No. 08-1202

IN THE

Supreme Court of the United States

IMS HEALTH, INC., ET AL.,
PETITIONERS
v.
KELLY A. AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE,
RESPONDENT

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

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF NATIONAL ADVERTISERS, INC. IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Although not strictly required by Rule 29.6 or 37.5, the instant *Amicus* submits the following corporate disclosure statement:

Amicus is incorporated as a nonprofit trade association, has no parent corporation, and has no stock or other interest owned by a publicly held company.

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BRIEF OF *AMICUS CURIAE* ASSOCIATION OF NATIONAL ADVERTISERS, INC. IN SUPPORT OF PETITIONERS

Amicus Curiae, the Association of National Advertisers, Inc. ("ANA"), respectfully requests that this Court grant the petition for writ of certiorari.[1]

INTEREST OF *AMICUS CURIAE*

The ANA leads the marketing community by providing insights, collaboration and advocacy to its membership, which includes over 350 companies with 9,000 brands that collectively spend over $100 billion in marketing communications and advertising annually in the United States. The ANA strives to communicate marketing best practices, to lead industry initiatives, to influence industry practices, to manage industry affairs, and to advance, promote and protect advertisers and marketers. The ANA also serves its members by advocating clear and coherent legal standards governing advertising, including this Court's commercial speech doctrine.

The decision in *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008) strikes at the heart of these interests. The First Circuit upheld New Hampshire's Prescription Information Law ("PIL"), which bans the communication or use of drug prescribing histories for commercial purposes.[2] To

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than the *amicus curiae* or its counsel, made a monetary contribution to its preparation or submission. The parties have been given at least ten days notice of the intention of *amicus* ANA to file, and have consented to the filing of this brief.

[2] Specifically, the PIL provides that "[r]ecords relative to prescription information . . . shall not be licensed, transferred, used, or sold . . . for any commercial purpose," which it defines broadly to include "advertising, marketing, promotion, or any

reach this conclusion, the court below held that the transfer of truthful, nonmisleading data could be characterized as "conduct," not speech, and thereby avoid First Amendment scrutiny altogether. *Id.* at 50-54. Alternatively, the court analyzed the law under the commercial speech doctrine, *id.* at 54-60, and held that the statute's expansive definition of restricted activities, which extends far beyond speech proposing a commercial transaction, justified applying the lower level of constitutional protection set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

Both conclusions undermine the constitutional protections guaranteed to ANA's members, contradict this Court's commercial speech jurisprudence, perpetuate confusion among the circuit courts, and require correction by this Court.

SUMMARY OF THE ARGUMENT

ANA supports all of the arguments for review raised in the Petition. Not only did the circuit court below fail to apply correctly long-settled principles under the commercial speech doctrine,[3] the opinion

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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 sales force." N.H. Rev. Stat. Ann. § 318:47-f.

[3] For example, the First Circuit found that it "demand[s] too much" to require New Hampshire to document that the ban on data mining would serve its asserted interest because "New Hampshire was the first state to deny detailers access to prescribing histories." *IMS Health Inc.*, 550 F.3d at 58. Such deference to "legislative judgment" where "evidence simply does not exist," *id.*, flies in the face of numerous decisions of this Court holding that "a governmental 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 v. Fane*, 507 U.S. 761, 771 (1993); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995). *See 44 Liquormart, Inc. v. Rhode*

further obscures important issues that have not yet been fully resolved by this Court. Notwithstanding our endorsement of the points raised in the Petition, this brief focuses principally on two issues: (1) whether the exchange of factual information can be denied First Amendment protection simply by characterizing it as "conduct," and (2) whether the standard for commercial speech articulated in *Central Hudson* applies more broadly beyond speech that does no more than propose a commercial transaction. Regardless whether the test for commercial or noncommercial speech is applied, the court below erred in upholding the New Hampshire law.

The First Circuit's conclusion that the PIL is immune from First Amendment scrutiny because it prohibits only "conduct" is unsupported by the decisions of this Court and greatly confuses First Amendment jurisprudence. To be sure, categories of unprotected speech exist, but not because they are considered to be conduct rather than expression. Contrary to the reasoning of the court below, this Court's decisions have long extended First Amendment protection to the entire communication process, from the gathering and printing of information through its dissemination. Such protection is unaffected by the fact that communication requires some form of "conduct" or the information may be labeled a "commodity."

The lower court's conclusion that constitutional protection may be withheld to parts of a communicative enterprise that may be characterized as "conduct" is profoundly dangerous for First

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Island, 517 U.S. 484, 508-11 (1996) (rejecting "legislative judgment" that a ban on alcohol price advertising would promote temperance). Nothing in this Court's cases supports the conclusion that New Hampshire's burden of proof disappears or is lessened simply because it is the first state to adopt such restrictions.

Amendment law in general, and not just with respect to commercial speech. All expression requires conduct of some kind, and there is no logical limit to the restrictions that may be imposed if the government can freely restrict components of expression it deems to be "conduct." This Court has long rejected the notion that the state is free from constitutional constraints by claiming only to regulate the process of communication or by calling it business activity. The decision below is at odds with this clear line of authority and conflicts with decisions in other circuits that have recognized protection for the collection and use of commercial data.

The First Circuit decision also highlights an unsettled question about the scope of the commercial speech doctrine. This Court has long grappled with whether to define commercial expression broadly, as speech related to the commercial interests of the speaker, or more narrowly, as speech that does no more than propose a commercial transaction. The question is of vital importance, because the answer determines whether expression is accorded the somewhat less rigorous constitutional protections that historically have been applied to commercial speech.

In this case, the First Circuit's embrace of the broader definition based on the speaker's commercial interests conflicts with the clear trend of this Court's decisions that have applied an increasing level of protection for commercial speech. In doing so, it exploited the fact that this Court has not explicitly resolved the definitional question, even though the prevailing logic of the cases supports the narrower formulation. The decision below deepened a split among the circuit courts on this question and threatens to obscure the scope of the commercial speech doctrine. Review by this Court is essential.

ARGUMENT

I. THE DECISION BELOW BREAKS SHARPLY WITH THE GENERAL TREND RECOGNIZING GREATER PROTECTION FOR COMMERCIAL SPEECH

For more than three decades, this Court has recognized that "a particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). *See also Bigelow v. Virginia*, 421 U.S. 809, 818-20 (1975). In addition to the needs of particular individuals, "society also may have a strong interest in the free flow of commercial information," and a particular advertisement, "though entirely 'commercial,' may be of general public interest." *Virginia State Bd. of Pharmacy*, 425 U.S. at 764. These observations – and the legal doctrine that emerged from them – did not limit First Amendment protection only to advertising that related in some way to a "public" issue. This Court explained that the constitutional interest in commercial speech is the "dissemination of information as to who is producing and selling what product, for what reason, and at what price" in order to facilitate "numerous private economic decisions." *Id.* at 765. "To this end, the free flow of commercial information is indispensable." *Id.*

Spawning the development of the commercial speech doctrine, *Virginia State Board of Pharmacy* represented a sharp break with the Court's prior approach to such expression. For example, nascent First Amendment jurisprudence denied constitutional protection to cinema and allowed states to ban films, reasoning that "[t]he exhibition of moving pictures is a business, pure and simple, originated and conducted for profit." *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 244

(1915). Among other things, the Court observed that, while opinion is free, "*conduct alone* is amenable to the law." *Id.* at 243 (emphasis added). It likewise upheld a state law that banned the use of images of the American flag "as an advertisement on a bottle of beer." *Halter v. Nebraska*, 205 U.S. 34, 42 (1907). Similarly, in *Valentine v. Chrestensen*, 316 U.S. 52, 53 (1942), the Court upheld a provision of the New York Sanitary Code that prohibited the act of "distribut[ing] in the streets . . . commercial and business advertising matter." *See id.* at 54 (prohibiting "such activity" is a matter of legislative judgment and does not violate the Constitution).

The "simplistic approach" of *Chrestensen* and prior commercial speech cases has been thoroughly repudiated by this Court,[4] and a separate test was fashioned for "speech which does 'no more than propose a commercial transaction.'" *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). In *Central Hudson*, 447 U.S. at 562-63, 566, this Court established a four part inquiry for determining the constitutionality of restrictions on commercial speech, but also held that the Constitution accords somewhat less (but still substantial) protection in this area than it does for non-commercial expression.

Decisions issued since then have increased significantly the level of protection for commercial speech, and in the past two decades the Court has

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[4] *Virginia State Bd. of Pharmacy*, 425 U.S. at 759 ("the notion of unprotected 'commercial speech' [has] all but passed from the scene"). *See Bigelow*, 421 U.S. at 818-20. For a precursor to these decisions, *see Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.").

invalidated: (1) an ordinance that regulated the placement of commercial newsracks, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); (2) a state ban on in-person solicitation by CPAs, *Edenfield*, 507 U.S. at 777; (3) a state ban on using the designations "CPA" and "CFP" on law firm stationery, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994); (4) a restriction on listing alcohol content on beer labels, *Rubin*, 514 U.S. at 491; (5) a state ban on advertising alcohol prices, *44 Liquormart,* 517 U.S. at 516; (6) a federal ban on broadcasting casino advertising, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); (7) state regulation of tobacco advertising, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); and (8) FDA restrictions on advertising the practice of drug compounding, *Western States Med. Ctr.*, 535 U.S. at 377.

Even as this Court has approved an increasing level of protection for purely commercial messages, it has stressed the importance of clarifying the distinction between fully protected expression and that which falls under the commercial speech doctrine. The *Central Hudson* Court cautioned that "special care" should be taken in the case of any ban on speech, noting that "in recent years, this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson*, 447 U.S. at 566 n.9. Clarity in drawing this line is essential "to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *Discovery Network*, 507 U.S. at 422-23. *See also id.* at 423 n.19 ("[T]he responsibility for distinguishing between the two carries with it the potential for invidious discrimination of disfavored subjects.").

The search for predictable standards has prompted continuing debate on the Court about the breadth of the commercial speech doctrine and even the propriety of maintaining a separate constitutional standard at all. *See*, *e.g.*, *44 Liquormart*, 517 U.S. at 501 (Stevens, J., plurality op.) ("The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them."); *id.* at 523-24 (Thomas, J., concurring) ("I do not believe that such a test should be applied to a restriction of 'commercial' speech, at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark."); *id.* at 517 (Scalia, J., concurring in part) ("I share Justice Thomas's discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it."). *See also Rubin*, 514 U.S. at 493 (Stevens, J., concurring) ("The Court's continued reliance on the misguided approach adopted in *Central Hudson* makes this case appear more difficult than it is."); *Discovery Network*, 507 U.S. at 438 (Blackmun, J., concurring) ("I hope the Court ultimately will come to abandon *Central Hudson's* analysis entirely in favor of one that affords full protection for truthful, noncoercive commercial speech about lawful activities."). In short, this Court's commercial speech jurisprudence has never fully resolved some fundamental issues regarding the scope of the doctrine and its application to particular situations.

The decision below does not raise a challenge to the continuing validity of *Central Hudson*, but it presents fundamental questions about the government's ability to avoid First Amendment scrutiny altogether when it bans the exchange of truthful information, as well as the proper definition of commercial speech. It constitutes a sharp break with the general trend of commercial speech cases

that have recognized greater protection for the free flow of commercial information, and it adds to confusion among the circuit courts.

II. THE CIRCUIT COURT DECISION CONTAINS FUNDAMENTAL DOCTRINAL ERRORS THAT REQUIRE CORRECTION AND CLARIFICATION BY THIS COURT

A. The First Circuit's Finding That The New Hampshire Law Regulates Only Conduct Is Patently Erroneous

The central premise of the circuit court decision is that the dissemination of prescribing histories for commercial purposes may be banned without any First Amendment scrutiny *at all* so long as the information is characterized as a "commodity." *IMS Health Inc.*, 550 F.3d at 53. Describing the PIL as a regulation of "conduct, not expression," the court's analysis is summed up thusly:

> 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 think that such an interpretation stretches the fabric of the First Amendment beyond any rational measure.

Id. This bizarre analogy is wrong, if for no other reason because the State of New Hampshire is *not* regulating beef jerky – it is banning the flow of information *because* it may be used to persuade. Calling the information used to engage in protected speech a "commodity" does not make it chopped liver, or, to parrot the lower court's strained metaphor, dried beef.[5] Nor is there any support in

[5] Judge Lipez dissented in part, correctly reasoning that the court may not "insulate this expression-based intention [of

this Court's opinions for such constitutional sleight of hand. *See, e.g.*, *Smith v. California*, 361 U.S. 147, 152 (1959) (rejecting an analogy between regulating speech and regulating food); *NAACP v. Button*, 371 U.S. 415, 429 (1963) ("[A] State cannot foreclose the exercise of constitutional rights by mere labels.").

Judge Selya's majority opinion begins with the unexceptional observation that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *IMS Health Inc.*, 550 F.3d at 51 (quoting *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) (citation omitted). From this basic premise, he leaps to the indefensible conclusion that the "course of conduct" that may be banned without constitutional implications is the gathering and use of truthful, nonmisleading information for purposes of "advertising, marketing, promotion, or any activity that could be used to influence sales or market share of a pharmaceutical product," and other related communications.

It is no doubt true that the use of language or information is not an absolute litmus test for First Amendment protection. Certain types of expression, such as extortion, perjury, bomb threats, price fixing agreements, or publication of state secrets, traditionally have been held to be unprotected, notwithstanding the fact that they necessarily involve the use of "speech." *See*, *e.g.*, Frederick F. Schauer, *The Aim and Target in Free Speech Methodology*, 83 NW. U. L. REV. 562, 563 (1989). The First Circuit majority purports to identify "a doctrinal mystery" by citing examples of other laws

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the PIL] from First Amendment scrutiny by directing its legislation to an earlier step in the communicative process." *IMS Health Inc.*, 550 F.3d at 80 (Lipez, J., concurring and dissenting).

that may be enforced without violating the First Amendment notwithstanding the "speech" component of the offense (*e.g.*, antitrust laws, prohibitions against creating a hostile work environment, laws governing union elections), and concludes, based on its "felt sense" of the matter, that the information banned by the PIL falls within the same "complex of de facto exceptions" to constitutional protection. *IMS Health Inc.*, 550 F.3d at 52 (collecting cases). But none of those examples support the result below – that the communication of data may be suppressed simply because it may be used to persuade people to make what the government believes are "unwise" choices.[6]

In sleuthing out what it claims to be a mystery, the First Circuit instead simply misstates the question. The issue in the cases it cites is not that there is a tangible distinction between "speech" and "conduct;" it is whether the expression at issue may itself be considered a crime. The lower court's error is evident from its reference to obscenity, fighting words, and false commercial speech as the "proof of this pudding [ ] that entire categories of speech receive no protection at all from the First Amendment." *Id.* at 51-52. The existence of certain types of unprotected speech may be undeniable, but such categories are not identified by "conduct." *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992) ("[T]hese areas of speech can, consistently

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[6] *See 44 Liquormart*, 517 U.S. at 503 ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."). The court below seeks to bolster its conclusion by asserting that the speech banned by the PIL "is of scant societal value," *IMS Health Inc.*, 550 F.3d at 52, but such an imperious observation ignores the teaching of this Court that "the speaker and the audience, not the government, assess the value of the information presented." *Western States Med. Ctr.*, 535 U.S. at 367 (quoting *Edenfield*, 507 U.S. at 767).

with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.), not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.") (emphasis in original). No precedent supports making the gathering and communication of truthful information for commercial purposes a criminal act.

What *does* create a doctrinal mystery is finding a stopping point if other courts were to accept the First Circuit's proposition that regulating or banning a component of speech as "conduct" requires no First Amendment scrutiny. *IMS Health Inc.*, 550 F.3d at 51-52. This is because all expression requires conduct. The printing and circulation of newspapers entails a great deal of physical activity, and, as more than one commentator has noted, the same can be said of speech "even if it only be the use of one's vocal chords." Melville B. Nimmer, FREEDOM OF SPEECH § 3.60[B] n.15 (1984); Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 827 (2d ed. 1988) ("[A]ny particular course of conduct may be hung almost randomly on the 'speech' peg or the 'conduct' peg as one sees fit."); Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 23 ("[A]ll speech is necessarily 'speech plus.'"). The Ninth Circuit has observed that "speech in any language consists of the 'expressive conduct' of vibrating one's vocal chords, moving one's mouth and thereby making sounds, or of putting pen to paper, or hand to keyboard." *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 934 (9th Cir. 1995) (*en banc*), *vacated as moot*, 520 U.S. 43 (1997). Consequently, if the First Circuit were correct that the government could freely regulate any "conduct" required for expression, then the only communication that would be fully protected under the First Amendment would be telepathy. *See* Tribe,

supra at 827 ("[A]ll communication except perhaps the extrasensory variety involves conduct.").

The First Circuit's erroneous analysis is not limited to commercial speech. As its citation of cases on other subjects suggests, its reasoning would permit the government to ban any discrete component of the communications process, so long as that activity could be characterized as "conduct." However, as this Court has made quite clear in numerous cases, the government runs afoul of the Constitution when it attempts to single out and restrict any particular part of a communicative enterprise under the rubric of regulating action and not speech.

Thus, the First Amendment has been held to protect the materials necessary for printing, *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (striking down tax on newsprint and ink); newsgathering activities, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (First Amendment requires right of access to criminal trials); and circulation of publications, including the physical placement of newsboxes. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988). *See Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("Liberty of circulating is as essential to th[e] freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.") (citation omitted). It has also held that the First Amendment protects campaign expenditures and contributions, since restricting such actions necessarily reduces the quantity of expression in political campaigns by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. *Randall v. Sorrell*, 548 U.S. 230, 246 (2006). Such precedents foreclose the First Circuit's conclusion.

This clear line of authority is unaffected by the fact that the communication New Hampshire has banned has a commercial purpose, *i.e.*, that information is used as "a commodity." *IMS Health Inc.*, 550 F.3d at 53. As this Court pointed out in *Bigelow*, 421 U.S. at 818, "[o]ur cases . . . clearly establish that speech is not stripped of First Amendment protection merely because it appears in [commercial] form." It explained further that First Amendment protections for commercial speech extend to the entire communication process, which includes the communication, its source and its recipients. *Virginia State Bd. of Pharmacy*, 425 U.S. 756-57. *Cf. Grosjean v. American Press Co.*, 297 U.S. 233, 240, 244-45 (1936) (invalidating tax imposed on any person or corporation "engaged in the business of selling . . . advertising or for advertisements, whether printed or published"). To hold otherwise – as the First Circuit did below – threatens to return First Amendment jurisprudence to the era in which films could be banned because "[t]he exhibition of moving pictures is a business, pure and simple, originated and conducted for profit," *Mutual Film Corp.*, 236 U.S. at 244, and commercial handbills could be outlawed because "distribut[ing] . . . commercial and business advertising matter" could result in litter. *Chrestensen*, 316 U.S. at 53-54.

The majority opinion below attempts to minimize the drastic implications of its logic by claiming that "detailing," using drug prescription data, is just part of the "art of marketing" that is used "[i]n the service of maximizing drug sales [whereby] detailers use prescribing histories as a means of targeting potential customers more precisely and as a tool for tipping the balance of bargaining power in their favor." *IMS Health Inc.*, 550 F.3d at 54. However, the lower court's flurry of words distinguishing "targeted marketing" from protected speech lacks any logical or legal support. The value of advertising

depends on the ability to get the message to the right audience, and this Court has held that a restriction on targeted marketing efforts necessarily implicates the First Amendment. *E.g.*, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). As the Tenth Circuit noted in striking down a ban on the use of customer data to make targeted solicitations, "a restriction on speech tailored to a particular audience, 'targeted speech,' cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, 'broadcast speech.'" *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999).

At the very least, review by this Court is essential to correct the doctrinal confusion engendered by the First Circuit's decision and to clarify a division among the circuit courts about the First Amendment protection accorded such commercial data. Contrary to the lower court's finding that the compilation and communication of information on prescribing histories may be regulated as conduct because the "putative speech comprises items of nugatory informational value," *IMS Health Inc.*, 550 F.3d at 52, at least two other circuits have held that the distribution of purely factual information for a commercial purpose is constitutionally protected. As noted above, the Tenth Circuit in *U.S. West, Inc.*, 182 F.3d at 1232, held that prohibiting the use of customer proprietary network information ("CPNI") to make targeted sales presentations violates the First Amendment. *See also Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1513 (10th Cir. 1994). The D.C. Circuit has reached the same conclusion. *NCTA v. FCC*, 555 F.3d 996, 1000 (D.C. Cir. 2009). Under circumstances analogous to the facts of this case, these circuits have applied the widely understood principle that "[e]ven dry information, devoid of advocacy, political relevance, or artistic expression," merits First Amendment protection. *E.g.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446-47 (2d

Cir. 2001). The anomalous decision in this case thus has split the circuits and requires review.

B. The First Circuit's Definition Of Commercial Speech Is Excessively Broad

This Court has struggled for years to devise a uniform definition of commercial speech, recognizing that crafting a coherent definition is a critical threshold question that determines the level of First Amendment protection that will apply in a given case. It has described "*the test* for identifying commercial speech," as speech that does no more than propose a commercial transaction, *Discovery Network*, 507 U.S. at 423 (quoting *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 473-74 (1989)) (emphasis in original), but has also referred more generally to "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561. This case underscores the pressing need for the Court to clarify the proper application of the commercial speech doctrine.

Without a definitive word from this Court as to whether the broader or narrower formulation should control, the circuits have become deeply divided, and the decision below only makes matters worse. In addition to the First Circuit below, three circuits have adopted the broader definition, which subjects more speech to a lesser degree of First Amendment protection. *See SKF USA, Inc. v. U.S. Customs and Border Prot.*, 556 F.3d 1337, 1355 (Fed. Cir. 2009); *Mason v. Florida Bar*, 208 F.3d 952, 955 (11th Cir. 2000); *Hoover v. Morales*, 164 F.3d 221, 225 (5th Cir. 1998). The opinion below "reject[ed]" the narrower test set forth in *Fox* and *Discovery Network* in favor of the more encompassing definition applied in other First Circuit cases. *IMS Health Inc.*, 550 F.3d at 54-55. *See, e.g.*, *Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 309 (1st Cir. 2005). The analysis of the court below was then picked up by a

divided Federal Circuit in *SKF USA, Inc.*, 556 F.3d at 1355. *But see id.* at 1371 n.5 (Linn, J., dissenting) (narrower definition should apply and "*IMS* was incorrectly decided"). At the same time, three other circuits apply the narrower definition set forth by this Court as speech that does no more than propose a commercial transaction. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002); *CFTC v. Vartuli*, 228 F.3d 94, 110 n.8 (2d Cir. 2000); *Adventure Commc'ns, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 440 (4th Cir. 1999).

In this case, the decision below is erroneous regardless whether *Central Hudson* or the test governing restrictions on noncommercial speech applies. *See supra* nn.3, 6. But the breadth of speech covered by the PIL highlights the importance of defining commercial speech precisely. The law prohibits the collection or use of prescriber data for "any commercial purpose," which goes far beyond advertising or proposing a commercial transaction to include "any activity that could be used to influence sales or market share of a pharmaceutical product," any evaluation of "the prescribing behavior of an individual health care professional," or any assessment of "the effectiveness of a professional pharmaceutical detailing sales force." N.H. Rev. Stat. Ann. § 318:47-f. In this connection, the Petition notes the array of non-marketing uses of such data, including "track[ing] patterns of disease and treatment, conduct[ing] research and clinical trials, implement[ing] best practices, and engag[ing] in economic analyses." Pet. at 17. Given the state's expansive conception of commercial speech and the lower court's analysis, the Court should grant review to ensure that fully-protected speech is not "inadvertently suppressed." *Bolger*, 463 U.S. at 66.

Finally, clarification by this Court of the definition of commercial speech is long overdue. Granting review on this issue would address a key question left open in *Nike, Inc. v. Kasky*, 539 U.S.

654 (2003) (*per curiam*). The California Supreme Court had applied the broader definition based on the speaker's commercial interest, and rejected Nike's argument that full First Amendment protection should have been applied because the speech at issue directly addressed a matter of public controversy. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 946, 964-68, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002). This Court initially granted review to consider the proper definition of commercial speech under *Central Hudson*, but after briefing and argument, dismissed certiorari as improvidently granted.[7] Nevertheless, no one has ever disputed the importance of the issue that was left unresolved. Over thirty amicus briefs were filed in the case, and a majority agreed that the breadth of the commercial speech definition and the proper scope of *Central Hudson* were important doctrinal issues that warranted the Court's review in a proper case.[8]

The proper case has now arrived. There is no question but that the decision below, after a full trial on the merits, is final. Unfortunately, the ongoing dispute about the definition of commercial speech, coupled with the missed opportunity in *Nike* to

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[7] In an opinion concurring in the dismissal, Justice Stevens, joined by Justices Ginsburg and Souter, wrote that the decision below lacked finality because the California Supreme Court never entered a final judgment as required under 28 U.S.C. § 1257, and that the parties lacked standing to proceed in federal court. *Nike, Inc. v. Kasky*, 539 U.S. at 657-63 (Stevens, J., concurring).

[8] Justice Stevens wrote that, under the doctrine of constitutional avoidance, the Court should not decide the matter prematurely *because of* "the novelty and importance of the constitutional questions." *Nike, Inc. v. Kasky*, 539 U.S. at 657-63 (Stevens, J., concurring) (Justice Souter did not join this part of the opinion). Justice Kennedy dissented from the dismissal without opinion. *Id.* at 665. Justice Breyer, joined by Justice O'Connor, also dissented, and wrote that he "would apply a form of heightened scrutiny to the speech regulations in question." *Id.* at 676 (Breyer, J., dissenting).

resolve the issue, permitted the First Circuit to add to the confusion among the circuits. As Justice Blackmun wrote in another context, "*Central Hudson's* chickens have come home to roost." *Discovery Network*, 507 U.S. at 436 (Blackmun, J., concurring). The Court should use this occasion to clarify this important area of the law.

CONCLUSION

For the foregoing reasons, *amicus* ANA respectfully requests that the Court grant the petition for certiorari.

Respectfully submitted,

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