of “substantive evils” that overcomes its First Amendment value. *Schenck v. United States*, 249 U.S. 47, 52 (1919). See also, e.g., *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 374–375 (2002) (speech restrictions permissible if speech is false); *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 465–466 (1978) (speech may be permissibly restricted when the danger of coercion was so high that a prophylactic measure was necessary to protect the consumer).

Circuit and held that prescriber information data is speech. *IMS Health Inc. v. Sorrell*, No. 1:07-CV-188 (D. Vt. Apr. 23, 2009), Slip Op. at 13-14.

This is, of course, not a case that resembles *Brandenburg* or *Ohralik* or anything remotely like those precedents' particulars. New Hampshire has never argued that petitioners' transfer of prescriber-identifiable data might incite "lawless action" by detailers. And New Hampshire has never contended that the statute was designed to combat factually inaccurate statements; after all, federal law already prohibits false medical advertisements. 21 C.F.R. § 202.1. Likewise, there is no danger of undue coercion (another basis for restricting speech based on the action or reaction of the listener); far from being "unsophisticated, injured, or distressed lay" people, *Ohralik*, 436 U.S. at 465, physicians are highly-trained professionals who make prescription decisions every day. *See also Edenfield v. Fane*, 507 U.S. 761, 775–776 (1993) (rejecting claim that a ban on solicitation between an accountant and a lay person survived First Amendment scrutiny because the ban was prophylactic in light of accountants' specialized expertise).

If allowed to stand, the First Circuit's holding presents the very real possibility that speech relying on the aggregation of data will be broadly denied First Amendment protection—not just under new Hampshire's prescription-information statute, but more generally. And the First Circuit's wrongheaded, *recipient*-focused analysis will relatedly encourage state legislatures to vastly expand the once-narrow category of speech that can be regulated based on the actions of the listener. Both of these results constitute dramatic departures from this Court's precedents. The Court should grant certiorari.

II. THE ISSUE PRESENTED IS OF NATIONAL SIGNIFICANCE.

A. Data Mining Firms Add Substantial Value To Raw Statistical Data.

Data mining firms like Datamonitor do far more than simply aggregate raw data; they interpret data and provide prescriptive advice to clients. Datamonitor analysts are skilled professionals with significant industry knowledge in their relevant fields; they include, for example, physicians, university researchers and professors, high-profile scientists and industry executives.

Datamonitor's process consists of several steps. Datamonitor analysts often begin by locating and sorting large volumes of data, often of a variety of types. Thus, in (for example) the healthcare industry, Datamonitor analysts commence their work with large volumes of data received from database warehouses, such as sales and promotional data from petitioner IMS Health, pharmaceutical data from Thomson, market data from MedTRACK, research and development data from Iddb3, and epidemiological and patient data sets provided by organizations such as the World Health Organization, IMPAC's National Oncology Database, and GLOBOCAN. Datamonitor also collects its own research, directly or through market research partners, from physicians and other healthcare stakeholders. Datamonitor also receives health and regulatory data from public databases including the U.S. Food and Drug Administration (FDA) and the European Medicines Agency. Analysts also consult a variety of other sources, including reviewing publications in the field, interviewing leading figures

in the applicable field, and analyzing company-reported sales, broker's reports and news feeds. Based on their review of all this information, and taking into account their experience in the relevant markets, analysts provide Datamonitor's clients with detailed strategic analyses. Datamonitor's efforts provide great value to its customers, researchers and academics. Far from a "commodity" like "beef jerky," as the First Circuit held, *cf.* Pet. App. 23, Datamonitor's work quite plainly produces speech.

B. Data Mining Is An Essential Tool For Companies In Nearly Every Industry.

Organizations big and small, for-profit and not-for-profit alike, make critical business decisions every day—what to manufacture, or what to stock, or how much of what product to order, or where to spend critical research and development resources. The choices those organizations make often (and sometimes by design) are felt well beyond the organization itself, affecting the consumers who want or need the product, or the employees who make it, or the intermediaries who distribute it, or sometimes even more broadly the regions in which the organizations are located.

To make their decisions in an informed and cost-effective way, companies reasonably seek access to all relevant information. *See Data Mining in the Meltdown: the Last, Best Hope?*, CFO Magazine, Feb. 12, 2009, at 1. Reliable statistical data—and expert analyses based on that data—are especially useful tools for decision-making. Datamonitor's own customer list of over 6,000 leading corporations demonstrates the value that successful organizations in a wide variety of industries place on data mining.

See Datamonitor website, <http://www.informa.com/brands/datamonitor> (last visited April 23, 2009). Datamonitor's customers—including manufacturers, financial services companies, and many other industries—rely on Datamonitor's services to address complex strategic issues, predict future trends, and respond effectively to the market.

For instance, many pharmaceutical companies depend on Datamonitor to analyze drug launch strategies in the United States and major European markets. Datamonitor analysts sort through databases, examine market trends, regulatory impacts, patient empowerment and disease management reports, and identify strategies to increase the market “voice” of each product. These analyses give Datamonitor's pharmaceutical clients a basis for making informed and cost-effective decisions about where to focus their resources in terms of products, geographic markets, design and other investments.

Similarly, in the automotive industry, Datamonitor analyzes relationships and patterns in the market to predict how it will evolve in the future. Datamonitor provides detailed coverage of the size and segmentation of the markets, including specific breakdown by country, product family and retail channel, identifies where market opportunities exist, and offers recommendations on how to maximize the returns for their businesses. Car manufacturers can use this information to gain a better understanding of the market and make informed decisions before investing in new technology or expanding into a new region. This in turn helps manufacturers avoid the

high costs associated with investing large sums of money in unprofitable markets.

Datamonitor's analyses are also used in academia. Datamonitor distributes data and analyses to universities and public libraries. University researchers, professors, specialists and Nobel Prize winning scientists are part of Datamonitor's Lifescience Analytics Research Board. The insights provided by these researchers, together with Datamonitor's proprietary analyses, helps other scientists and academics develop ground-breaking technology and improve therapeutic research in areas of significant unmet medical need, such as prostate cancer, renal cell carcinoma, multiple myeloma and malignant melanoma.

All of these (and many more) myriad uses, and users, of "mined" statistical information confirm the importance of this issue in the national economy. *See Bigelow v. Virginia*, 421 U.S. 809, 825-826 (1975) (commercial speech has value in the marketplace of ideas). The "free flow of commercial information is indispensable" in a free enterprise economy, where allocation of resources is made predominantly through numerous private economic decisions. *Virginia State Bd. of Pharmacy*, 425 U.S. at 765. It is critical that those economic decisions be well-considered, and before a decision may be well-considered it must be sufficiently well-informed. Companies depend on data mining for the reliable business data necessary to make those informed and efficient decisions that are critical to the success of their businesses—and to the economy more generally. The First Circuit's erroneous characterization of this vital commercial speech as valueless "conduct" denies businesses some of the

information they need to carry out their functions effectively and well, places those companies at a competitive disadvantage, and impedes efficient use of their capital. The implications are just that stark; and the First Circuit's decision should be taken up, reviewed, and reversed before its analysis catches any further hold.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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