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 WASHINGTON LEGAL FOUNDATION, CATO INSTITUTE, REASON FOUNDATION, THOMAS F. REILLY, BILL DEWEESE, KEN GUIN, RAY MERRICK, AND GLENN RICHARDSON AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Of Counsel:

Ilya Shapiro
Cato Institute
1000 Mass. Ave., NW
Washington, DC 20001
(202) 218-4600

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: April 27, 2009

QUESTION PRESENTED

Amici curiae address the following issues only, the first and second Questions Presented in the petition for certiorari:

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

2. Does the First Amendment permit a State to prohibit the acquisition, analysis, and publication of accurate factual information that is used by third parties for a commercial purpose, when the State does so for the purpose of "level[ing] the playing field" by reducing the effectiveness of the third parties' commercial speech, while simultaneously permitting the use of the identical information for communication of the State's preferred viewpoint?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

BRIEF OF WASHINGTON LEGAL FOUNDATION, CATO INSTITUTE, REASON FOUNDATION, THOMAS F. REILLY, BILL DEWEESE, KEN GUIN, RAY MERRICK, AND GLENN RICHARDSON AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

Amici curiae are a bipartisan group of current and former elected state government officials, and three nonprofit organization; each strongly supports the First Amendment rights of participants in the health care industry to speak truthfully without unwarranted government interference.[1]

The Honorable Thomas F. Reilly served as Attorney General of Massachusetts from 1999 to 2007. Rep. Bill DeWeese is the Majority Whip in the Pennsylvania House of Representatives and previously served as Speaker of the House. Rep. Ken Guin is the Majority Leader of the Alabama House of Representatives and serves as Chair of the House Rules Committee. Rep. Ray Merrick is the Majority Leader of the Kansas House of Representatives. Rep. Glenn Richardson is the Speaker of the Georgia House of Representatives. While recognizing the need to keep health care costs in check, each believes that suppressing

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondent with notice of intent to file. All parties have consented to this filing; the parties indicated their consent in a letter lodged with the Court.

truthful speech is not an effective means of controlling costs and interferes with the exchange of information necessary to ensure medical advances.

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 States. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF has devoted substantial resources to promoting free speech rights of the business community, appearing before numerous federal courts in cases raising First Amendment issues. *See, e.g., Nike v. Kasky*, 539 U.S. 654 (2003). WLF has successfully challenged the constitutionality of FDA restrictions on speech by pharmaceutical manufacturers. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd*, 202 F.3d 331 (D.C. Cir. 2000).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicating to advancing the principles of liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual Cato Supreme Court review, and files amicus briefs with the courts. This case is of central concern to Cato because it addresses the collapse of constitutional protections for commercial speech and the attempt by government to impede the free flow of information.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason promotes policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason Magazine, as well as commentary on its websites, www.reason.com and www.reason.tv, and by issuing policy research reports that promote choice, competition, and a dynamic market economy as the foundation for human dignity and progress. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues, to further Reason's avowed purpose to advance "Free Minds and Free Markets."

Amici are concerned that by unduly restricting the dissemination of truthful information by Petitioners and others, the State of New Hampshire is relegating this important health care-related speech to a second-class status. *Amici* are also concerned that the decision below, if allowed to stand, sets a dangerous precedent that all but eliminates First Amendment restrictions on government efforts to "level the playing field" by favoring speech by one side of debate over speech by the other side.

STATEMENT OF THE CASE

Petitioners IMS Health Inc. and Verispan LLC are companies in the business of collecting and distributing health information, research, and analysis. Petitioners' reports provide detailed information regarding individual physicians, their medical specialties, and their

prescribing patterns. That information is immensely valuable to a wide variety of users. For example, researchers use the information as a means of locating doctors whose patients might be interested in participating in clinical trials of new medicines. The court of appeals explicitly found that Petitioners' "massive collections of information have great utility" for entities such as "educational institutions, public interest groups, and law enforcement agencies." Pet. App. 6.

The State of New Hampshire has become concerned by the commercial use of Petitioners' information by pharmaceutical companies. Those companies regularly engage in a practice known as "detailing," whereby a company salesperson (or "detailer") visits with doctors in an effort to persuade them to prescribe more of the company's brand-name (and thus, generally, higher-priced) drugs. It is widely recognized that these visits are more effective if the detailers come armed with information obtained from Petitioners – the information allows them, based on a doctor's prescribing history, to tailor their sales pitches in a manner likely to maximize prescriptions. Concerned that detailing was leading to increased prescriptions for high-priced drugs (and thus was causing significant increases in State health care costs), the New Hampshire legislature determined that it would take steps to control the effects of detailing.

The means devised by New Hampshire for controlling those price effects, however, was highly unusual. New Hampshire did not impose any direct controls on detailing. Instead, New Hampshire adopted

a statute, the Prescription Information Law (PIL),[2] which imposes restrictions on entities, such as Petitioners, that supply prescriber-identifiable information to pharmaceutical companies. New Hampshire's theory is that if pharmaceutical companies are denied access to prescriber-identifiable data, their detailing activity will be less successful in inducing doctors to prescribe higher-priced drugs, and thus State medical costs will be reduced.

The PIL provides, *inter alia*, that (subject to limited exceptions) no "prescriber-identifiable data" relative to prescription information may be "licensed, transferred, used, or sold" by any "pharmacy benefits manager, insurance company, electronic transmission intermediary, retail, mail order, or Internet pharmacy or other similar entity, for any commercial purpose." N.H. Rev. Stat. Ann. 318:47-f. The PIL defines a "commercial purpose" as including, but not limited to, "advertising, marketing, promotion, or any 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." *Id.* Section 318:47-f has been construed by the appeals court as prohibiting Petitioners from conveying their prescriber-identifiable data to pharmaceutical companies for use in their detailing activities, but permitting Petitioners to convey the same data to others. Pet. App. 25.

---

[2] 2006 N.H. Laws 328, codified as N.H. Rev. Stat. Ann. 318:47-f & 318:47-g & 318-B:12, IV (2006).

Petitioners contend that the PIL, by imposing content-based restrictions on their rights to convey truthful information to others, violates their First Amendment rights. After conducting a trial, the U.S. District Court for the District of New Hampshire agreed, holding that the PIL did, indeed, violate Petitioners' First Amendment rights; it enjoined enforcement of the statute. Pet. App. 153-197.

The U.S. Court of Appeals for the First Circuit reversed. *Id.* at 1-151.[3] The appeals court held that the First Amendment was completely inapplicable to Petitioners' claims because "the challenged portions of the statute principally regulate conduct, and to the extent that the challenged portions impinge at all upon speech, that speech is of scant societal value." *Id.* at 22. The court recognized that the PIL implicated First Amendment rights because of its impact on the detailing activities of pharmaceutical companies, but it determined that Petitioners lacked standing to assert those rights. *Id.* at 12-17.

As an alternative basis for its decision, the appeals court held that even if Petitioners' transfer of information to pharmaceutical companies were entitled to First Amendment protection, the PIL survives First

---

[3] In addition to rejecting Petitioners' First Amendment claims, the First Circuit also rejected two other claims that the district court had not addressed: Petitioners' claims that the PIL was void for vagueness, *id.* at 42-46, and that it violated the dormant Commerce Clause. *Id.* at 46-50. One member of the panel dissented on the Commerce Clause issue; he would have remanded the case to the district court for an initial determination of the issue. *Id.* at 142-150 (Lipez, J., concurring and dissenting).

Amendment scrutiny under the standard established by *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), for evaluating restrictions on commercial speech. *Id.* at 26-41. In particular, the court held that the regulation of Petitioners' speech is "no more extensive than necessary to serve [New Hampshire's] interest in cost containment." *Id.* at 38. The court determined that one suggested alternative regulation that would not have entailed restrictions on Petitioners' speech – a counter-detailing program whereby New Hampshire would "educate doctors to prescribe low-cost generic drugs whenever possible" – "fails as a matter of simple economics." *Id.* at 39a. The court explained that the "the marketplace of ideas" lacked "equilibrium" because pharmaceutical companies spend $4 billion each year on detailing, and New Hampshire and like-minded States are not equipped to (and thus should not be forced to) expend a similar sum to restore that equilibrium. *Id.* at 40. Thus, the Court held, New Hampshire did not violate the First Amendment – the State properly concluded that it could restore equilibrium only by imposing the PIL's speech restrictions on Petitioners (thereby, in New Hampshire's view, making detailing activities less effective in inducing prescriptions of expensive brand-name drugs). *Id.*

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Although the PIL indisputably prohibits Petitioners from conveying information that is highly valued by its customers, the appeals court held that the PIL is altogether "outside the ambit of the First Amendment," explaining that the "challenged portions of the statute principally regulate conduct, and to the

extent that the challenged portions impinge at all upon speech, that speech is of scant societal value." Pet. App. 22. The appeals court likened Petitioners' speech to other forms of speech (*e.g.*, obscenity, libel, insulting or "fighting" words, and communications in furtherance of a crime) that according to the court lie "outside the compass of the First Amendment." *Id.* at 20. Review is warranted because the appeals court's conclusion that the PIL's prohibition against the transfer of information "principally regulates conduct" conflicts with numerous decisions of this Court and of other federal appeals courts. That conclusion threatens a radical curtailment of First Amendment rights by creating a previously unrecognized category of speech to which the First Amendment ostensibly does not apply.

As the Petition notes, laws similar to New Hampshire's have been adopted in two other States and, in light of the First Circuit's decision upholding the PIL, numerous other States are actively considering following suit. Review is also warranted in order to provide those States with guidance regarding the constitutionality of such statutes. It is highly unlikely that challenges to similar laws will reach the Court in the next several years; unless review is granted here, state legislatures will be confronted with proposals to adopt statutes similar to the PIL without any guidance from the Court. Moreover, this case is a particularly good vehicle for addressing the First Amendment questions presented by the Petition. The case has been brought by entities that supply information to the pharmaceutical industry; such entities are far better positioned than are pharmaceutical companies to raise First Amendment issues in a manner that will permit a meaningful merits resolution by the Court. In particular, the PIL operates most directly against entities such as

Petitioners who are in the business of transferring prescriber-identifiable data to consumers of such data (such as pharmaceutical companies). While the PIL creates difficulties for pharmaceutical companies by making it more difficult for them to obtain such data and thus has a significant impact on their ability to solicit customers, that impact is largely indirect in nature.

Moreover, such customer solicitation activity clearly constitutes commercial speech, a category of speech that has received somewhat less First Amendment protection than other forms of speech. While *amici* would welcome a reconsideration of the Court's downgrading of constitutional protections for commercial speech, it is far from clear that Petitioners' activity – conveying truthful information to customers for a fee – should even be deemed commercial speech. Petitioners thus have a far stronger claim that their speech is entitled to full First Amendment protection. Accordingly, it would make little sense to deny review in this case and await a challenge by a pharmaceutical company, when this case presents the strongest possible case for First Amendment invalidation of the PIL.

Review is also warranted because the First Circuit's alternative holding – that the PIL passes constitutional muster even if examined under a commercial speech lens – so clearly conflicts with this Court's commercial speech jurisprudence. In concluding that the regulation of Petitioners' speech met the fourth prong of the *Central Hudson* test (narrow tailoring), the appeals court rejected as infeasible several alternative regulations that would not have restricted Petitioners' speech – yet its grounds for doing so conflicted with decisions of this Court. In particular, the appeals court held that New Hampshire

was entitled to a "level playing field" – on which the State and pharmaceutical companies would have roughly equal influence over doctors' prescribing decisions – without having to pay the large sums that would be necessary to establish a comprehensive counter-detailing program. Pet. App. 39-40. On that basis, the appeals court determined that an expanded counter-detailing program did not qualify as a more-narrowly-tailored non-speech alternative regulation, because it would have cost New Hampshire too much to establish the "level paying field" it had a right to demand. *Id.*. That determination conflicts with numerous holdings of this Court that a desire to create a "level playing field" among competing points of view does not justify imposing speech restrictions on the party with greater financial resources. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976).

I. The Appeals Court's Holding That the PIL "Primarily Regulates Conduct" and Thus Lacks First Amendment Protection Conflicts With Numerous Decisions of This Court

The First Circuit found a simple way to avoid addressing all of the complex First Amendment issues raised by this case: it held that the PIL is altogether "outside the ambit of the First Amendment" because it principally regulates conduct, not speech. Pet. App. at 22. Review is warranted because the appeals court's characterization of Petitioners' information distribution as mere "conduct" is unprecedented under First Amendment law and conflicts with numerous decisions of this Court and other federal appeals courts.

The appeals court apparently arrived at its "conduct" determination because it viewed Petitioners' data transfers

as fundamentally different from "stereotypical commercial speech." *Id.* at 4. In characterizing Petitioners' activities, the court opined, "Unlike stereotypical commercial speech, new information is not filtered into the marketplace with the possibility of stimulating better informed consumer choices (after all, physicians already know their own prescribing histories)." *Id.* While the court was undoubtedly correct that Petitioners' information transfers do not resemble typical commercial speech (*e.g.*, Petitioners are not advertising their services or otherwise proposing a commercial transaction), that distinction suggests that Petitioners' activities constitute fully protected non-commercial speech, not that the activities do not constitute speech at all. The appeals court asserted that Petitioners' information transfers to pharmaceutical companies have "scant societal value ," *id.* at 22, but that assertion is belied by the evidence at trial: pharmaceutical companies and other customers pay many millions of dollars every year for the information supplied by Petitioners.

As this Court has made clear, "the general rule is that the speaker and the audience, not the government, assess the value of information presented." *Edenfield v. Fane*, 507 U.S. 761 (1993). The appeals court can only be understood to have been saying that the information supplied by Petitioners was not being used wisely,[4] not that the information lacked value. But such negative assessments regarding the uses to which truthful information will be put has never been deemed grounds for denying First Amendment protection. To the contrary,

---

[4] *See, e.g., id.* at 4 ("[T]he societal benefits flowing from the prohibited transactions [*i.e.,* supply of information from Petitioners to pharmaceutical companies] pale in comparison to the negative externalities produced.").

the Court has regularly condemned government efforts to prohibit "the dissemination of truthful information in order to prevent members of the public from making bad decisions with the information." *Thompson v. Western States Medical Center*, 535 U.S. 357, 374 (2002).

Remarkably, the panel held that the Act does not implicate IMS Health's First Amendment rights without citing a single case that so much as suggests that the publication of truthful data about individuals does not constitute First Amendment-protected speech. In fact, every prior federal appellate decision that has addressed the issue has concluded (or at least strongly suggested) that such publication is, indeed, protected by the First Amendment, regardless whether the published information is deemed a matter of public concern.

For example, the Court has stated that although it is a matter of public concern that the crime of rape has occurred, a mere list of the names of rapes victims is not a matter of public concern but rather is only a matter of "private concern." *Florida Star v. B.F.J.*, 491 U.S. 524, 536-37 (1989). The Court nonetheless held that the listing of such names by a commercial newspaper is speech entitled to substantial First Amendment protection and noted pointedly that "our decisions have *without exception* upheld the press' right to publish" information of only private concern. *Id.* at 530 (emphasis added).[5] Similarly, the Court

[5] Importantly, the appeals court did not base its decision on any asserted privacy rights of physicians, *id.* at 28, and thus that issue plays no role in this Petition. Judge Lipez explicitly rejected privacy concerns as a basis for upholding the PIL. *Id.* at 101 (Lipez, J., concurring and dissenting). Indeed, any privacy defense is doomed to failure, given that New Hampshire disclaims an interest

has upheld the First Amendment right of newspapers to publish the names of juvenile offenders (at least where it has lawfully obtained the names), even though States routinely treat such names as matters of private concern that should be kept confidential. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979). Given that listing personal data constitutes "speech" when performed by commercial newspapers, there can be no grounds for stripping it of all constitutional protection simply because it is undertaken instead by other types of commercial entities, such as Petitioners.[6]

The Court has further made clear, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), that First Amendment protections apply to aggregated financial data regarding businesses disseminated

---

in preventing the dissemination of prescriber-identifiable data to anyone other than a drug company planning to use the data to assist with detailing. As the Court explained in *Florida Star*, States may not, consistently with the First Amendment, prohibit newspapers on privacy grounds from publishing rape victims' names unless they apply the prohibition across the board. *Florida Star*, 491 U.S. at 540. "When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smallest disseminator as well as the media giant." *Id.; see also, id.* at 541-42 (Scalia, J., concurring in part and concurring in the judgment).

[6] Of course, the purposes for which speech is uttered may dictate the level of First Amendment protection to which it is entitled; *e.g.*, commercial speech (that is, speech that "proposes a commercial transaction," *Bd. of Trustees v. Fox*, 492 U.S. 469, 473 (1989)) is entitled to a somewhat lesser degree of protection than other forms of speech. But a commercial purpose has never been deemed grounds for denying First Amendment protection altogether.

for a profit by a credit reporting agency. In *Dun & Bradstreet*, the plaintiff alleged that unfavorable financial data disseminated by the credit reporting agency was false; it sued for libel. The only issue that divided the Court was the *degree* of First Amendment protection to which the credit reporting agency was entitled; all nine members of the Court agreed that agency's dissemination of aggregated financial data was speech that was entitled to *some* First Amendment protection. *See, e.g.*, 472 U.S. at 759-60 (plurality opinion).[7]

In yet another factually analogous case, all nine Supreme Court justices indicated that regulation of dissemination of aggregated data should be deemed regulation of speech. *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), involved plaintiffs who facially challenged a California statute that prohibited disclosure of police department arrest records to firms that refused to agree not to use those records for commercial purposes (e.g., sales to attorneys who were interested in soliciting business from arrestees). A majority of the Court rejected the facial challenge, finding that the First Amendment was not implicated when a government allows some citizens access to public records but denies access to others. But all nine justices agreed that if the plaintiffs could gain access to the records without government assistance, any government effort to prevent their use would implicate the First Amendment. *See United*

---

[7] The Court ultimately held that the First Amendment does not prohibit States from permitting the award of presumed or punitive damages in libel cases involving *wholly false speech* where (as in *Dun & Bradstreet*) the defamatory statements do not involve matters of public concern, even in the absence of a showing of "actual malice." *Id.* at 755-761 (plurality).

Reporting, 528 U.S. at 40 ("This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses."); *id.* at 42-43 (Ginsburg, J., with whom O'Connor, Souter, and Breyer, JJ., joined, concurring) ("Anyone who comes upon arrestee information in the public domain is free to use the information as she sees fit. [Once the information is published in a legal newspaper, the challenged statute] *would indeed be a speech restriction if it then prohibited people from using that published information to speak to or about arrestees*.") (emphasis added); *id.* at 46 (Stevens, J., with whom Kennedy, J., joined, dissenting).

The panel arrived at its the-First-Amendment-is-not-applicable conclusion without even mentioning *Florida Star, Smith, Dun & Bradstreet, United Reporting,* or any of the numerous federal appeals court decisions that have concluded that dissemination of aggregated data is entitled to First Amendment protection. *See, e.g., TransUnion v. FTC*, 245 F.3d 809 (D.C. Cir. 2001), *cert. denied*, 538 U.S. 915 (2002). Review is warranted in light of the conflict between the decision below and the numerous decisions of this Court and other federal appellate courts regarding whether the transfer of aggregated data constitutes "speech" worthy of First Amendment protection.

II. Review Is Warranted Because This Case Is a Good Vehicle for Examining the Important First Amendment Issues Facing Numerous States Seeking to Control Health Care Costs

Review is also warranted because the issues raised in the Petition are arising with increasing frequency as States look for novel ways to control their health care costs. As the Petition notes, two other States (Maine and

Vermont) have adopted statutes substantially similar to the PIL; and following the First Circuit's decision upholding the PIL, numerous other States are considering similar legislation. Pet. 11. Review is warranted to provide those States with guidance regarding the constitutionality of such statutes. While litigation challenging the Maine and Vermont statutes is pending, the posture of those suits makes it highly unlikely that either suit could reach this Court for some years to come. Accordingly, if the Court is to provide any guidance to the more than 20 state legislatures that are considering similar legislation, it must come in connection with this Petition.

This case is a particularly good vehicle for addressing the First Amendment questions presented by the Petition. The case has already been tried in the district court, and the record is fully developed. The First Circuit addressed the merits of Petitioners' claims and determined that any First Amendment rights possessed by Petitioners are not infringed by the PIL. The appeals court directed entry of final judgment for New Hampshire, and thus there is no further opportunity for development of the record.

Moreover, companies (such as Petitioners) that collect and distribute prescriber-identifiable data are the entities best situated to raise all aspects of the First Amendment issues implicated by the PIL's speech prohibitions. Such companies are the ones most directly targeted by the PIL because they are the ones prohibited from transferring information to drug companies that would use the information to enhance their detailing capabilities. While the PIL may also infringe the First Amendment rights of drug companies, its impact on them is largely indirect in nature – their ability to communicate with doctors is abridged only because they cannot obtain data from

companies such as Petitioners. Accordingly, it would make little sense to deny certiorari for the purpose of awaiting a challenge to the PIL brought by a drug company; this suit already includes the plaintiffs most directly affected by the statute.

This case is a superior vehicle for addressing First Amendment issues implicated by the PIL because, in all likelihood, Petitioners' speech interests are entitled to significantly more First Amendment protection than are the speech interests of drug companies. When drug companies undertake detailing, they undoubtedly are engaging in commercial speech, a form of speech receiving a somewhat reduced level of First Amendment protection. Detailing meets the classic definition of commercial speech: speech (such as advertising) that "propose[s] a commercial transaction." *Fox*, 492 U.S. at 473. In contrast, Petitioners' activities do not so easily fit into the commercial speech mold. When Petitioners transfer information to a drug company, they are not proposing that the company engage in any sort of commercial transaction, and the transfer takes place "outside a traditional advertising format, such as a brief television or newspaper advertisement." *Nike v. Kasky*, 539 U.S. 654, 677 (2003) (Breyer, J., dissenting from dismissal of the writ). As Justice Breyer has explained, those noncommercial characteristics of speech by a business entity strengthen the entity's claim to heightened First Amendment protection. *Id.*[8] Accordingly, if the Court is

[8] The Court has never suggested that speech not falling within the classic definition of "commercial speech" is nonetheless entitled to reduced First Amendment protection simply because the speech arises in a commercial context. To the contrary, the Court has explicitly rejected the notion that a profit motive lessens the constitutional protection otherwise afforded to speech, stating,

to consider First Amendment issues raised by the PIL, it makes much more sense to do so in the context of a challenge raised by Petitioners than in connection with a challenge raised by a drug company.

Several justices have expressed dissatisfaction with the Court's current approach to commercial speech cases, particularly where the speech at issue arises outside the context of traditional advertising and/or the government is seeking to restrict the speech for reasons other than its potential falsity. *See, e.g., Western States*, 535 U.S. at 377 (Thomas, J., concurring); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 517-18 (1996) (Scalia, J., concurring in part and concurring in the judgment). Given the context within which Petitioners' claims arise (speech arising outside of the traditional advertising context, with no suggestion that Petitioners' speech is false), this case would be an ideal vehicle for the Court to examine whether to modify existing commercial speech standards.

While it is true that the appeals court denied Petitioners' standing to assert the First Amendment rights of drug companies, that denial does nothing to detract from the attractiveness of this case as a vehicle for considering whether the PIL and/or similar laws pass First Amendment muster. For the reasons explained above, Petitioners' First Amendment claims are significantly stronger than the First Amendment claims of any drug company whose activities

---

"Some of our most valued forms of fully protected speech are uttered for a profit." *Fox,* 492 U.S. at 482. *See also Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530, 537 1980). The Court has, for example, afforded full First Amendment protection to the contents of a paid advertisement soliciting money. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

are affected by the PIL. Thus, First Amendment claims would not be significantly strengthened by combining the claims of Petitioners and a drug company in a single case. Petitioners' First Amendment claims are based on an asserted right to convey information to drug manufacturers, and those claims are not dependent on a showing that the PIL also interferes with drug companies' ability to communicate effectively with doctors.

In sum, this case presents an ideal vehicle for addressing First Amendment issues raised by state efforts to restrict speech that allows detailing to be effective.

III. The Appeals Court's Alternative Holding That New Hampshire May Restrict Speech in Order to "Level the Playing Field" Conflicts with This Court's Jurisprudence Regarding Commercial (and Other) Speech

Review is also warranted because the First Circuit's alternative holding – that the PIL passes constitutional muster even if examined under a commercial speech lens – so clearly conflicts with this Court's commercial speech jurisprudence.

The flaws in the First Circuit's commercial speech analysis are most evident in connection with its consideration of the fourth prong of the *Central Hudson* test: whether challenged regulation restricts speech no more than is necessary to further the governmental interest purportedly advanced by the regulation. *Central Hudson*, 447 U.S. at 556. The appeals court recognized, in accord with established case law, that a speech restriction does not survive this narrow tailoring test if the governmental

interest would be equally well served by measures that do not involve regulation of speech: "Our starting point is well marked: 'If the First Amendment means anything, it means that regulating speech must be a last – not first – resort.'" Pet. App. 38 (quoting *Western States*, 535 U.S. at 373).

But the appeals court then proceeded to reject each of the non-speech measures suggested by Petitioners. In particular, it rejected a suggestion that New Hampshire adopt an expanded counter-detailing program, whereby state officials would seek to persuade doctors to prescribe low-cost generic drugs in place of the more expensive brand-name drugs being pushed by detailers. *Id.* at 39-40. It stated that a counter-detailing program would not accomplish New Hampshire's governmental interest in "restor[ing] equilibrium to the marketplace of ideas" in the absence of a multi-billion dollar expenditure designed to match the pharmaceutical companies' "marketing juggernaut": the over $4,000,000 they spend per year on detailing. *Id.*[9] The court reasoned that, in light of what it viewed as the prohibitive cost, a counter-detailing program was not an adequate substitute means for leveling the playing field. *Id.*

Review is warranted because the appeals court's level-the-playing-field rationale conflicts with numerous decisions of this Court. In the context of campaign financing, the Court has repeatedly held that a desire to create a "level playing field" among competing points of

---

[9] The court earlier explained that New Hampshire sought "to level the playing field" by rendering detailing less effective "by eliminating the detailers' ability to use a particular informational asset – prescribing histories – in a particular way." Pet. App. 25-26.

view does not justify imposing speech restrictions on the party with greater financial resources. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). As *Buckley* explained:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." . . . The First Amendment's protection against government abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Id. (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 266, 269). *See also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 227 (2003) (citing *Buckley*).

The Court recently observed that government efforts to restrict speech in order to "level the playing field" have "ominous implications," because they necessarily require the government to get into the business of evaluating the relative strength of speakers. *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2773 (2008). The Court stated that it is up to the people, not the government, to make those kinds of determinations: "'[T]he people in our democracy are entrusted with the responsibility for evaluating the relative merits of conflicting arguments' and 'may consider, in making their judgment, the source and credibility of the advocate.'" *Id.* at 2773-74 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92

(1978)).

This Court's commercial speech case law includes nothing to suggest that the aversion to level-the-playing-field speech restrictions is reduced in the commercial speech context. To the contrary, the Court has repeatedly spoken out against government restrictions on commercial speech that are based on a government desire to protect listeners from their own misuse of too much speech. The Court has "rejected the notion that the Government has an interest in preventing the dissemination of truthful information in order to prevent members of the public from making bad decisions with the information." *Western States*, 535 U.S. at 374.

For example, in rejecting Virginia laws designed to protect consumers from too much drug-price advertising that might cause them to make unwise purchasing decisions, the Court explained:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not itself harmful, that people will perceive their own best interests if they are well enough informed, and that the best means to that end is to open the channels of communications rather than to close them. . . . Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.

Virginia State Bd. of Pharmacy v. Virginia Citizens

Consumer Council, Inc., 425 U.S. 748, 770 (1976).

If New Hampshire wishes to ensure that doctors receive what it deems a more-balanced presentation regarding the relative merits of competing prescription drugs, nothing prevents it from "open[ing] the channels of communication" by adopting an expanded counter-detailing program. But *Western States* and *Virginia State Bd. of Pharmacy* make clear that New Hamphire is not free to restrict the truthful speech of pharmaceutical companies (or, even worse, restrict the truthful speech of Petitioners and others who do not make any commercial pitches to New Hampshire's doctors) in an effort to "level the playing" field between itself and the pharmaceutical industry. It may fear that doctors will make unwise use of the information supplied to them by detailers, but such fears do not justify restrictions on truthful speech.

In sum, review is warranted because the appeals court's justification for upholding the PIL as a valid restriction on commercial speech – that it serves to "level the playing field" in terms of the quantity of speech reaching New Hampshire doctors – conflicts with this Court's jurisprudence regarding commercial speech and many other kinds of speech.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Of Counsel:

Ilya Shapiro
Cato Institute
1001 Mass. Ave., NW
Washington, DC 20001
(202) 218-4600

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: April 27, 2009