No. 08-1202

In the
Supreme Court of the United States

IMS HEALTH, INC. AND VERISPAN LLC,

Petitioners,

v.

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

Respondent.

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

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION, ASSOCIATED INDUSTRIES OF MASSACHUSETTS, ASSOCIATED INDUSTRIES OF VERMONT, MAINE MERCHANTS ASSOCIATION, AND AMERICAN LEGISLATIVE EXCHANGE COUNCIL, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae adopt the Questions Presented as stated by Petitioners. This amicus brief focuses on the first question as stated by Petitioners:

> 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?

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INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF"), Associated Industries of Massachusetts ("AIM"), Associated Industries of Vermont ("AIV"), Maine Merchants Association ("MMA"), and American Legislative Exchange Council ("ALEC") seek to share their views concerning the need for this Court to clarify the fact and extent of the protection afforded by the First Amendment of the U.S. Constitution to the sale of information for commercial use.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. Moreover, no person other than amici curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission. Pursuant to Supreme Court Rule 37.2(a), counsel for amici state that counsel of record for all parties received notice at least ten days prior to the due date of amici's intention to file this brief. The parties have consented to its filing.

AIM is a 90-year-old nonprofit association with over 7,000 employer members doing business in the Commonwealth of Massachusetts. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth, by: improving the state's economic climate; proactively advocating fair and equitable public policy; and providing relevant and reliable information and excellent services.

Founded in 1920, AIV serves as an advocate for Vermont's industrial and business communities in the formulation of public policy that protects and enhances Vermont's private enterprise economy. AIV provides legislative and regulatory advocacy and representation at the state and federal levels and its membership runs the full range of the manufacturing, technology, and natural resource sectors, with companies of every size and from every part of the state.

MMA is a nonprofit organization with over 400 members and represents the interests of the retail merchant industry before elected Maine officials. MMA's lobbying and issue education efforts are designed to ensure sound policy decisions on issues that directly affect Maine businesses, including wage and hour issues, workers' compensation and healthcare costs, employee benefits, and taxes.

ALEC is a nonprofit organization dedicated to the advancement of the Jeffersonian principles of

free markets, limited government, federalism, and individual liberty, through a nonpartisan public-private partnership of America's state legislators, members of the private sector, the federal government, and the general public. More than 25% of all state legislators belong to ALEC, along with more than 300 corporate and private foundation members.

NELF, AIM, and ALEC have regularly appeared as amici curiae in cases raising issues of general significance to their members.[2] This is such a case, and NELF, AIM, AIV, MMA, and ALEC (hereafter, "Amici") believe that this brief provides

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[2] *See, e.g., Ysursa v. Pocatello Educ. Ass'n,* __U.S.__, 129 S. Ct. 1093 (2009); *District of Columbia v. Heller,* __U.S.__, 128 S. Ct. 2783 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308 (2007); *Davenport v. Wash. Educ. Ass'n,* 551 U.S. 177 (2007); *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1 (2007); *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399 (2006); *Rapanos v. United States,* 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.,* 547 U.S. 370 (2006); *Kelo v. City of New London,* 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280 (2005); *Comm'r v. Banks,* 543 U.S. 426 (2005); *Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 73 (2008); *Saab v. Massachusetts CVS Pharmacy, LLC*, 452 Mass. 564 (2008); *Thurdin v. SEI Boston, LLC*, 452 Mass. 436 (2008); *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337 (2008); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008); *Moelis v. Berkshire Life Ins. Co.*, 451 Mass. 483 (2008).

an additional perspective which may aid the Court in determining whether to grant the Petition For A Writ of Certiorari ("Pet.").

SUMMARY OF ARGUMENT

The First Circuit decision that has occasioned this petition is in conflict with the decisions of this Court providing that the transfer of information constitutes speech entitled to First Amendment protection. The First Circuit's decision is likewise in conflict with the decisions of this Court applying the commercial speech doctrine, although language in certain of the Court's opinions has engendered considerable confusion regarding the proper contours of that doctrine, as evidenced by conflicting decisions among the circuits and even within the First Circuit.

The Court should issue a writ of certiorari to resolve this doctrinal confusion in favor of the "proposes a commercial transaction" definition of commercial speech. The Court would thereby prevent the substantial harm to social and economic interests that could result if, as the First Circuit has decided, every sale of information for a commercial purpose deemed by the judiciary to have minimal societal value may on that basis be denied First Amendment protection or afforded the lower level of protection from government regulation that attaches to commercial speech.

ARGUMENT

I. Certiorari is warranted because the First Circuit's decision conflicts with this Court's decisions holding that the transfer of information constitutes speech protected by the First Amendment.

As District Judge Barbadoro noted when he enjoined the statute's enforcement, the New Hampshire Prescription Information Law, 2006 N.H. Laws § 328, *codified at* N.H. Rev. Stat. Ann. §§ 318:47-f, 318:47-g, 318-B:12(IV) (2006), "bars pharmacies, insurance companies, and similar entities from transferring or using prescriber-identifiable data for certain commercial purposes." *IMS Health Incorporated v. Ayotte*, 490 F. Supp. 2d 163, 165 (D.N.H. 2007), *rev'd,* 550 F.3d 42 (1st Cir. 2008). Judge Barbadoro further recognized, as the First Circuit apparently does not, that this constitutes a direct restriction on the "transmission of truthful information," and therefore on "speech." *Id.* at 175. *See Bartnicki v. Vopper,* 532 U.S. 514, 526-27 (2001) (a "prohibition against disclosures is fairly characterized as a regulation of pure speech"); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information . . . . This right . . . is fundamental to our free society.").[3]

[3] As the First Circuit's opinion does recognize, the First Amendment applies to even "pure informational data." Appendix to Petition for a Writ of Certiorari ("App.") at 19. It

The First Circuit appears to have been disturbed by the fact that, in this instance, the information to be transferred has monetary value and is therefore bought and sold like a "commodity." App. at 23. However, the transfer or dissemination of information does not lose its status as speech under the First Amendment merely because money passes hands. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 761 (1976) (speech "carried in a form that is 'sold' for profit" does not lose protection); *Smith v. California,* 361 U.S. 147, 150 (1959) ("It is of course no matter that the dissemination takes place under commercial auspices."); *Murdock v. Pennsylvania,* 319 U.S. 105, 111 (1943) ("It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.").

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is, in fact, because product advertising conveys factual information that even it has First Amendment protection. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 765 (1976) ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price . . . . [T]he free flow of commercial information is indispensable."); *Wine and Spirits Retailers, Inc. v. R.I.,* 481 F.3d 1, 6 (1st Cir. 2007) (acknowledging that the "dissemination of information about . . . prices and products to other retail stores and to the public at large" constitutes "speech" for First Amendment purposes).

Nor is the First Circuit correct that the Prescription Information Law principally regulates conduct rather than speech. App. at 22-26. Again, the statute directly regulates the disclosure of truthful information by pharmacies and others to the petitioners and "[i]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does . . . ." *Bartnicki,* 532 U.S. at 527; *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (distinguishing the regulation of a "business transaction [face-to-face solicitation of clients by lawyers] in which speech is an essential but subordinate component" from the direct regulation of speech).

Finally, the First Circuit is incorrect to the extent it is suggesting that a complete ban on any transfer of this information would be necessary to trigger First Amendment protection. App. at 23-24 ("The plaintiffs may still gather and analyze [prescriber-identifiable information]; and may publish, transfer, and sell this information to whomever they choose *so long as that person does not use the information for detailing.*") The First Amendment proscribes laws "abridging," or restricting, free speech, as well as those that ban speech. U.S. Const. amend. I; *see also Florida Bar v. Went for It, Inc.,* 515 U.S. 618, 622 (1995) ("[T]he First Amendment guards against government restriction of speech in most contexts . . . .").

The fundamental basis for the First Circuit's approach in this case appears to be an erroneous belief that courts are free to act on their own judgments about the value to society of particular information. Amici do not begin to agree with the First Circuit's conclusion that the speech at stake here is "of scant societal value." App. at 22. Even more importantly, however, Amici do not find in this Court's First Amendment jurisprudence permission for either state legislatures or federal judges to ignore the First Amendment because they perceive the speech at issue to be lacking in value. *See Edenfield v. Fane,* 507 U.S. 761, 766 (1993) ("[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.")

The implications of the First Circuit's approach extend far beyond the specific context of pharmaceutical marketing at issue in this case. Amici's members include representatives of a wide variety of industries, and Amici are deeply concerned that if information used to market drugs can be suppressed without regard to First Amendment protections, the same fate can befall information that other enterprises require to market their products and services or otherwise run their businesses.

This Court should issue a writ of certiorari to evaluate the First Circuit's dangerous departure from the Court's First Amendment precedent.

II. Certiorari is warranted because the First Circuit has decided an important question regarding the scope of the commercial speech doctrine under the First Amendment in a way that conflicts with this Court's actual application of that doctrine but derives from uncertainty created by the Court's opinions.

As District Judge Barbadoro's decision in this litigation again recognizes, the contours of "commercial speech" are not entirely clear from this Court's decisions. *Ayotte,* 490 F. Supp. 2d at 176. In its decision in *Central Hudson,* the Court appeared to define commercial speech as that which "proposes a commercial transaction," but also indicated that commercial speech is "related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557, 561-63 (1980). The Court's decision in *Board of Trustees of State University of New York v. Fox,* 492 U.S. 469 (1989), rendered after *Central Hudson*, very clearly employed the "proposes a commercial transaction" definition, describing it as "the test for identifying commercial speech." *Id.* at 473-74. This suggests that the language in *Central Hudson* regarding the speaker's and listener's economic interests was meant to be descriptive of speech that "proposes a commercial transaction," rather than an independent definition of commercial speech. *See United States v. United Foods, Inc.,* 533

U.S. 405, 409 (2001) (commercial speech is "usually defined as speech that does no more than propose a commercial transaction"); *Commodity Futures Trading Comm'n v. Vartuli,* 228 F.3d 94, 110 n.8 (2d Cir. 2000) (discussing ramifications of using the *Central Hudson* "description as a definition"). However, in *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 422 (1993), the Court interpreted *Central Hudson* as suggesting that there could be speech that does not propose a commercial transaction and yet qualifies as commercial speech because it is "related solely to the economic interests of the speaker and its audience."

As the petitioners explain, the uncertainty in the Court's decisions regarding the definition of "commercial speech" has led to conflicting decisions among the circuits. Pet. at 21-23. The First Circuit in this case has employed the broader "economic interests" concept as an actual definition of commercial speech, citing its prior decisions in *Pharmaceutical Care Management Ass'n v. Rowe,* 429 F.3d 294 (1st Cir. 2005) and *El Dia, Inc. v. Puerto Rico Department of Consumer Affairs,* 413 F.3d 110 (1st Cir. 2005). App. at 27-28. The Second Circuit, however, applies the "proposes a commercial transaction" definition. *See Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.,* 134 F.3d 87, 96-97 (2d Cir. 1998) (Bad Frog's label "serves to propose a commercial transaction" and communicates the

source of the product such that it "suffices to invoke the protections for commercial speech . . . ."); *N.Y. State Ass'n of Realtors, Inc. v. Shaffer,* 27 F.3d 834, 840-41 (2d Cir. 1994) (solicitation of homeowners by realtors seeking the right to sell residential property " 'is primarily aimed at proposing a commercial transaction' " and should therefore be considered commercial speech). Since this contrary Second Circuit precedent will govern the pending challenge to Vermont's version of the Prescription Information Law,[4] the conflict in circuit decisions on this fundamental question is manifest even in the limited arena of pending litigation over state statutes restricting the transfer and use of prescriber-identifiable data.

The confusion that reigns regarding the scope of the commercial speech designation is further evidenced by conflicting decisions from the First Circuit itself. Thus, while the *Pharmaceutical Care* and *El Dia* First Circuit decisions cited by that court in its opinion in this case apply the broader "economic interests" formulation, *see* discussion *supra* p. 9, other First Circuit decisions apply the

[4] The Vermont case is *IMS Health v. Sorrell,* No. 1:07-cv-00188, consolidated with l:08-cv-00220 (D. Vt. filed Aug. 29, 2007).

[5] The fact that Circuit Judge Selya wrote the two *Wine and Spirits* decisions as well as the First Circuit's decision in this case compounds the confusion.

"proposes a commercial transaction" test. *See Wine and Spirits Retailers, Inc. v. R.I.*, 418 F.3d 36, 49 (1st Cir. 2005) ("The provision of advertising and licensing services is not speech that proposes a commercial transaction and therefore does not constitute commercial speech." (citing *Fox,* 492 U.S. at 482, as indicating that the "proposal of a commercial transaction . . . 'is what defines commercial speech,' . . ."); *Wine and Spirits Retailers, Inc. v. R.I.,* 481 F.3d 1, 6 (1st Cir. 2007) (same).[5] This conflict even within a single circuit demonstrates the extent of the confusion generated by *Central Hudson* and its progeny.

Despite the confusion generated by the "economic interests" language in *Central Hudson*, this Court has never actually found speech to be "commercial speech" except where it involves direct or indirect advertising. *See* 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, 1082 (2000).[6] In fact, the Court has struggled with applying the "commercial speech" label even in the advertising context. Thus, in *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 66-67 (1983), the Court, after designating as commercial speech mailings of

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[6] Amici have conducted independent research on this question, and this appears to continue to be the case post-2000.

unsolicited advertisements for contraceptives that consisted primarily of price and quantity information, indicated that it was addressing a "closer question" in classifying as commercial speech what the Court subsequently described as "informational pamphlets that were concededly advertisements referring to a specific product"—i.e., advertising combined with other informational speech. *City of Cincinnati,* 507 U.S. at 422-23 (discussing *Bolger*).

The separate opinions of several justices in the case of *Nike, Inc. v. Kasky,* 539 U.S. 654 (2003), in which the Court dismissed a previously granted writ of certiorari as having been improvidently granted, are also instructive. A California citizen sued Nike for false advertising and unfair business practices based on a report and other publications (press releases, letters to newspaper editors, and letters to university presidents and athletic directors) by Nike denying allegations of poor working conditions at its facilities in foreign countries. The California Supreme Court found that " '[b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, . . . [the] messages are commercial speech.' " *Id.* at 657 (Stevens, J., concurring) (quoting *Kasky v. Nike, Inc.,* 27 Cal. 4th

939, 946 (2002)). Concurring in the Court's reversal of its prior decision to hear the case, Justice Stevens (joined by Justices Ginsburg and Souter) characterized Nike's speech as combining commercial speech, noncommercial speech, and public discourse, and indicated that the case therefore raised novel First Amendment issues better addressed on a fuller factual record. *Id.* at 663-64. Focusing on Nike's "direct communications with customers and potential customers that were intended to generate sales—and possibly to maintain or enhance the market value of Nike's stock," the concurring justices raised the prospect of according even misstatements contained in that speech protection comparable to the "broad protection for misstatements about public figures that are not animated by malice," because these communications with actual and potential customers "were part of an ongoing discussion and debate about important public issues . . . ." *Id.* at 664.

Similarly, Justice Breyer (joined by Justice O'Connor), dissenting from the Court's decision not to hear the *Nike* case, wrote that even the direct correspondence with university presidents and athletic directors who were actual and potential Nike customers was distinguishable from "purer forms of commercial speech, such as simple product advertisements," and should, given the circumstances presented as to "format, content, and regulatory context," be subjected to heightened

scrutiny. *Id.* at 678-79 (Breyer, J., dissenting). Justice Breyer further opined that "it is likely, if not highly probable, that, if this Court were to reach the merits, it would hold that heightened scrutiny applies . . . ." *Id.* at 681.

In *Nike*, therefore, five justices (including four who remain on the Court) indicated at least an inclination to treat certain direct speech by a business to its customer base designed to encourage purchase of its products as deserving of heightened protection associated with noncommercial speech. Those justices would likely find such heightened protection even more appropriate here, where a statute restricts informational transfers that neither constitute nor are combined with direct or indirect product promotions.

In sum, while the Court has never expressly disavowed the *Central Hudson* "economic interests" phraseology, its later decisions demonstrate a clear reluctance to apply the "commercial speech" label except to speech that primarily entails advertising or marketing. Moreover, a frequently cited explanation for granting commercial speech lesser protection than other speech is the fact that it is " 'linked inextricably' with the commercial arrangement that it proposes, so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." *Edenfield v. Fane,* 507 U.S. 761, 767 (1993) (citation

omitted); *see also Friedman v. Rogers,* 440 U.S. 1, 10 n.9 (1979). This justification for lesser First Amendment protection applies only to speech that directly proposes a commercial transaction, and not to other speech that relates solely to economic interests. *Cf. Bolger,* 463 U.S. at 65 ("In light of the greater potential for deception or confusion *in the context of certain advertising messages*, content-based restrictions on commercial speech may be permissible.") (emphasis supplied) (citation omitted).

Both judges and commentators have noted significant concerns with reliance on the broader language of *Central Hudson* as a definition of commercial speech. The following discussion is illustrative:

> The Court has at times suggested that the commercial speech category may also generally cover speech that is 'related solely to the economic interests of the speaker and its audience,' and some lower courts have accepted this definition. But this can't be right. Consider . . . the newspaper that discusses business affairs, almost entirely in order to make money by helping its readers do well in business. Consider a product review written by its author because he wants to be paid, published by the newspaper because it wants to keep its paying

> subscribers, and read by readers because they want to know how to best spend their money. Consider a union buying TV ads urging people to 'Buy American' because that's the best way of maintaining the viewers' (and the union members') standard of living.
>
> . . .That [such commentary] has to do with the listeners' economic interests merely highlights its importance—for most people, economic well-being is more important than politics, art, social concerns, or often even religion, and speech on economic matters often has more effect on the nation than does most art or theology, or even much political debate.

Volokh, 52 Stan. L. Rev. at 1081-82 (footnotes omitted);[7] *see also* Troy L. Booher, *Scrutinizing*

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[7] Professor Volokh continues:

> If communicating information about a person's bad credit record is mere 'commercial speech,' then communicating information about a business's bad service record should be too. Both, after all, involve speech on economic matters. Both involve speech that's primarily of economic interest to listeners. Both are motivated by the speaker's economic interest -- either a desire to get money from the buyer of the information, or a

Commercial Speech, 15 Geo. Mason U. Civ. Rts. L.J. 69, 70 (2004) ("[S]peakers are rarely motivated by a monolithic desire for profit and . . . it is difficult to determine when speech is sufficiently motivated by a desire for profit to warrant a different level of protection.").

Justice Stevens anticipated these problems in his concurring opinion in *Central Hudson*:

> The Court first describes commercial speech as 'expression related solely to the economic interests of the speaker and its audience.' Although it is not entirely clear whether this definition uses the subject matter of the speech or the

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> desire to get redress from the business. Either both are commercial speech or neither is.
>
> In a free and competitive economy, people naturally want to talk about economic matters. Often their motives for such speech are largely economic: They want to learn how to make more money. They want to persuade people that some course of action is economically better. They want to alert people to what they think are others' dishonest business practices. Giving the government an ill-defined but potentially very broad power to restrict such speech -- not just speech that proposes a commercial transaction between speaker and listener and thus directly implicates the risk of fraud -- risks exposing a great deal of speech to government policing.

Id. at 1087.

> motivation of the speaker as the limiting factor, it seems clear to me that it encompasses speech that is entitled to the maximum protection afforded by the First Amendment. Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward. Thus, the Court's first definition of commercial speech is unquestionably too broad.

447 U.S. at 579-80 (Stevens, J., concurring) (citation omitted).

The transfer, whether by sale or otherwise, of prescriber-identifiable data or other factual information from one willing business to another obviously does not "propose a commercial transaction." "It doesn't advertise anything, or ask the receiving business to buy anything from the communicating business . . . . The recipient business does intend to use the information to more intelligently engage in commercial transactions, but that's equally true of businesspeople reading Forbes."

Volokh, 52 Stan. L. Rev. at 1082-83 (footnotes omitted). And yet the First Circuit has concluded that such transfers, if they constitute speech at all, are entitled to only the lesser degree of protection from government regulation afforded commercial speech.

This Court should issue a writ of certiorari in this case so as to resolve the widespread confusion, evidenced by conflicting judicial decisions, concerning the definition of commercial speech and, for the reasons noted by both judges and commentators, limit its scope to speech that proposes a commercial transaction. Resolution of the question, and in this way, could not be more important because proper application of the "commercial speech" label is necessary to "ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger,* 463 U.S. at 66. [8]

[8] Indeed, it is unclear to Amici that there will be any compilation and transfer of prescriber-identifiable data at all, in order for it to serve noncommercial purposes such as healthcare research, if the Prescription Information Law and other statutes like it are upheld. To the extent these laws effectively restrict all transfers and uses of prescriber-identifiable data by eliminating the market incentives and resources that permit the aggregation and dissemination of the data, *see* discussion *infra* pp. 18-20*,* the statutes undeniably impinge on noncommercial speech.

III. Certiorari is warranted because the First Circuit's approach could significantly impede the flow of information in our society.

It is well recognized that "scientific and technological advances facilitate the ability to both gather and disseminate information, increasing the demand for and uses of information . . . ." Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age,* 65 Ohio St. L.J. 249, 262 (2004). Market forces provide the incentives and resources needed to meet this increased demand for information. *See Buckley v. Valeo,* 424 U.S. 1, 19 (1976) ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money."); Solveig Singleton, *Privacy as Censorship: A Skeptical View of Proposals to Regulate Privacy in the Private Sector*, Cato Policy Analysis No. 295 (January 22, 1998), http://www.cato.org/pubs/pas/pa-295.html ("The formal mechanisms that businesses have developed to transfer information about consumers, borrowers, and other businesses serve valuable economic and social purposes formerly served by person-to-person informal information networks.")

Just as speech "does not lose its First Amendment protection because money is spent to project it," *City of Cincinnati,* 507 U.S. at 420, the mere fact that a business has disseminated

information should not make that publication commercial speech. In our "information age," sales and other voluntary transfers of data by and between businesses are fundamental to the efficient operation of the free enterprise system and often serve, as in this instance, societal needs as well as the interests of individual businesses. Thus, treating the sale of information for a commercial purpose as less deserving of First Amendment protection than other informational transfers can be expected to have serious, adverse ramifications for both economic and social interests served by the free flow of information in our society.

If, for example, the transfer of prescriber-identifiable data for a commercial purpose can be proscribed, the effect may be to circumscribe as well the compilation and transfer of prescriber-identifiable data for noncommercial purposes such as healthcare research. In addition, if pharmaceutical companies are unable to focus their marketing activities based on prescriber-identifiable data, those marketing efforts will be less efficient and more expensive. This could lead to higher prescription drug prices and associated higher health insurance costs for employers, including Amici's many members already struggling to meet their employees' healthcare needs.

In short, because market forces fuel the compilation and publication of most information in

modern society, efforts to restrict the transfer and use of data for commercial purposes will likely have consequences far beyond that intended focus to the detriment of the public interest. It is therefore critical that direct, legislative restrictions on the sale of information for commercial purposes such as that contained in the Prescription Information Law not escape First Amendment scrutiny or be evaluated under the lesser standard of scrutiny applicable to commercial speech. This Court's attention to the matter could not be more important or timely.

CONCLUSION

For the reasons stated above, the Court should grant the Petition For A Writ of Certiorari of IMS Health, Inc. and Verispan LLC.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION, ASSOCIATED INDUSTRIES OF MASSACHUSETTS, ASSOCIATED INDUSTRIES OF VERMONT, MAINE MERCHANTS ASSOCIATION, AND AMERICAN LEGISLATIVE EXCHANGE COUNCIL

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