No. 08-1202

In The
Supreme Court of the United States

IMS HEALTH, INC. AND VERISPAN LLC,

Petitioners,

v.

KELLY A. 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 THE STATE OF VERMONT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT AND IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

WILLIAM H. SORRELL
Attorney General

BRIDGET C. ASAY*
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3181
Attorneys for Amicus Curiae State of Vermont
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICUS CURIAE STATE OF VERMONT[1]

Vermont, like New Hampshire, has chosen to restrict the use of prescriber-identifiable data (data taken from patient prescription records) for marketing prescription drugs. Vermont's law, passed in 2007, is similar in purpose to the New Hampshire statute upheld by the First Circuit. *See* Vt. Stat. Ann. tit. 18, § 4631. As with New Hampshire, Vermont's law has a "limited scope" that does not restrict any "message disseminated to the public at large." Pet. App. 126, 131 (Lipez, J., concurring). While New Hampshire decided to prohibit the use of prescriber-identifiable data for marketing prescription drugs, Vermont created a process for doctors to decide whether or not their prescription information may be used for marketing purposes. Absent consent, pharmaceutical companies may not use the data for marketing drugs. Vermont's law was upheld by a federal district court following a five-day bench trial. *IMS v. Sorrell,* No. 1:07-cv-188, 2009 WL 1098474 (D. Vt. Apr. 23, 2009). An appeal is now pending in the Second Circuit.[2]

Because of this pending litigation, Vermont has taken the unusual step of appearing as amicus curiae

---

[1] As required by Supreme Court Rule 37.2, counsel of record received timely notice of Vermont's intent to file this amicus brief. Because the brief is filed by Vermont's Attorney General, Vermont does not need permission to file. *See* Supreme Court Rule 37.4.

[2] The appeal was docketed May 4, 2009.

in opposition to this petition for certiorari. Petitioners' challenge to New Hampshire's data mining law was expedited and trial was held after only a short period of discovery. Vermont's law had a delayed effective date, and that allowed Vermont to conduct substantially more discovery and to prepare a more detailed case for trial. For example, Vermont elicited discovery from pharmaceutical companies about the covert use of prescriber-identifiable data in drug marketing; obtained company documents from the data mining industry; and presented expert testimony showing that these laws will not just help reduce health care costs but also will reduce unnecessary risk to patients and promote public health. *Compare id.* at *13 (finding evidence supports State's interest in protecting public health) *with* Pet. App. 106 (Lipez, J., concurring) (describing New Hampshire's record on this issue as "undeveloped").

For these reasons, Vermont believes that the pending case presents a poor vehicle for this Court to review the constitutionality of restrictions on the use of prescriber-identifiable data. With no split of authority calling for the Court's intervention, the Court should not reach out to decide this case and short-circuit development of the issues in the lower courts. Moreover, if the Court believes review of this issue is necessary – and it may not be, if no conflict develops in the Courts of Appeal – that review should not be based upon a record compiled in an expedited proceeding. Vermont thus submits this brief to aid the

Court in its consideration of the petition for certiorari.

STATEMENT OF THE CASE

Pharmaceutical companies spend billions of dollars each year marketing drugs directly to doctors. *E.g.,* Pet. App. 31; *Sorrell,* 2009 WL 1098474, at *1. These marketing efforts are limited to expensive, brand-name drugs that retain patent protection (that is, most marketing efforts stop once generic versions of a drug become available). Pet. App. 6, 163. There is no question but that these sophisticated, expensive marketing campaigns succeed in influencing doctors to prescribe the drugs being marketed. The First Circuit reached this conclusion, as did the District Court in Vermont. *E.g.,* Pet. App. 30-31; *Sorrell,* 2009 WL 1098474, at *11. These lower court decisions are firmly grounded in empirical evidence, including a substantial body of peer-reviewed research showing that doctors' prescribing decisions are influenced by marketing campaigns. Pet. App. 31-32; *id.* at 109-12, 122 (Lipez, J., concurring) (discussing research); *Sorrell,* 2009 WL 1098474, at *11 ("Research shows doctors are influenced by the marketing efforts of pharmaceutical companies."). In Vermont's trial, three respected scientists testified about the nature of this influence and the studies that document it. A recent report by the Institute of Medicine likewise shows that the medical profession recognizes the influence of marketing. The report recommends that

institutions and physicians adopt sharp new limits on interactions between pharmaceutical sales representatives and doctors (as well as medical students and residents).[3]

A few years ago, press accounts began to highlight what was then a little-known fact about drug marketing. *E.g.,* Pet. App. 32 (citing 2003 Boston Globe article). Coincident with a sharp rise in spending on pharmaceutical marketing, pharmaceutical companies also began using a new marketing tool: data culled from patients' prescriptions records that revealed the prescribing practices of individual doctors. *Sorrell,* 2009 WL 1098474, at *2. Data mining companies, like the petitioners in this case, obtain this data by buying patients' prescription records from pharmacies. The patient's name is encrypted, and some other identifying information is removed, but essentially, data mining companies purchase detailed health care records from pharmacies. An individual prescription record shows, for example, that Dr. Jane Jones prescribed Lipitor to

---

[3] Committee on Conflict of Interest in Medical Research, Education, and Practice, Institute of Medicine, *Conflict of Interest in Medical Research, Education, and Practice* 5-4, 5-6 to 5-14, 5-28 to 5-30, 6-7 to 6-8, 6-15 to 6-17 (Bernard Lo & Marilyn J. Field, eds., 2009) (presently available in uncorrected proofs at http://www.nap.edu/catalog.php?record_id=12598). As one example relating to medical education, the report observes that "the literature suggests that academic medicine and the public have reason to be concerned about the easy access of sales representatives to medical students, residents, and faculty." *Id.* at 5-9.

Patient X, a 50-year-old man who lives in central Vermont, and who had the prescription filled on June 1, 2009 at the Rite Aid pharmacy in Montpelier, Vermont. *See Sorrell,* 2009 WL 1098474, at *1 (describing data purchased from prescription records). By combining prescription records from most pharmacies, the data mining companies can track how often Dr. Jones prescribes Lipitor, how often she prescribes other cholesterol-reducing drugs, what combinations of drugs she uses, and whether she prescribes a particular drug as first-line treatment or as an alternative after other treatments fail. The evidence in Vermont's trial showed that patient identity is encrypted in a way that allows data mining companies to track the drugs prescribed to a particular, though anonymous, patient and identify the doctors who write the prescriptions.

As data mining companies emphasized to pharmaceutical companies, using this data to market drugs to doctors would increase sales and profits, and allow the companies to "reap[] big returns." But pharmaceutical companies took pains not to explain this new marketing practice to doctors. Sales representatives were trained not to discuss the data with doctors and to leave their laptop computers (loaded with detailed spreadsheets tracking doctors in their territory) outside doctors' offices. Neither data mining companies nor pharmaceutical companies made any effort to get the consent of patients or doctors before using their information as a marketing tool. For the most part, patients and

doctors did not even know that health care records were being sold and used in this way. *E.g.,* Pet. App. 23 n.6; *Sorrell,* 2009 WL 1098474, at *12 n.15.

Beginning in 2006, three state legislatures have taken a close look at the practice of using prescriber-identifiable data from prescription records for marketing prescription drugs. After investigation and deliberation, these three legislatures in Maine, New Hampshire, and Vermont decided to regulate the practice to protect privacy, contain unnecessary health care spending, and protect the public health. The narrow question posed by this case, and similar cases still pending in the lower courts, is whether states have authority, consistent with the First Amendment, to regulate the sale and commercial use of this data that is drawn from nonpublic patient health care records.

ARGUMENT

Petitioners have not advanced persuasive grounds for the Court to grant the petition for certiorari. The Court does not typically grant review in the first case to raise a particular issue, especially when, as here, other similar cases are pending in the lower courts. There are good reasons to adhere to that practice and deny the petition in this case. The expedited trial court proceeding and certain procedural issues discussed below cloud any potential First Amendment review. Just as importantly, the

Courts of Appeal have only begun to consider the First Amendment arguments asserted by petitioners. The Court should not reach out to decide the question at this early stage. Indeed, absent a conflict in the lower courts, this Court's review may not be required at all.

New Hampshire's brief in opposition fully addresses the principal points raised by the petition and shows why the conflicts asserted by petitioners either do not exist or are not relevant to the petition for certiorari. Vermont seeks to add to this conversation by showing that this case is a poor vehicle for the Court to consider whether restrictions on the use of prescriber-identifiable data satisfy the *Central Hudson* standard for commercial speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). The First Circuit applied *Central Hudson* as a separate and fully dispositive ground for upholding New Hampshire's law, and petitioners ask this Court to review that fact-intensive holding. *See* Pet. 24-37. The Court should not do so. To begin with, this is not only the first case to raise this issue, it is also a facial challenge that was expedited in the trial court. As a result, New Hampshire did not have a full opportunity to develop a factual record and the decision below reflects uncertainty about petitioners' standing and the scope of New Hampshire's law. Second, the decision by the District Court in Vermont's case confirms that the First Circuit's application of *Central Hudson* to these facts is unremarkable. Assuming *Central Hudson* review is

even required,[4] restrictions on the use of prescriber-identifiable data readily satisfy that standard. Other courts have likewise upheld limited restrictions on the use or disclosure of data; nothing about the First Circuit's ruling on this point warrants Supreme Court review.

I. This case is a poor vehicle for reviewing the fact-intensive application of *Central Hudson* to restrictions on the use of prescriber-identifiable data.

New Hampshire was the first state to restrict the use of prescriber-identifiable data in marketing prescription drugs. Petitioners filed suit in July 2006, shortly after New Hampshire's law became effective. The District Court expedited the case and it went quickly to trial six months later, in January 2007. *See* Pet. App. 10-11. The record shows that the parties conducted minimal discovery. New Hampshire relied primarily upon the legislative record together with expert testimony about pharmaceutical marketing practices. Vermont agrees with New Hampshire and the First Circuit that this record is certainly sufficient to support the law's constitutionality under

[4] Vermont agrees with the First Circuit that New Hampshire's law regulates commercial conduct, not speech protected by the First Amendment. But as Vermont has consistently argued in its own case, even if the *Central Hudson* standard applies, these narrowly-tailored restrictions on the use of prescriber-identifiable data are constitutional.

Central Hudson. *See* Pet. App. 41; *id.* at 122 (Lipez, J., concurring) (noting the "extent of [New Hampshire's] empirical and anecdotal evidence"). But the record does not provide a complete picture of the ways in which pharmaceutical companies rely upon the covert use of data mining to market their products to doctors. That outcome is not surprising: petitioners brought a facial challenge to New Hampshire's statute, the case was tried very quickly, and no pharmaceutical company participated in the lawsuit.

These factors – petitioners' facial challenge, the expedited proceeding, and the lack of a proper plaintiff – all point toward the same conclusion: this is not a particularly good case for the Court to grant review.

A. Facial challenges are disfavored, even in First Amendment cases.

Petitioners chose to bring a facial challenge to New Hampshire's law. *See* Pet. App. 45. "Facial challenges are disfavored," *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008), and the difficulty of adjudicating a facial challenge, *see id.* at 1190-91, is one reason not to grant review in this case. Petitioners may argue that a facial challenge is appropriate because they claim that New Hampshire's law restricts their speech rights. *Cf. id.* at 1191 n.6. The question at this point, however, is not whether petitioners' facial challenge is justiciable, but whether the case is a

suitable vehicle for this Court's review. Facial challenges are disfavored in part because, when a statute has not been implemented or enforced, the Court may not have the best record possible to assess the statute's constitutionality. *See id.* at 1190-91; *see also Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1622-23 (2008) (Stevens, J., joined by Roberts, C.J. and Kennedy, J.). The facts may not be developed fully and questions may remain about the statute's interpretation that can only be resolved by the state courts. *See Washington State Grange,* 128 S. Ct. at 1190-91. As explained further below, these concerns are present here. Had petitioners' claims arisen in the context of an enforcement action brought by New Hampshire's Attorney General, the courts could have undertaken review with the benefit of a precise factual application. And the state courts could have resolved any questions about the statute's meaning. That did not happen, however, and this Court should accordingly hesitate to entertain petitioners' request to invalidate New Hampshire's statute on its face. *See Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006) ("ruling of unconstitutionality frustrates the intent of the elected representatives of the people").

B. New Hampshire's expedited proceeding foreclosed discovery of additional relevant information.

In reaching its final decision upholding Vermont's law, the District Court in Vermont observed that the

parties presented "testimony from numerous witnesses and introduced reams of exhibits." *Sorrell*, 2009 WL 1098474, at *4. Vermont's legislative record, introduced at trial, comprises hundreds of pages of expert testimony, news reports, journal articles, and testimony from Vermont doctors. The trial record includes expert opinion testimony about the influence of marketing on doctors and its impact on the doctor-patient relationship; the unjustified over-prescription of expensive new drugs; the risk to patients from unnecessary prescription of new drugs with unknown risks; and the potential cost savings if prescribing practices shift even slightly in favor of generic drugs. Importantly, Vermont's record also includes industry documents obtained in discovery from data mining and pharmaceutical companies. While New Hampshire presented a strong body of evidence, sufficient for all three judges below to uphold New Hampshire's law, the expedited proceeding in New Hampshire foreclosed that state's opportunity to conduct additional discovery and present additional evidence.

Vermont cannot summarize its record here, nor would it be appropriate to do so. Discussion of a few points, however, is helpful to illustrate the ways in which Vermont's record expands upon – and fully supports – the First Circuit's *Central Hudson* analysis.

1. Vermont's record contained substantially more detail about the State's interest in protecting the health and safety of its residents. Vermont's experts provided detailed testimony about the

uncertain risks posed by new drugs, and the need to avoid over-prescription of those drugs before their use and risks are fully understood. The District Court's opinion recounts some of this evidence about drugs like Baycol and Vioxx, which were widely and unnecessarily over-prescribed before they were withdrawn from the market for safety reasons. *Sorrell,* 2009 WL 1098474, at *13. One of the plaintiffs' key witnesses – the "distinguished cardiologist" who also testified for petitioners in New Hampshire, Pet. App. 32 – provided important testimony supporting Vermont on this precise point. *Sorrell,* 2009 WL 1098474, at *13 (citing testimony of Dr. Wharton). The District Court found this evidence persuasive and concluded that Vermont's law substantially advances the State's interest in protecting patient health as well as its interest in controlling health care costs. *Id.*

The First Circuit, on the other hand, did not consider the State's interest in promoting public health. Pet. App. 28. In his separate opinion, Judge Lipez opined that New Hampshire's record on this point was "undeveloped" and "inadequate" under *Central Hudson.* Pet. App. 106 (Lipez, J., concurring). The District Court's ruling in Vermont shows that public health is affected by the use of prescriber-identifiable data for marketing, and should be given full consideration under *Central Hudson.*

2. Vermont's direct evidence about pharmaceutical marketing practices, particularly evidence obtained in discovery from industry sources, provides

strong support for the States' *Central Hudson* arguments. As one example, petitioners here promote pharmaceutical detailing using prescriber-identifiable data as an "exchange of valuable, truthful information between doctors and pharmaceutical companies." Pet. 23-24. When these same data mining companies promote the use of prescriber-identifiable data to pharmaceutical companies, however, the message sounds quite different. In fact, the message sounds much like what New Hampshire and Vermont say: that using prescriber-identifiable data in marketing allows drug companies to substantially increase drug sales and profits. IMS executives expressly describe the aim of purchasing prescriber-identifiable data as "reaping big returns." They describe one company increasing its market share *by 86%*. *Sorrell*, 2009 WL 1098474, at *11. Promotional materials from another data mining company explain that sales representatives use prescriber-identifiable data to gain access to the "most valuable prescribers," which in turn leads to more prescriptions, increased revenue, and profits. As for the supposed "exchange of valuable, truthful information," an IMS executive expressed a different view in a promotional industry article. He pointed out that prescriber-identifiable data answers the two most important questions for pharmaceutical sales representatives: "how much am I getting paid" and "what do I need to do to make more money." Another IMS brochure sums up the point in unmistakable terms. Prescriber-identifiable data lets companies "maximize the revenue per call and the scripts per detail."

Along with information from data mining companies, Vermont obtained discovery from numerous pharmaceutical companies and used the results to help prove its case at trial. These internal pharmaceutical company documents rebut both petitioners' claims and the assertions made in PhRMA's amicus brief in support of the petition. Like petitioners, PhRMA tries to convince the Court that restricting the use of prescriber-identifiable data will make detailing "less informative." PhRMA Amicus Br. 11. The District Court in Vermont's case flatly rejected this contention, and concluded that prescriber-identifiable data "does not add" to the "purported educational value" of detailing. *Sorrell*, 2009 WL 1098474, at *11.[5] The court's finding on this point is fully supported by industry documents that show how companies use prescriber-identifiable data for marketing. Some examples from these documents contradict PhRMA's assertions that the data is used to "facilitate discussions" and "provide doctors the most useful scientific information." PhRMA Br. 10.

[5] The District Court likewise rejected PhRMA's claim that using the data makes detailing more efficient because it allows sales representatives to determine which doctors may be interested in using a drug. The District Court found that sales representatives record and track numerous details about the doctors they visit, including birthdays and favorite sports teams, and thus can easily track a doctor's specialty areas. *Sorrell,* 2009 WL 1098474, at *12.

- Managers are trained to use the data to provide feedback to sales representatives, with suggested statements like: "These are really important doctors in your territory, but they are really dragging down your share. If you move 10 of these doctors by 5 percentage points, you will hit your [sales] goal easily."

- Sales representatives use prescriber-identifiable data in a "payout calculator." The representative plugs in the desired salary or bonus and the calculator shows the volume of prescriptions or market share needed to achieve that goal.

- Sales representatives get regular email "alerts" telling them things like which prescribers are "underperforming" (that is, not writing enough prescriptions).

- Companies train sales representatives to use prescriber-identifiable data to target doctors based on sales and market share. As one company explains, sales representatives should use the data to "[l]ocate Top Potential Physicians" that "can help move share." After sorting their list of physicians, sales representatives should "delete" physicians who do not make the "market share cutoff," leaving on the list "only those top physicians that can help move share."

These materials and others seriously undermine claims both about the benefits of marketing using

prescriber-identifiable data and the supposed educational benefits of detailing generally. Sales representatives are trained to promote their products and influence doctors to increase the number of prescriptions written for their products. They are not trained to improve the prescribing practices of physicians based on treatment guidelines or best practices. *Cf.* Pet. 24. A statement from one company's marketing manual is telling. According to this company, when a doctor says "All my patients are controlled," that statement is an "obstacle" and sales representatives must find ways to handle it. That kind of training is not consistent with a description of detailing as providing doctors with "useful information."

3. Another important fact uncovered by Vermont – but not mentioned in the petition or the opinions below – is that petitioners and pharmaceutical companies *prohibit* publication or disclosure of prescriber-identifiable data. Petitioners' self-description as "publishers" of prescriber-identifiable data, Pet. i, 10, 12, is not accurate, because petitioners do not make prescriber-identifiable data publicly available. To the contrary, petitioners contractually bar disclosure of the data. Pharmaceutical companies license the right to use the data but are not allowed to disclose it to anyone else. In fact, it is undisputed that pharmaceutical companies prohibit sales representatives from disclosing information about a

doctor's prescribing practices *to the doctor*. *Sorrell,* 2009 WL 1098474, at *12 n.15.[6]

PhRMA's claim that prescriber-identifiable data is used to "facilitate" discussions thus represents a careful choice of language on its part. *See* PhRMA Br. 10. As described by the District Court in Vermont, a sales representative's use of the data is "covert." *Sorrell,* 2009 WL 1098474, at *11, *12. A former sales representative testified that he was trained not to show the data to doctors, to dismiss or deflect questions about the use of the data, and to understate the value of the data to the company's marketing practices. He explained that doctors "regard this information as confidential" so "we pretend we don't know." This same sales representative described making a sales pitch where he knew but did not disclose information about the doctor's prescribing practices. He called the presentation factually true but "very skewed" and "distorted." Whatever discussion is facilitated by prescriber-identifiable data, it is not an open exchange of information.

As this discussion shows, the record compiled in Vermont proves that pharmaceutical companies make

---

[6] The First Circuit acknowledged that detailers "do not routinely disclose a physician's prescribing history to that physician" and "many physicians . . . never discover that the detailers possess such information." Pet. App. 23 n.6. But the record apparently did not disclose the fact that data mining companies contractually prohibit pharmaceutical companies from disclosing this information to doctors or anyone else.

secret use of prescriber-identifiable data to try to influence doctors without the doctors' knowledge. It is no surprise that the Vermont Medical Society,[7] which provided strong support for Vermont's law, told the Vermont Legislature that "the use of physician prescription information by sales representatives is an intrusion into the way physicians practice medicine." 2007 Vt. Acts & Resolves, No. 80, § 1, Finding 20, at 637.[8]

Even this cursory discussion of the proceedings and evidence in Vermont's case shows that the Court should not grant review at this time. New Hampshire's case was the first to raise this issue, and the speed of the proceeding came at the expense of the ordinary development of the record through discovery. One telling comparison is that the parties in New Hampshire conducted only a handful of depositions, while the parties in Vermont conducted almost 50. It makes little sense for the Court to grant review when the issue is still moving through the lower courts and other pending cases have more fully developed records.

---

[7] The Vermont Medical Society represents two-thirds of Vermont doctors. 2007 Vt. Acts & Resolves, No. 80, § 1, Finding 20, at 637.

[8] In addition to the Medical Society's resolution in the legislative record, Vermont also presented expert testimony on the ways that pharmaceutical marketing, including the use of prescriber-identifiable data, undermines the doctor-patient relationship.

C. Petitioners' lack of standing and the related uncertainty about the intended reach of New Hampshire's law further show that the Court should not grant review in this case.

The First Circuit's split decision shows that this case is procedurally complex. Petitioners' standing to raise all the First Amendment claims is doubtful. And uncertainty about the intended reach of New Hampshire's law – whether it applies solely to domestic conduct and, if so, what conduct – muddles the record for purposes of deciding the *Central Hudson* issue.

1. Petitioners' lack of standing clouds the First Amendment issues in this case.

As the majority opinion below recognized, this case presents a difficult question of standing. Pet. App. 12-17. The only parties interested enough to bring suit in New Hampshire were data mining companies. New Hampshire's law, however, principally regulates pharmacies, and the law has the effect of restricting the use of prescriber-identifiable data by pharmaceutical companies who market to doctors. No pharmacy, pharmaceutical company, or doctor felt sufficiently aggrieved to challenge New Hampshire's law. Vermont agrees with New Hampshire and the First Circuit that data mining companies do not have standing to litigate the rights of pharmaceutical companies, because those companies are fully capable of asserting their own rights. Indeed, PhRMA, the

trade organization for pharmaceutical companies, is a party to the litigation in Vermont.

The majority opinion below sets forth why petitioners lack standing and New Hampshire's Brief in Opposition convincingly explains why, as a result, this case does not present all the First Amendment issues asserted by petitioners. Rather than repeating those arguments here, Vermont notes only that this question of standing complicates any First Amendment review by this Court. PhRMA has filed an amicus brief with this Court that attempts to assert the views and interests of pharmaceutical companies. But no pharmaceutical company was concerned enough to file suit in New Hampshire. If the Court grants review in this case, the Court must first decide what issues petitioners have standing to raise – and the answer to that question may limit the Court's First Amendment review.

2. The record also shows uncertainty over the scope of New Hampshire's statute.

No court has definitively resolved the scope of New Hampshire's statute. In response to petitioners' facial Commerce Clause challenge, New Hampshire argued that the statute should be interpreted to "relate only to activity that takes place domestically." Pet. App. 48-49. Accepting this argument as a concession, the majority opinion construed the statute as not barring the routine out-of-state transfer,

aggregation, and sale of data from New Hampshire prescription records. Pet. App. 50. The court expressly did not decide "whether the purchasers [of the data] could subsequently make use of the aggregated data in New Hampshire." *Id.* at 50 n.11.

The filings in this Court, as well as the opinions below, show that this uncertainty also complicates review of the petitioners' First Amendment claims. Petitioners claim that "as construed by the First Circuit, [New Hampshire's law] permits most New Hampshire prescription history data to be used in detailing." Pet. 35. In fact the First Circuit did not go nearly so far. *See* Pet. App. 50 & n.11. However, Judge Lipez, dissenting on this issue, observed that the majority's interpretation may mean that the law "would pose no barrier to the use of such data by detailers *inside* New Hampshire." Pet. App. 146. Judge Lipez also highlighted a second, related issue not resolved by the majority opinion: whether New Hampshire pharmacies can transfer data out-of-state knowing the data will later be sold or used for marketing purposes. Pet. App. 146-48. New Hampshire, in its Brief in Opposition in this Court, argues that the statute should *not* be construed to allow New Hampshire pharmacies to avoid the restriction by routing data through out-of-state facilities.

Thus, as the case is presented to this court, there is no lower court decision that elucidates the reach of New Hampshire's statute. Instead, the petition, New Hampshire's response to the petition, and the separate opinions below demonstrate uncertainty on this

point. To reach the merits of petitioners' First Amendment arguments, the Court would likely have to first resolve this question and decide whether the First Circuit properly understood and applied New Hampshire's argument about the geographic reach of the statute. *Compare* Pet. App. 46-50 *with id.* at 142-50.

This uncertainty further illustrates the difficulty of resolving facial challenges and counsels against granting the petition. This Court is not in the best position to determine what concessions, if any, were intended by arguments made by the parties in the lower courts. Moreover, if arguments made below are deemed concessions that bind the parties in this particular proceeding, then the Court's First Amendment analysis may have little application beyond the specific facts of this case.

II. Vermont's record confirms that the First Circuit's decision is an unexceptional application of the *Central Hudson* test and absent a conflict in the circuits, there is no need for this Court's intervention.

Vermont's case is relevant for another, perhaps more important reason. It shows that the First Circuit's *Central Hudson* analysis is a reasonable and unexceptional application of the *Central Hudson* factors to a specific set of facts. Assuming New Hampshire's law warrants any First Amendment scrutiny as a restriction on speech – a point Vermont, like New Hampshire, does not concede – New Hampshire met its burden under *Central Hudson.*

Any doubt on this point is erased first, by Judge Lipez's separate and thorough analysis below, and second, by the recent decision upholding Vermont's similar law. The District Court in Vermont's case was not bound to follow the First Circuit's decision in *Ayotte*. Indeed, the District Court's decision shows its independent analysis, because the decision rejects *Ayotte's* first ground for upholding the law. *Sorrell,* 2009 WL 1098474, at *5-*6. The District Court conducted its own independent review, based on a substantial and detailed record compiled through nearly a year of pretrial proceedings, and readily upheld Vermont's law under *Central Hudson*. *Id.* at *8-*15.

Taken together, the First Circuit's ruling in *Ayotte* and the District Court's decision in *Sorrell* show that this Court's review is unnecessary and unwarranted. The lower courts are tasked with undertaking the detailed *Central Hudson* review in commercial speech cases. They have done so here and the decisions show that the relevant evidence strongly supports the constitutionality of these laws. Absent a conflict in the lower courts or a compelling indication that a lower court has erred, there is no need for this Court to review the application of established law to a particular set of facts. And, in fact, there is no pertinent split in the lower courts. The First Circuit's ruling fits comfortably alongside other lower court rulings upholding similarly limited restrictions on disclosure or commercial use of data. *E.g., National Cable & Telecom. Ass'n v. FCC,* 555

F.3d 996, 1002 (D.C. Cir. 2009) (upholding restriction on disclosure of customer information); *Trans Union LLC v. FTC,* 295 F.3d 42, 53 (D.C. Cir. 2002) (upholding Gramm-Leech-Bliley privacy rules, including restriction on disclosure of consumer account numbers); *United States v. Miami Univ.*, 294 F.3d 797, 820-24 (6th Cir. 2002) (rejecting First Amendment challenge to Family Educational Rights and Privacy Act and finding no First Amendment right of access to student records); *Trans Union Corp. v. FCC*, 245 F.3d 809, 818 (D.C. Cir. 2001) (upholding restriction on the creation of targeted marketing lists under Fair Credit Reporting Act).[9]

Given this body of case law and the decisions in *Ayotte* and *Sorrell,* the lower courts may well continue to hold that laws restricting the use of prescriber-identifiable data are constitutional. If so, this Court's

---

[9] Other laws restricting disclosure or use of data have apparently not been challenged, suggesting that petitioners greatly overstate the practical importance of the First Circuit's decision upholding New Hampshire's law. *See, e.g.,* Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d-6 (prohibiting use and disclosure of "individually identifiable health information"); Video Privacy Protection Act, 18 U.S.C. §§ 2710-2711 (prohibiting disclosure of "personally identifiable information concerning any consumer" of a video rental establishment without the individual's consent); Cable Communications Policy Act, 47 U.S.C. § 551(c)(1) (prohibiting disclosure of "personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber"); Stored Communications Act, 18 U.S.C. § 2702 (restrictions on disclosure of electronic communications).

review will not be necessary. In any event, the Court should not take up the issue prematurely.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM H. SORRELL
Attorney General

BRIDGET C. ASAY*
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3181
Attorneys for Amicus Curiae State of Vermont
**Counsel of Record*