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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

1. The petition and the extraordinary *twelve* supporting *amicus* briefs filed by a diverse array of forty individuals and organizations demonstrate that certiorari should be granted to review the First Circuit's decision rejecting petitioners' First Amendment challenge to New Hampshire's Prescription Information Law (PIL). The decision below not only approves sweeping restrictions on the economically vital industry of data mining, but equally applies to any publication of commercially valuable facts, such as the stock reports of the *Wall Street Journal*. "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." NELF et al. Br. 22.

New Hampshire's assertion that the ruling below "may not" extend far beyond data mining because the court of appeals characterized petitioners' transfers of prescription information as intended "to increase one party's bargaining power in negotiations" (BIO 13 (quoting Pet. App. 26)) is empty: any transfer of information that may facilitate better-informed decisions improves "bargaining power" in the identical sense. "If the state had barred the sale of Nielsen ratings to fast food advertisers to prevent them from targeting shows that appeal to young adults, there would be no doubt the restriction violated the first amendment, even though it did not directly regulate advertisers" (PhRMA & BIO Br. 6), but such a restriction would be free from First

Amendment scrutiny under the First Circuit's analysis.

Even if limited to prescription history information, the ruling below threatens a vast amount of speech, including "legitimate pharmaceutical survey research by eliminating a valuable information and data resource." Council of Am. Survey Research Orgs. et al. Br. 2. As the *amici* researchers explain: the PIL bans the transfer of "data describing real-world events and practices; data that informs researchers as they study and evaluate medical practices and health care policies—issues of vital interest to society, and information squarely within the core of constitutionally protected speech." Ernst Berndt, Ph.D. et al. Br. 5. The pernicious effect of the New Hampshire statute is well illustrated by the lead front-page article in the nation's largest newspaper announcing its list of the country's "Most Influential Doctors," which explains that "[b]ecause of the ban, no New Hampshire doctors appear." Steven Sternberg, et al., *In Patients' Hunt for Care, Database 'A Place to Start,'* USA Today, May 14, 2009, at 1A-2A.

2. The petition demonstrated (at 14-16) that the First Circuit's holding that the PIL regulates conduct rather than speech conflicts with this Court's precedents and with the rulings of other circuits. Indeed, since the petition was filed, the Tenth Circuit has reaffirmed the holding of *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), that a prohibition on the use of data to target marketing is a speech restriction subject to First Amendment scrutiny. *Sorenson Communications, Inc. v. FCC,* No. 08-9503, 2009 WL 1561430 (10th Cir. June 4, 2009).

New Hampshire does not even attempt to defend the court of appeals' characterization of petitioners' speech as a "commodity." Through the PIL, "the State of New Hampshire is *not* regulating beef jerky – it is banning the flow of information *because* it may be used to persuade." Ass'n of Nat'l Advertisers Br. 9 (emphases in original). "Books, newspapers, magazines and website access are all forms of information sold as 'a commodity,' and certainly no State could regulate the transfer of these items without any First Amendment scrutiny." Source Healthcare Analytics Br. 6. *See also* Datamonitor Group Br. 7 ("The ultimate product—the speech at issue here—thus necessarily reflects considered judgments as to what the data means, which data is significant, and how it should be interpreted and conveyed to customers.").

Even assuming the First Circuit were correct that the PIL regulates "conduct," New Hampshire has no response to the petition's showing that the ruling below conflicts with this Court's precedents because the *purpose* of the regulation is to limit the speech of detailers, in violation of the First Amendment. *See* Pet. 19 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

3. The petition also demonstrated that certiorari is warranted because the court of appeals' alternative holding that the PIL survives First Amendment scrutiny conflicts with this Court's and other circuits' decisions.

a. The petition established (at 12-13) that the PIL rests on a prohibited paternalistic judgment that doctors cannot make correct decisions about what drugs to prescribe for their patients. New Hampshire only reinforces that fact: based on the Legislature's

view that "physicians are often unaware of the substantial impact manufacturer promotional activities have on their prescription practices" (BIO 2), the State determined to force "a *shift in the message* being provided by pharmaceutical representatives" (BIO 3 (emphasis added)). "A paternalistic desire to have consumers, let alone industry professionals, make different market choices among goods and services is not the type of interest that can sustain a restriction on truthful and non-misleading commercial speech." Coalition for Health Care Commc'ns Br. 16.

The State notes that it may seek to defend the PIL on two other grounds that the district court rejected and the First Circuit did not embrace: "maintaining patient and prescriber privacy, and protecting citizens' health from the adverse effects of skewed prescribing practices." BIO 35. But "'[p]rivacy' considerations are phantoms" (Center for Democracy and Tech. et al. Br. 7) because (a) petitioners never receive identifying information about patients, and (b) doctors can have their own prescription information withheld or simply decline to meet with detailers. The State's remaining purported interest – inhibiting discussions with detailers that could lead doctors to make poor prescribing decisions – is "nothing more than a restatement of [the State's] contentions that the law can be justified because it prevents pharmaceutical companies from using prescriber-identifiable data in ways that undermine public health and increase health care costs" (Pet. App. 101, (Lipez, J.)) and thus is precisely the kind of paternalistic judgment that this Court's precedents reject. If New Hampshire wants to regulate the marketing or prescribing of

drugs, it should do so directly. Alternatively, it can (and does) engage in speech of its own. But the First Amendment does not allow it to suppress petitioners' constitutionally protected speech in a further effort to suppress the speech of pharmaceutical companies.

Nor does New Hampshire offer a persuasive defense of the First Circuit's standing holding. The petition demonstrated (at 28-29) that the court of appeals erred – and contravened this Court's decision in *Western States*, *supra* – in sustaining the PIL on the basis of the State's interest in "level[ing] the playing field" in communications between detailers and physicians (Pet. App. 25) while refusing to consider whether that interest was impermissibly paternalistic. The fact that the court of appeals permitted petitioners to "dispute[] the State's assertion that" the PIL would reduce health-care costs (BIO 28) only reinforces the point: there was no basis for the First Circuit to address whether the statute furthered the State's asserted interest while simultaneously refusing to consider whether that interest was even permissible under the First Amendment.

b. New Hampshire does not dispute the petition's showing (at 21-22) that there is a conflict in this Court's precedents over the definition of "commercial speech" that has spawned a significant circuit split. This case is an ideal vehicle to resolve that conflict because the information transfers prohibited by the PIL manifestly do not propose a commercial transaction or otherwise amount to advertising. *See* Pet. 23. The State's answer that "[t]his Court has been reluctant, for good reason, to reduce the doctrine to any simple rule or determinate criteria, and it should decline to do so now" (BIO 23 (footnote

omitted)) dramatically understates the pervasive uncertainty and inconsistency that exists in the law. Petitioners' point is not merely that the existing precedent is vague, but that it has produced *conflicting* standards that produce inconsistent results based on the coincidence of the court hearing the challenge.

The petition also presents an ideal opportunity for this Court to consider the degree of constitutional scrutiny applicable to restrictions on commercial speech. Petitioners' transfers of prescription information "have none of the characteristics associated with commercial speech": they "pose no 'risk of fraud,' . . . nor do they involve 'misleading, deceptive, or aggressive sales practices,' . . . that have in the past permitted more robust regulation of commercial speech." Am. Bus. Media et al. Br. 11-12. The PIL instead aims to suppress valuable exchanges between detailers and doctors that address the strengths and weaknesses of various treatments. Pet. 23-24 (quoting Pet. App. 32 and trial testimony).

c. New Hampshire offers no response to the petition's showing (at 26-27) that the PIL amounts to prohibited viewpoint discrimination. The statute's avowed purpose is to inhibit drug sales by brand-name manufacturers, while freely permitting the State and insurers to use the *identical* information to promote generic equivalents or state preferred brands. "In so doing, the government creates a bias in the democratic process designed to achieve the state's desired result, which is exactly the opposite of what the First Amendment is intended to do." PLF Br. 15.

d. The ruling below also creates a significant circuit conflict over the continued vitality of the

holding of *Posadas de P.R. Associates v. Tourism Co.*, 478 U.S. 328 (1986), that it is "'up to the legislature' to choose suppression [of speech] over a less speech-restrictive policy." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 509 (1996) (plurality opinion calling for *Posadas*' overruling). New Hampshire argues that the court of appeals cited *Posadas* only "in rejecting one of the district court's suggested alternative measures: counter-detailing." BIO 33. But that is precisely the point: the petition collected (at 36-37) numerous effective alternatives to the PIL. The First Circuit held, citing no other authority than *Posadas*, that the Legislature was free to choose to restrict petitioners' speech instead. Pet. App. 40.

Relatedly, the petition demonstrated (at 30-31) that the First Circuit erred in "defer[ring] to the New Hampshire legislature" (Pet. App. 37), given that there is concededly "no direct evidence" (Pet. App. 33) of the statute's efficacy. The Legislature thus made no study of whether the statute would work, never subpoenaed a single pharmaceutical provider for information about its detailing practices, never assessed whether doctors in the State were actually proscribing unnecessarily expensive drugs, and made no findings at all, much less findings that the law would achieve its objectives. In light of the First Amendment interests directly implicated by the PIL, the question whether the statute advances the State's interests is not "more a matter of policy than of prediction." *Contra* Pet. App. 35. Instead, the First Amendment obliges the courts to conduct a searching examination of the Legislative record that the PIL cannot possibly survive.

e. Certiorari is also warranted because the First Circuit sustained the PIL despite the fact that the

statute is patently under- and over-inclusive. *See* Pet. 34-37. The attorney general concedes that, under the First Circuit's authoritative construction of the PIL – which it adopted at the State's own urging – the statute will not significantly further the State's asserted interests "because pharmacies transmit the data to data centers *outside* of New Hampshire before selling the data to Petitioners." BIO 31-32 (emphasis in original). Having persuaded the court of appeals to adopt its prior construction in order to reject petitioners' Commerce Clause challenge, the State now attempts to reverse course to opine that "[t]he PIL need not be given such a narrow construction." BIO 32. This vacillation is entirely improper but ultimately academic. The Court's settled practice is to defer to the courts of appeals' interpretation of state law. *See McMillian v. Monroe County*, 520 U.S. 781, 787 (1997). There is accordingly no "confusion over the scope of the PIL." *Contra* BIO 34.

That is not to say that the PIL represents an insubstantial First Amendment burden. The statute continues to directly prohibit petitioners' acquisition and analysis of prescription history information provided by New Hampshire pharmacies that do not employ out-of-state data centers. The Attorney General's refusal to acknowledge that the State is bound by the court of appeals' construction of the PIL has furthermore created a *severe* chill in the willingness of even non-New Hampshire entities to provide prescription information to petitioners.

Nor is there merit to the State's assertion that "Petitioners' argument that the PIL is over-inclusive because it inhibits competition between patent-protected brands is unpersuasive since the PIL affects all brands equally." BIO 33. It is uncontested

that the PIL impedes detailing that would encourage the use of less expensive but equally effective brand-name drugs. The statute thus in many applications restricts speech that would further the State's asserted goals, which is the very definition of overinclusiveness. *See* Pet. 34-37.

4. New Hampshire's assertion that this case is not an ideal vehicle in which to resolve the questions presented is unpersuasive.

a. There is no reason to defer resolving the questions presented for several years until a pharmaceutical company can litigate a challenge to the PIL. *Contra* BIO 34. The resulting delay would harm significant First Amendment interests. There is no prospect that such a case would produce a different result, given that the First Circuit held that the PIL is immune from any First Amendment scrutiny. There also is no benefit to awaiting a suit instituted by a pharmaceutical company to decide the questions presented, given that the statute does not directly regulate them. New Hampshire's statement that the PIL imposes only "restrictions . . . on the *recipient*'s use of the information" (BIO 17 (emphasis in original)) is a serious mischaracterization: the statute instead operates directly on *petitioners'* publication of information. *See* App. 13. "This case is a superior vehicle for addressing First Amendment issues implicated by the PIL" because Petitioners, as mere publishers of information, are entitled to greater First Amendment protection than drug advertisers. WLF et al. Br. 17.

b. Nor would a subsequent case produce a better record to decide the questions presented. As the First Circuit found, and New Hampshire reiterates, "[t]he raw facts are largely undisputed." BIO 30

(quoting Pet. App. 4). New Hampshire thus notably does not doubt that the record on the constitutionality of the PIL was fully developed.

Further, the many significant legal errors of the court of appeals are not tied to the underlying factual record. For example, the First Circuit held that (i) petitioners' speech warrants no First Amendment protection; (ii) the PIL alternatively restricts "commercial speech"; and (iii) the Court should defer to the New Hampshire legislature rather than scrutinize the law independently. None of those holdings relates in any respect to the record that was assembled in this case.

Amicus Vermont's effort (at 10-18) to tout the record in its own just-completed trial is misleading and merely represents a litigant's attempt to position its own case for review before this Court. Although proceedings in the New Hampshire litigation were placed on an expedited track by agreement of the parties, the trial was not conducted "very quickly." *Contra* Vermont Br. 9. During the half-year period between the filing of the complaint and the trial, the parties developed an extensive factual record. Petitioners' request for injunctive relief included seven declarations (including one detailing the entire legislative record). By the time of trial, the parties had conducted extensive discovery and recognized that they had compiled all the relevant facts. New Hampshire had deposed most of petitioners' trial witnesses (seven in total) and introduced declarations, depositions, and live testimony from an array of witnesses. Petitioners introduced deposition and trial testimony from six witnesses and articles and data on the uses of prescription histories. The trials in the New Hampshire and Vermont cases were

indistinguishable in length (both lasted five days); the only notable difference is that New Hampshire called *more* factual witnesses and introduced *more* evidence than did Vermont.

This suit is moreover a "facial challenge" (Vermont Br. 7) to the PIL only in the sense that petitioners filed suit prior to the statute's enforcement. Vermont omits that petitioners' complaint expressly seeks a declaration that the PIL "is unconstitutional, both facially *and as applied* to the non-commercial speech in which the plaintiffs engage." D.E. 1, at 28 (emphasis added). In invalidating the PIL, the district court did not treat the suit as a facial attack. In any event, such pre-enforcement suits are commonplace in First Amendment cases, given the critical free speech interests involved. This Court has long applied an "exception to [the Court's] normal rule regarding the standard for facial challenges" in such cases. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Moreover, the ordinary concern with facial challenges – that the measure may constitutionally be applied to parties not participating in the suit – does not arise here because the parties agree (and even Vermont does not dispute) that the same First Amendment analysis applies to all applications of the PIL. Nor in the wake of the First Circuit's ruling is there otherwise any disagreement about the circumstances in which the statute applies.

This Court's intervention would also not in any respect be premature. The ruling below gives rise to significant conflicts with decisions of this Court and rulings of other circuits. Those are the prototypical grounds for certiorari review. The overwhelming volume and diversity of *amicus* participation

demonstrates the profound error and sweeping consequences of the ruling below. The question moreover arises in a context of undoubted importance, as two other states have already adopted similar statutory schemes and roughly half of the states are considering them.

CONCLUSION

For the reasons set forth above, as well as in the petition and the supporting *amicus* briefs, certiorari should be granted.

Respectfully submitted,

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