No. 08-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For decades, publishers have acquired doctors' prescribing histories, and used the information to publish reports. Drug companies use that information to deliver information about new products to doctors. New Hampshire has made it a crime to transfer prescribing histories within the state to increase brand-name drug sales. The First Circuit held that the law does not implicate the First Amendment because it targets conduct and involves only speech with "scant societal value." Alternatively, it held that the First Amendment permits the government to "level the playing field" in communications with doctors, notwithstanding that the law in fact "may not accomplish very much."

The Questions Presented are:

1. To what extent does the First Amendment protect the acquisition, analysis, and publication of accurate factual information that is used by third parties for a commercial purpose?

2. Does the First Amendment permit such a prohibition when the government seeks to "level the playing field" by inhibiting truthful speech while simultaneously permitting the use of the identical information for communication of the state's preferred viewpoint?

3. Does the First Amendment permit such a prohibition when it is both grossly underinclusive (because it is so riddled with exceptions that it "may not accomplish very much") and overinclusive (because it inhibits even communication that the state acknowledges benefits public health)?

RULE 29.6 DISCLOSURES

IMS Health, Inc. has no parent corporation and no publicly owned corporation owns 10 percent or more of its stock. Verispan, LLC is wholly owned by SDI Health LLC and no publicly owned corporation owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners IMS Health, Inc. and Verispan LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1) is published at 550 F.3d 42. The district court's opinion (Pet. App. 152) is published at 490 F. Supp. 2d 163.

JURISDICTION

The First Circuit denied timely petitions for rehearing on January 14, 2009. Pet. App. 201. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Appendix reproduces the relevant statutory provisions.

STATEMENT OF THE CASE

New Hampshire law makes it a crime to transfer or use within the state information regarding a doctor's prescribing history for the purpose of increasing the sales of drugs. The district court held that the law violates the First Amendment because the government cannot quarantine doctors from truthful speech about the merits of prescription drugs. The First Circuit reversed, holding that the statute does not implicate the First Amendment and, alternatively, that the government may seek to obstruct speech that it believes will drive up the cost of health care, although it acknowledged that this statute may not substantially advance that interest.

1. Petitioners IMS Health and Verispan are among the world's largest publishers of information, research, and analysis for the health care and pharmaceutical industries. Among other things, petitioners collect, assess, and publish information on physicians' prescribing histories. Petitioners produce reports identifying the physicians who regularly treat particular conditions or prescribe specific prescription medications, as well as those who have shown themselves most likely to adopt new treatments. Petitioners acquire information about prescriptions principally from the centralized data centers of pharmacy chains and pharmacy software vendors, which in turn receive it in the ordinary course of business from the local pharmacies that fill prescriptions.

To protect personal privacy, petitioners do not collect information that would identify the individual patients who submitted the prescriptions. In

addition, petitioners comply with a program of the American Medical Association that permits doctors to restrict use of information about their prescribing activity by pharmaceutical sales representatives.

Petitioners' principal commercial clients are pharmaceutical companies. Those companies use petitioners' reports to engage in "detailing" – discussions in which (assuming a physician wants to meet with the drug company's representative) they provide the physician with information regarding the medical benefits of their products and, in turn, learn from doctors' experiences with various treatments. The revenue generated by petitioners' relationship with pharmaceutical companies allows petitioners to also provide prescription history data at little or no cost to an array of other organizations for public health purposes.

2. The federal government prohibits any drug promotion that is false, misleading, or that lacks a "fair balance between information relating to side effects and contra-indications and information relating to effectiveness." 21 C.F.R. § 202.1(e)(5)-(6). *See generally* 21 U.S.C. §§ 332-337. Some states nonetheless have grown hostile to the practice of pharmaceutical detailing, on the theory that it drives up the use of brand-name drugs and, in turn, the cost of health care. They have adopted two regulatory responses.

First, states have developed so-called "counter detailing" programs, under which the government uses prescription history data (generally secured from Medicaid and Medicare claims records) to identify and contact doctors to persuade them to prescribe less-expensive medications. For example,

New Hampshire is deploying an "evidence-based prescription drug education program" to utilize one-on-one communications with health care providers to encourage the prescription of less expensive generic drugs. N.H. Rev. Stat. § 126-A:5, XVII. New Hampshire also authorizes "formulary compliance" programs, through which insurance companies and state health agencies use prescription history information to persuade or require doctors to prescribe generic alternatives or cheaper brand-name products. N.H. Rev. Stat. § 318:47-f.

Second, states have sought to make detailing more costly and inefficient by prohibiting the transfer or use of prescription history information to increase drug sales. New Hampshire's "Prescription Information Law" (PIL) makes it a crime for a pharmacy, insurer, or "similar entit[y]" 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.

As authoritatively construed by the First Circuit, the PIL prohibits only the transfer of prescription data (a) within the State of New Hampshire (b) for the purpose of influencing drug sales. Pet. App. 13, 49. The statute has no application to data that is initially transferred from an in-state pharmacy to an out-of-state data center of a pharmacy chain or insurance company in the "routine" course of the pharmacy's business. *Id.* 50. Petitioners, the drug chains, and drug companies all have their operations outside of New Hampshire. As a practical matter, the statute therefore applies only to prescription data that originates from the limited number of non-chain

pharmacies in New Hampshire, because those small entities generally do not otherwise make use of out-of-state data centers. *Id.*

3. In 2006, petitioners brought this suit in federal district court alleging that the PIL violates, *inter alia*, the First Amendment. After receiving extensive evidentiary submissions and holding a trial on the merits, the district court agreed and issued a permanent injunction for the reasons set forth in a lengthy opinion. Pet. App. 152-199.

The district court recognized that petitioners have standing to challenge the PIL because the statute directly regulates petitioners' acquisition, analysis, and publication of covered prescription history data. Pet. App. 176 n.9. To the extent petitioners' speech was not directly prohibited, their acquisition and publication of that data would subject them to criminal liability for conspiracy to violate the PIL. *Id.*

The district court held that the PIL regulates speech because the First Amendment protects the transmission of factual information, not merely advocacy or expression. Pet. App. 177. The court further reasoned that the PIL is subject to intermediate scrutiny as a regulation of commercial speech, though it recognized that existing precedent "is unclear as to how commercial speech is defined." *Id.* 180.

In assessing the statute's constitutionality, the district court determined from the trial record that the PIL does not directly further an important governmental interest, reasoning that it would be inappropriate to defer to New Hampshire's judgment to enact the statute. Pet. App. 183 n.12. The district

court recognized that, under this Court's precedents, the State's paternalistic attempt to inhibit the free flow of information between drug companies and doctors does not amount to a significant governmental interest, particularly given the sophistication of trained physicians in evaluating "truthful and non-misleading marketing information." *Id.* 193.

The district court concluded that the PIL is invalid for the additional reason that it is not properly tailored to advance the State's interest in promoting public health and lowering drug costs. By "impos[ing] a sweeping ban on the use of prescriber-identifiable information to enhance the effectiveness and efficiency of all detailing," the statute applies even when "detailing *serves* the state's interest in public health by *promoting* efficacious treatments." Pet. App. 194 (emphases added). Further, the State has available to it measures to provide "competing information that will help health care providers balance and place in context the sales messages that detailers deliver." *Id.* 195.

4. On respondent's appeal, the First Circuit reviewed the district court's findings *de novo* and reversed. Pet. App. 12; *id.* 1-51. The court deemed the PIL to be entirely outside "the proscriptions of the First Amendment," reasoning that the statute principally regulates conduct and that the communication of prescription data has "scant societal value. *Id.* 22-23 & n.6. On that view, the information exchanges prohibited by the PIL are indistinguishable from "obscene" speech and "fighting words." *Id.* 20, 22. Though the court of appeals acknowledged that the dissemination of factual

information has been held to be protected by the First Amendment, it rejected that conclusion in "a situation in which information itself has become a commodity." *Id.* 22-23. In that circumstance, the court concluded, the transfer of information is entitled to no greater First Amendment protection than a shipment "of, say, beef jerky." *Id.* 23.

The First Circuit held, in the alternative, that the PIL survives intermediate scrutiny as a restriction on commercial speech. Pet. App. 27-41. The court of appeals recognized this Court's conclusion that the category of lesser-protected commercial speech is limited to statements proposing a commercial transaction. *Id.* 27 (citing *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989)). But it elected to "reject" that narrow definition and instead apply its own circuit precedent, which more broadly defines commercial speech as all communication relating to the speaker's commercial interests. *Id.*

The court of appeals accepted that pharmaceutical companies use prescription history data to identify the audience for their speech and to tailor a truthful message regarding the health benefits of their products. But in its view, the government may "level the playing field" by limiting the drug companies' communication in order to "improve the quality" of their discussions. *Id.* 12, 25-26.

The First Circuit refused to consider whether that interest rests on the impermissible, paternalistic assertion of the power to inhibit truthful communication. According to the majority, petitioners may not "assert the First Amendment rights" of "detailers to use prescriber-identifiable

information in communicating face-to-face with physicians, nor can they assert the rights of physicians to receive that information during such interactions." Pet. App. 13-14.

The court of appeals also found that the State had established that the PIL sufficiently advances its asserted interest. It characterized the State's proof that the PIL would lower health care costs as "not overwhelming," and indeed recognized that "there was no direct evidence on that point." Pet. App. 33. Particularly given that New Hampshire was the first state to adopt such a statute, the "evidence" that would establish the State's asserted interest "simply does not exist." *Id.* 36. But the court of appeals concluded that "this is more a matter of policy than of prediction" (*id.* 35), so that the appropriate course was to "defer to the New Hampshire legislature" (*id.* 37). In its view, "[a] state need not go beyond the demands of common sense to show that a statute promises directly to advance an identified governmental interest." *Id.* 29.

The First Circuit moreover stated that it could not identify "an alternative to the Prescription Information Law that promises to achieve the goals of the law without restricting speech." Pet. App. 41. The court of appeals recognized that New Hampshire and third parties could engage in counter-speech to persuade doctors not to prescribe expensive brand-name drugs. But the First Circuit read this Court's decision in *Posadas de P.R. Associates v. Tourism Co.*, 478 U.S. 328 (1986), to hold that such an effort was not required by the First Amendment. Pet. App. 40.

The court of appeals also recognized that the statute – which it construed to prohibit only *in*-state

transfers and uses of data – "permits the routine transfer of data to out-of-state facilities where it can then be aggregated and sold legally to others." Pet. App. 50. Because pharmaceutical and insurance data centers, petitioners' facilities, and drug companies are all located outside of New Hampshire, the statute thus only applies to the limited category of data transfers from New Hampshire to out-of-state facilities for the specific purpose of facilitating drug sales. Because "most prescriber-identifiable data leaves New Hampshire in [the] permissible manner" of routine transfers (*id.* 145 (separate opinion of Lipez, J.)), the court of appeals recognized that the statute "may not accomplish very much" (*id.* 50 (majority opinion)). But the First Circuit concluded that a state may adopt such a measure as a "prophylactic" protection against the further non-routine dissemination of prescription history data. *Id.*

Judge Lipez concurred in part and dissented in part. Pet. App. 51-151. In his view, the PIL regulates speech and is subject to First Amendment scrutiny because "the State targeted, albeit indirectly, the speech of the detailers." *Id*. 96. He nonetheless concluded that the statute survives intermediate scrutiny as a regulation of commercial speech because at trial the State introduced sufficient evidence that detailing increases drug costs. *Id*. 121. Further, in his view, the PIL is not overbroad, because it only inhibits detailing, while still permitting other forms of pharmaceutical marketing. *Id*. 131. Rather than reversing the district court, however, Judge Lipez would have remanded to permit the district court to decide in the first instance

the extent to which the statute applies to routine transfers of prescription information outside of New Hampshire. *Id*. 142.

5. The First Circuit subsequently denied rehearing and rehearing en banc. Pet. App. 201.

REASONS FOR GRANTING THE WRIT

The First Circuit's decision permits the government to prohibit a class of speech – the evaluation and publication of important factual information – that is one of "the top ten emerging fields in today's technological world." Tal J. Zarsky, "*Mine Your Own Business!": Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion*, 5 Yale J. L. & Tech. 4 (2003). This speech has "entered a golden age, whether being used to set ad prices, find new drugs more quickly or fine-tune financial models." Ashlee Vance, *Data Analysts Are Mesmerized by the Power of Program R*, N.Y. Times, Jan. 7, 2009, at B6. The basic economic viability of the Internet, for example, rests in no small part on the accumulation, analysis, and distribution to advertisers of massive volumes of data regarding users' interests. Traditional media is equally pervaded by publications devoted to the dissemination of commercial data. The daily stock report of the *Wall Street Journal* is only one obvious example among many. *See generally* Br. of *Amicus Curiae* Newsletter Publishers Ass'n, No. 98-678, *LAPD v. United Reporting Publ'g Corp*. 11-12 (collecting newsletters devoted to publishing reports of data in numerous fields, such as *Megawatt Daily*, *Inside Mortgage Finance*, and *Random Lengths*

(lumber prices)). The court of appeals' holding in this case strips all that truthful communication of any constitutional protection and provides a ready path for the government to interfere with the free flow of information in the knowledge-based economy of the twenty-first century any time it disagrees with the choices made by the consumers of information.

The First Circuit's judgment upholding New Hampshire's legislative effort to muzzle that speech warrants review for three reasons. First, the ruling is in irreconcilable conflict with this Court's First Amendment precedent. Second, the case directly implicates an important conflict in the circuits concerning the constitutionality of governmental efforts to regulate speech about factual information that has important value for social and commercial communication and, in particular, the appropriate standard of judicial scrutiny for such legislation. Third, the daily impact of this legislation on ongoing speech activities, as well as the proliferation of similarly speech-restricting statutes in other jurisdictions, necessitates this Court's prompt review of the statute's constitutionality. Two other states have already adopted similar statutes, and parallel measures have been introduced in roughly half the states. Indeed, the First Circuit itself recognized that the case "raises important constitutional challenges that lie at the intersection of free speech and cyberspace." Pet. App. 3.

Certiorari accordingly should be granted.

I. The First Circuit's Holding That Legislation Proscribing The Transfer Of Factual Information Merits Little, If Any, First Amendment Protection Conflicts With This Court's And Other Circuits' Precedent.

A. The Dissemination Of Truthful Factual Information Is Protected Speech.

The court of appeals' holding that the publication of truthful factual information falls completely "outside" the protection of the First Amendment (Pet. App. 22) warrants review because it defies this Court's precedent and because of the practical impact such a rule has on the free flow of information.

1. The First Circuit's conclusion that the truthful factual information at issue here lacks First Amendment protection because of its commercial or medical context flies in the face of settled free speech principles. A uniform line of precedent makes clear that, however beneficial or utilitarian the government might perceive a restraint in the free flow of information, the First Amendment trumps that judgment and debars government officials from using the suppression of communication as a tool of governance. *Virginia State Board of Pharmacy v. Virginia Consumer Counsel, Inc.*, 425 U.S. 748 (1976), held that a ban on the advertising of prescription drug prices violates the First Amendment. The Court expressly rejected the state's claim that the First Amendment is inapplicable because the advertising "merely reports a fact": "Purely factual matters of public interest may claim [First Amendment] protection," *id.* at 762, because it is "indispensable" to the "public interest" that there be a "free flow" of "information as to who is producing

and selling what product, for what reason, and at what price," *id.* at 765.

Other decisions have followed suit, underscoring that, in the commercial speech context in particular, the First Amendment protects the dissemination of truthful, factual marketplace information. *Edenfield v. Fane*, 507 U.S. 761 (1993), invalidated a ban on solicitation by certified public accountants because it "threaten[ed] societal interests in broad access to complete and accurate commercial information." *Id.* at 766. "[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.* at 767.

This Court has never deviated from that principle. Most recently, *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), held that the government may not prohibit pharmacists from advertising the availability of compounded drugs. "We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." *Id.* at 374. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995). *Cf. Lowe v. SEC*, 474 U.S. 181, 210 (1985) ("[t]o the extent that the chart service contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt about the protected character of the communications").

Majorities of this Court specifically have twice concluded that the transfer of pure data for commercial purposes is constitutionally protected. In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985), the Court applied First Amendment scrutiny to a libel suit regarding the private dissemination of factual reports on individuals' creditworthiness. A three-Justice plurality reasoned that the reports are constitutionally protected, although that protection is "reduced" because (in their view) it concerned "no public issue." *Id.* at 762 & n.8 (Powell, J., joined by Rehnquist and O'Connor, JJ.). Four other Justices would have applied full First Amendment scrutiny, reasoning that the "Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or the audience." *Id.* at 787 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.).

Subsequently, in *LAPD v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), the Court deemed premature a facial challenge to a statute providing that the government would not disclose arrest records – specifically, the names and addresses of arrestees – to be used for commercial purposes. The Ninth Circuit had held that such a use of arrest data constituted commercial speech. 146 F.3d. 1137 (9th Cir. 1999). In turn, a majority of the members of this Court agreed that a state prohibition on a private party distributing lawfully acquired arrest data for commercial purposes would be subject to First Amendment scrutiny. 528 U.S. at 44 (Ginsburg, J., joined by O'Connor, Souter, and

Breyer, JJ.) (such a statute "would indeed be a speech restriction if it . . . prohibited people from using that information to speak to or about arrestees"); *id.* at 46 (Stevens, J., joined by Kennedy, J.) (deeming it "indisputabl[e]" that if an entity lawfully "acquires the data, the First Amendment protects its right to communicate it to others").

The First Circuit's ruling in this case would be rejected on the reasoning of the majorities of this Court in both *Dun & Bradstreet* and *United Reporting*. But because neither of those cases confronted the issue in a opinion for the Court, the question remains unsettled as a matter of precedent. Certiorari should be granted here to remove that remaining uncertainty.

In all of this Court's relevant cases, the protected speech consisted of a piece of marketplace data – a price, a drug's existence, or the availability of a product – and in each the communication of that information was constitutionally protected speech. Given that precedent, the court of appeals' holding that truthful information about a doctor's prescribing practices falls completely outside the First Amendment's protection – diminished to the status of child pornography or fighting words – is indefensible. "We already have a code of 'fair information practices,' and it is the First Amendment, which generally bars the government from controlling the communication of information." Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049, 1051 (2000).

2. Contrary to the ruling below, this Court has held that the categories of speech that are immune from constitutional scrutiny should be expanded, if at all, only grudgingly. The Court has withdrawn First Amendment protection only "in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992). It is only when the speech is affirmatively *harmful* – the imminent physical threat entailed in fighting words, and the horrific conduct that creates child pornography – that the absence of any countervailing value takes the speech outside the First Amendment realm. *See New York v. Ferber*, 458 U.S. 747, 759-64 (1982).

That rationale has no relevance here. Quite the opposite, it is precisely because the information has proven *value*, addresses "a matter of public concern," and is actively used and valued by decisionmakers (*IMS Health, Inc. v. Rowe*, 532 F. Supp. 2d 153, 166 n.12 (D. Me. 2007)) that the State wants to squelch it. New Hampshire's own asserted interest in enacting the PIL is that this truthful information has a direct relationship to the sale of brand-name drugs, which is the subject of a significant ongoing public debate.

Prescription history information is widely used to study the delivery of medical care and the spread of an array of medical conditions – not only by drug companies, but also by "biotechnology firms, pharmaceutical distributors, government agencies, insurance companies, health care groups, researchers, consulting organizations, the financial community, manufacturers of generic drugs,

pharmacy benefit managers, and others." Pet. App. 157 n.2. The data is used "to track patterns of disease and treatment, conduct research and clinical trials, implement best practices, and engage in economic analyses." *Id.* Even the First Circuit acknowledged that "[t]hese massive collections of information have great utility for certain non-profit entities (*e.g.*, educational institutions, public interest groups, and law enforcement agencies)." *Id.* 6.

3. The court of appeals' refusal to accord First Amendment protection to factual data conflicts not only with this Court's precedent, but also with the rulings of other circuits. In the Second Circuit, "[e]ven dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection." *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446-47 (2d Cir. 2001).

The Tenth Circuit likewise has held that the First Amendment protects a phone company's use of its own customer information (CPNI) in making marketing decisions. *See U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999). In that case, the court specifically rejected the government's "argu[ment] that the FCC's CPNI regulations do not violate or even infringe upon [the company's] First Amendment rights because they only prohibit the use of CPNI to target customers and do not prevent [the company] from communicating with its customers or limit anything that it might say to them." *Id.* at 1232. "Such laws are subject to First Amendment scrutiny because they affect both the speaker's ability to communicate with his intended audience and the audience's right to receive information." *Id.*

The D.C. and Tenth Circuits too have held that the distribution of factual commercial information is subject to First Amendment protection. *Nat'l Cable Television Ass'n, Inc. v. FCC*, 555 F.3d 996, 1000 (D.C. Cir. 2009) (accepting that regulation of transfers of CPNI information from telephone companies to joint venture partners "is a regulation of commercial speech," and applying First Amendment scrutiny); *Trans Union LLC v. FTC*, 295 F.3d 42, 52 (D.C. Cir. 2002); *Trans Union Corp. v. FTC*, 245 F.3d 809, 818, *rh'g denied*, 267 F.3d 1138 (D.C. Cir. 2001); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1513 (10th Cir. 1994) (prohibition on distribution of records for commercial purposes triggers First Amendment scrutiny because the government "has drawn a regulatory line based on [the] speech use of [the] records"), *cert. denied*, 513 U.S. 1044 (1994).

4. Because petitioners' speech is constitutionally protected, the court of appeals erred in holding that New Hampshire's law could bypass the First Amendment because the statute ostensibly criminalizes the "conduct" of acquiring, assessing, and distributing information, rather than the speech itself. That holding cannot be reconciled with this Court's precedent and, indeed, opens the door to troublingly broad regulatory power to proscribe quintessential speech activities. This Court has repeatedly held that the First Amendment forbids both direct and indirect restraints on the physical activities that are necessary to the communication and sharing of information – the mechanics of speaking.

In *Lorillard*, *supra*, for example, the Court gave no quarter to the claim that a regulation on the "placement" of cigarette advertising merely regulated conduct, explaining that the First Amendment was triggered whenever regulation of conduct "would impose particularly onerous burdens on speech." 533 U.S. at 564. That decision simply echoed this Court's repeated holdings that legislation regulating or proscribing the actions necessary to engage in communication triggers First Amendment scrutiny. *E.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 577, 592-93 (1983) (First Amendment applies to "use tax" on the cost of paper and ink products consumed in the production of a publication).

The First Amendment implications of New Hampshire's PIL are even more stark. The only "conduct" that it regulates is the act of communicating and interchanging truthful factual information. The proscribed activities thus can no more be divorced from the speech itself than could a regulation forbidding the "conduct" of distributing newspapers, the "conduct" of pamphleting, the "conduct" of broadcasting, or the "conduct" of mailing letters. The conduct is the act of communication and thus is precisely what the First Amendment protects.

Beyond that, simply declaring that conduct is the target of regulation does not strip the government of its First Amendment obligations. Conduct regulations that burden speech are justified only "if the governmental interest is unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). New Hampshire's *only* asserted interest, however, is in regulating the

speech itself – preventing petitioners' distribution of truthful factual information to drug companies, and the companies' subsequent "detailing" discussions with doctors. After all, if conduct were the State's true target, then the statute would not contain the multiple exemptions that it does allowing the distribution of the identical information as long as it is unrelated to the speech disfavored by the State.

The First Circuit opined that petitioners supposedly treat prescription information as a "commodity," indistinguishable from "beef jerky." Pet. App. 23. That is not correct: the distinguishing feature of petitioners' reports is that they are individualized – *not* commoditized – assessments of physician prescribing history. But in any event, the First Circuit's rationale makes no constitutional sense. For countless speakers who are indisputably cloaked with First Amendment protection – ranging from newspaper publishers to the providers of credit information to Internet sellers of sexually explicit material – speech could be described as a "commodity." It would stand the First Amendment on its head to hold that the more a speaker speaks, the less the Constitution applies. The world-wide circulation of *The New York Times* or the Internet publication of census data have as much constitutional stature as any isolated utterance.

B. The Court Of Appeals' Holding That Prescription Patterns Are Purely Commercial Speech Warrants Review Because It Expands A Conflict In The Circuits.

The First Circuit ruled, in the alternative, that if the First Amendment protects petitioners' prescription history information, it is at best commercial speech, the prohibition of which is subject to only intermediate scrutiny. That erroneous holding stands at the intersection of inconsistent precedents from this Court that have spawned a circuit conflict of surpassing importance.

In both *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 473-74 (1989), and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993), this Court held that the category of "commercial speech" receiving lessened First Amendment protection is limited to statements that propose a commercial transaction. In *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980), however, this Court more broadly defined commercial speech as "expression related solely to the economic interests of the speaker and its audience," *id*. at 561. *See also In re R. M. J.*, 455 U.S. 191, 204 n.17 (1982).

The courts of appeals have struggled for years with those competing definitions, producing a circuit conflict that the decision here expands. The First Circuit in this case acknowledged the narrow definition of "commercial speech" articulated in *Fox*, *supra*, but "reject[ed]" it on the basis of its own circuit precedent. Pet. App. 27-28 (citing *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 309 (1st Cir.

2005); *El Dia, Inc. v. P.R. Dep't of Consumer Affairs*, 413 F.3d 110 (1st Cir. 2005)). Three other circuits have adopted a similarly broad definition of commercial speech. In *SKF USA, Inc. v. U.S. Customs & Border Protection*, --- F.3d ---, 2009 WL 398263, at *12 (Fed. Cir. Feb. 12, 2009), the Federal Circuit approvingly invoked the decision in this case and concluded that the Supreme Court has "broadly defined 'commercial speech' as 'expression related solely to the economic interests of the speaker and its audience.'" The dissent, on the other hand, argued that a narrower definition applied because "*IMS* was incorrectly decided." *Id.* at *27 n.5 (Linn, J., dissenting). *See also Mason v. Florida Bar*, 208 F.3d 952, 955 (11th Cir. 2000); *Hoover v. Morales*, 164 F.3d 221, 225 (5th Cir. 1998).

By contrast, three other circuits apply the narrower definition adopted by this Court in *Fox* and *Discovery Network*. The Second, Fourth, Ninth and Tenth Circuits have held that "speech is not 'purely commercial' . . . if it does more than propose a commercial transaction"; when it does, "it is entitled to full First Amendment protection." *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002). Those courts recognize that "[u]se of the *Central Hudson* description as a definition of commercial speech might, for example, permit lessened First Amendment protection and increased governmental regulation for most financial journalism and much consumer journalism simply because they are economically motivated, a notion entirely without support in the case law." *CFTC v. Vartuli*, 228 F.3d 94, 110 n.8 (2d Cir. 2000). *See also Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1185 (9th

Cir. 2001); *Adventure Commc'ns, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 440 (4th Cir. 1999).

The conflict in the circuits concerning the proper definition of "commercial speech" thus is widespread and entrenched, and accordingly capable of resolution only by this Court's intervention. This case, moreover, directly implicates that conflict and squarely frames the question for this Court's decision. The communication prohibited by the PIL – petitioners' acquisition, analysis, and publication of prescription history data – does not propose a commercial transaction. Indeed, the PIL applies whether or not petitioners sell the information or instead give it away.

The subsequent "detailing" discussions between pharmaceutical companies and doctors likewise go far beyond proposing a commercial sale. As even the court of appeals acknowledged, detailers "focus on the weakness of the physician's erstwhile drug of choice as opposed to the clinical virtues of the detailed drug." Pet. App. 32.

This case highlights the social benefit of expression driven by the speaker's commercial interests, and thus would not only allow the Court to resolve the conflict in its own precedent and in the circuits, but would also provide it with the opportunity to revisit whether commercial speech should remain subject to lessened First Amendment protection. Petitioners' ability to publish profitably and free from government restraint generates tremendous social benefits. Detailing discussions produce an exchange of valuable, truthful information between doctors and pharmaceutical

companies about the medical benefits of particular drugs. Trial testimony in this case thus established that detailers regularly provide doctors with new and valuable information on important health topics, such as changes to "best practice" guidelines for treating illnesses. E.g., Trial Tr. 1-30-07, at 27-28, 31 (Wharton); *id.* at 20-21 (Cole). Furthermore, the process of detailing is a two-way street in which drug companies receive information from doctors regarding the efficacy of various treatments. *Id.* at 21 (Dr. Cole: "I'm being asked my opinion more than told my opinion"). Commercial sales also allow petitioners to provide prescription history information at little or no cost to governmental and non-profit organizations for their use in ongoing public health work. In depriving petitioners of any commercial benefit from their activities, the government will necessarily extinguish this vital social benefit of petitioners' speech.

II. The First Circuit's Holding That The PIL Survives First Amendment Scrutiny Was Wrong And The Implications Of Its Erroneous Holding Merit This Court's Intervention.

A. The Court Of Appeals' Holding That The Government Has A Substantial Interest In Inhibiting Truthful Communication Between Drug Companies And Doctors About The Merits Of Prescription Drugs Should Be Reversed.

The First Circuit's ruling strays so far from accepted First Amendment principles as to merit this Court's review to correct its enduring impact on

speech within that circuit's jurisdiction, and to resolve the circuit conflict it has spawned.

1. The First Circuit's rationale for upholding the law banning truthful factual speech of value to its audience was the State's determination to "level the playing field" for information about drugs by curtailing the amount of information detailers have, thereby purportedly "improv[ing] the quality of interactions between detailers and physicians." Pet. App. 12, 25-26.

In so holding, the court of appeals has given precedential sanction to the paternalistic goal of protecting doctors from truthful speech about the merits of brand-name drugs. New Hampshire is, quite literally, attempting to make it more difficult for drug companies and physicians to have an intelligent conversation. This Court has specifically rejected the "assumption that doctors would prescribe unnecessary medications" on the basis of drug advertising, because it "amounts to a fear that people would make bad decisions if given truthful information." *Western States*, 535 U.S. at 359.

The district court correctly recognized that, if the government has no cognizable interest in prohibiting professionals such as accountants from soliciting lay persons (*Edenfield v. Fane*, *supra*), then it manifestly has no such interest in the context of physician/pharmaceutical company discussions. "Health care providers are highly trained professionals who are committed to working in the public interest. They certainly are more able than the general public to evaluate truthful pharmaceutical marketing messages." Pet. App. 193. That is all the more true given that physicians can –

and regularly do – simply decline to meet with a drug company representative. Doctors can also designate their prescription history off limits for use by pharmaceutical sales representatives. *See supra* at 2-3. Thus, in practice, New Hampshire's law bars *only* truthful communications between drug companies and knowledgeable and willing doctors desirous of the information.

Likewise, New Hampshire's avowed desire to "level the playing field" to balance out drug companies' financial wherewithal (Pet. App. 25) directly parallels the premise repeatedly rejected by this Court that the government may limit individual expenditures in political campaigns. Under the First Amendment, the government may not inhibit speech just because it considers its influence to be economically outsized. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 217-18 (2003); *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986); *Buckley v. Valeo*, 424 U.S. 1, 39-51 (1976).

Compounding the court of appeals' error was its ratification of the statutory scheme's viewpoint discrimination. New Hampshire seeks to inhibit communication advocating the use of prescription drugs. At the same time, it permits insurers to use the identical information to promote the use of generic equivalents to those same drugs. *See* Trial Tr. 1-31-07, at 37-38 (Solbelson). And the State has adopted its own "counter detailing" program to use prescription history data to discourage brand-name drug use. *See supra* at 3-4. If the First Amendment means anything it means that the government

cannot outlaw the one side in a debate that it disfavors.

2. The court of appeals relied only on *Posadas de P.R. Associates v. Tourism Co.*, 478 U.S. 328 (1986), to vindicate New Hampshire's paternalistic agenda. *See* Pet. App. 40. But that makes review all the more appropriate. This Court has already cast substantial doubt on *Posadas* because its "precedent both preceding and following *Posadas* ha[s] applied the *Central Hudson* test more strictly." *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 182 (1999). Thus, in *44 Liquormart*, *supra*, the Court reversed the First Circuit's holding that the state made a "reasonable choice" in prohibiting certain truthful alcohol advertising. A four-Justice plurality concluded that "*Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy." 517 U.S. at 509 (Stevens, J., joined by Kennedy, Thomas, and Ginsburg, JJ.). Other members of the Court read *Posadas* narrowly, but declined to formally overrule it, because the facts of that case did not "require[] adoption of a new analysis for the evaluation of commercial speech regulation." *Id.* at 532 (O'Connor, J., joined by Rehnquist, C.J., and Souter and Breyer, JJ.).

By continuing to breathe life into *Posadas*, the court of appeals put its law at odds with that of other circuits, which have held that *Posadas* has been abrogated in relevant part. *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 737 n.20 (9th Cir. 2003) (the Supreme Court has "disavowed *Posadas*' First Amendment holding"); *Pearson v. Shalala*, 164 F.3d 650, 568 (D.C. Cir.

1999) ("the Supreme Court [has] expressly disapproved of that aspect of *Posadas*"). Only this Court can finally inter *Posadas* and bring uniformity to First Amendment law.

3. Review is also warranted to reverse the First Circuit's holding (Pet. App. 16) that petitioners' lack "standing" to argue that New Hampshire cannot assert an interest in limiting detailing because petitioners do not themselves engage in such discussions with doctors. There is in fact no dispute that petitioners have standing to challenge the constitutionality of the PIL, and the First Circuit itself adjudicated petitioners' suit. Petitioners have suffered an injury that would be redressed by a ruling in their favor: the PIL not only directly restricts petitioners' conduct, it also injures them by inhibiting their ability to acquire prescription history information from third parties. *See generally Summers v. Earth Island Inst.*, No. 07-463, slip op. at 4 (Mar. 3, 2008).

Nothing in law or logic supports the First Circuit's bizarre conclusion that, because New Hampshire's *defense* of the PIL rests on its desire to regulate the conduct of third parties, petitioners are precluded from explaining why the statute does not in fact advance a cognizable state interest. Petitioners have third-party standing to assert the claims of detailers. *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990). But in any event, principles of standing are not implicated when petitioners argue that the PIL cannot constitutionally be applied to *them* because it is not justified by an interest that is permissible under the First Amendment. Once the court has the power to

adjudicate petitioners' suit, it is not required to put on blinders to the merits of that claim. Thus, in *Western States*, *supra*, a pharmacy seeking to advertise compounded drugs filed suit, and the government defended the challenged regulation based on the claim that the advertising would distort communication between third parties – consumers and their doctors. This Court never doubted that the plaintiff pharmacy could dispute the government's assertion that it had a substantial interest in ensuring the accuracy of those third-party discussions.

The First Circuit's contrary holding produces an absurd jurisprudence that the framers of Article III could not have imagined. The court of appeals illogically invoked New Hampshire's interest in limiting brand-name drug sales while completely ignoring whether that interest was, in fact, legitimate. Pet. App. 16-17 ("We think it important to note, however, that this restriction on *jus tertii* rights does not prevent consideration of New Hampshire's interest in combating detailing."). Though the First Circuit left open the possibility that a drug advertiser could someday challenge the PIL (Pet. App. 46 n.10), that is a hollow hope, as the court of appeals held not only that the statute withstands constitutional scrutiny but also that the statute does *not* directly regulate drug companies and detailers (*id.* 13), which therefore face significant obstacles in establishing their own standing to bring suit.

B. The Court Of Appeals' Deference To The State Legislature And Refusal To Defer To The Findings Of The District Court Merit This Court's Review.

This Court has repeatedly held that "a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71. That burden is "not satisfied by mere speculation and conjecture" (*id.* at 770), nor by "anecdotal evidence and educated guesses" (*Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995)).

In this case, the First Circuit concluded that the PIL sufficiently advances New Hampshire's interest in reducing prescription drug costs, notwithstanding that "there was no direct evidence on that point." Pet. App. 33. Concluding that "this is more a matter of policy than of prediction" (*id.* 35), the First Circuit held that it was obliged to "defer to the New Hampshire legislature" (*id.* 37). Although the district court had found to the contrary that the PIL would not advance the State's interest (*id.* 190), the First Circuit refused to defer to its findings, instead applying *de novo* review (*id.* 12).

The First Circuit's holding that New Hampshire need not justify the PIL through an adequate evidentiary record conflicts not only with this Court's precedents (*see supra*) but also with rulings of other circuits. *E.g.*, *Cal-Almond, Inc. v. United States Dep't of Ag.*, 14 F.3d 429, 437 (9th Cir. 1993) ("we may not simply defer to legislative and executive judgment," but "must determine ourselves whether the program directly advances USDA's asserted interests");

Adolph Coors Co. v. Brady, 944 F.2d 1543, 1551 (10th Cir. 1991) ("Requiring the government to affirmatively demonstrate a nexus between its legislative means and ends may appear an undue judicial intrusion on the legislative function . . . . [But] we cannot simply assume that particular means will accomplish certain ends because the legislature presumed they would and enacted them into law.").

There also is no support for the conclusion that New Hampshire was exempt from providing the evidentiary foundation required by the Constitution merely because it was the first state to adopt a statute similar to the PIL. The First Amendment has no "one free bite" exception to the obligation to establish that a speech restriction is tailored to directly advance a sufficient governmental interest. If anything, the district court correctly recognized that this is a particularly inappropriate context in which to defer to a legislative judgment. Not only did the New Hampshire legislature lack relevant "expertise" but it "acted quickly after the bill was introduced, received hearing testimony by numerous individuals who had yet to review proposed amendments, made no express findings either on the record or incorporated into the statute, failed to discuss alternative measures that would not restrict speech, and cited no evidence as to how effective the restriction might prove to be." Pet. App. 183 n.12.

Review is equally warranted of the First Circuit's refusal to defer to the findings of the district court. The court of appeals held that, because the case arose in the context of the First Amendment, it was required by *Bose Corp. v. Consumers Union of United*

States, Inc., 466 U.S. 485, 514 (1984), to engage in *de novo* review. Pet. App. 12. That ruling directly implicates an acknowledged, long-simmering conflict in the circuits. *See Don's Porta Signs, Inc. v. City of Clearwater*, 485 U.S. 981, 981 (1988) (White, J., dissenting from the denial of certiorari). Like the First Circuit, four other circuits apply *de novo* review on the basis of *Bose*.[1] By contrast, three other circuits hold that *de novo* appellate review applies only when they review rulings *rejecting* First Amendment claims.[2]

This case is an ideal vehicle to resolve this recurring conflict because the First Circuit's departure from the deference generally applicable to district court findings directly affected its holding that the PIL significantly advances an important governmental interest. The First Circuit rested its decision heavily on the State's assertion that detailing drives up health care costs by causing doctors to choose expensive brand-name drugs over less expensive generic equivalents. *See* Pet. App. 6-7 ("detailing is employed where a manufacturer seeks to encourage prescription of a patented brand-name drug as against generic drugs, or as against a

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[1] *See United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), *cert. denied,* 2009 WL 425168 (U.S. Feb. 23, 2009) (No. 08-6651); *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987); *Moore v. Morales*, 63 F.3d 358, 361 (5th Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996).

[2] *See Multimedia Publ'g Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 160 (4th Cir. 1993); *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988); *Planned Parenthood Ass'n Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1229 (7th Cir. 1985).

competitor's patented brand-name drug, or as a means of maintaining a physician's brand loyalty after its patent on a brand-name drug has expired"). By contrast, the district court specifically found that the PIL would not substantially reduce expenditures on brand-name drugs because "pharmaceutical companies generally *stop* detailing branded drugs when bioequivalent generic drugs become available." Pet. App. 191 n.15 (emphasis added). That conclusion is sound: the marginal profit on brand-name drug sales in that context is small, because states and insurers often mandate the use of available bioequivalent drugs. Thus, "the use of prescriber-identifiable data will not affect a prescriber's choice between a brand-name drug and a bioequivalent generic alternative." *Id.*

Detailing is instead principally directed at a doctor's choice between patent-protected drugs, or between a patent-protected drug and a non-bioequivalent generic alternative. The court of appeals did not contend that the PIL's broad restriction on speech could be justified merely because it reduced those limited effects on brand-name drug use. Other circuits would have deferred to the district court's factual finding and concluded on that basis that the PIL does not sufficiently advance New Hampshire's interest in reducing drug costs.

C. Certiorari Is Warranted To Review The Court Of Appeals' Holding That The PIL Is Valid Notwithstanding That The Statute Is Grossly Over- And Under-Inclusive.

In assessing whether a regulation of speech is sufficiently tailored to advance the government's asserted interests (*see supra* at 30 (citing *Edenfield v. Fane*, *supra*)), this Court's precedent consistently holds that the government may not adopt a prohibition that includes numerous exceptions which render it illogical or substantially ineffective. *Greater New Orleans*, *supra*, invalidated a prohibition on certain casino advertising, reasoning that "[t]he operation of [the statute] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." 527 U.S. at 190. In support, the Court cited *Rubin*, *supra*, which invalidated a ban on disclosing alcohol content on containers while permitting the disclosure of the same information in ordinary advertising. 514 U.S. at 488.

The Third Circuit applied those principles in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004) (Alito, J.). There, the government barred alcohol advertising in school-affiliated publications, but not other media. The Third Circuit held that the statute violated the First Amendment because it was "both severely over- and under-inclusive." *Id.* at 108. The law prohibited such advertising notwithstanding that most of the university population "is over the legal drinking age," and thereby "prevented the communication to adults of truthful information about products that adults could lawfully purchase and use." *Id.* Further, the

statute applied "to advertising in a very narrow sector of the media (*i.e.*, media associated with educational institutions), and the Commonwealth has not pointed to any evidence that eliminating ads in this narrow sector will do any good." *Id.* at 107.

In this case, the First Circuit held that there was a sufficient "fit" between the PIL and the State's asserted interests because no equally effective alternative existed that would restrict less speech. Pet. App. 41. That ruling cannot be reconciled with this Court's precedents because the First Circuit afforded no weight to the fact that the PIL is simultaneously under- and over-inclusive in the speech it restricts, and thus cannot possibly achieve the State's goals.

The PIL is grossly under-inclusive because, as construed by the First Circuit, it permits most New Hampshire prescription history data to be used in detailing. The statute allows that use whenever the data originates with "routine" transfers from New Hampshire pharmacies to the out-of-state data centers of pharmacy chains and insurers. Pet. App. 50. Because it is uncontested that "most prescriber-identifiable data leaves New Hampshire in this permissible manner" (*id.* 145 (separate opinion of Lipez, J.)), the First Circuit candidly admitted that the statute "may not accomplish very much" (*id.* 50 (majority opinion)) and will only produce "the closing of one aspect of the New Hampshire market" (*id.* 49). But it nonetheless held that the First Amendment permits New Hampshire to adopt the PIL as a "prophylactic" measure to protect against later non-routine distribution of the same information. *Id.* The statute thus directly bans some speech, and

chills much more through the threat of criminal prosecution, without significantly advancing the State's interests.

The PIL is equally over-inclusive because it prohibits detailing that does not implicate, or actually furthers, the State's interests. The statute is not limited to restricting those instances of detailing that cause doctors to make inappropriate prescribing decisions. To the contrary, the statute equally applies when the detailing identifies a *less expensive* alternative medication and when it conveys valuable information about drug treatments that improve public health, which is itself a significant state interest. A further significant proportion of detailing inhibited by the PIL involves competition between patent-protected brands that frequently has no effect on drug costs. *See supra* at 33. The First Circuit dismissed that fact as merely "not the state's primary concern" (Pet. App. 30 n.7), completely failing to recognize the statute's dramatic overbreadth. The PIL also prohibits *generic* manufacturers from electing to use prescription history information to market their less-expensive products to doctors. *See* Trial Tr. 1-29-07 at 9-10 (Sadek). In all those many instances, the statute inhibits speech without furthering – and often while undermining – New Hampshire's own claimed interests.

The First Circuit was also wrong to conclude that the PIL was valid because, in its view, petitioners could not identify "an alternative to the Prescription Information Law that promises to achieve the goals of the law without restricting speech." Pet. App. 41. In fact, New Hampshire (like other states) has adopted a "counter detailing" program designed to

achieve its goals by persuading doctors to prescribe fewer brand-name drugs. N.H. Rev. Stat. § 126-A:5, XVII. Other states have furthered cost containment through an array of other measures that do not restrict speech, many of which New Hampshire has not adopted.[3]

[3] *See, e.g.,* D.C. Code § 48-831.04 (2006) (requiring use of aggregate purchasing to negotiate lower prices of prescriber drugs); Fla. Stat. Ann. § 465.025 (2006) (requiring pharmacists to substitute generic drugs for bioequivalent brand-name drugs); N.H. Rev. Stat. Ann. § 318:47-d (2003) (authorizing pharmacists to substitute bioequivalent generic drugs); Me. Rev. Stat. Ann. tit. 22, § 2697 (2006) (prohibiting profiteering in prescription drugs); Me. Rev. Stat. Ann. tit. 22, § 2700-A (2006) (providing for consumer education about prescription drugs); Minn. Stat. § 151.461 (1994) (prohibiting gifts from drug manufacturers to health care practitioners); Vt. Stat. Ann. tit. 33, § 2005a (2006) (requiring sales representatives to disclose prices to prescribers); W. Va. Code Ann. § 5-16C-9 (2006) (setting forth a variety of strategies to reduce unnecessary prescription drug costs).

CONCLUSION

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

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