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# Supreme Court Hears Oral Argument in First Amendment Case on Law Restricting Pharmaceutical Marketing Practices

The Supreme Court last Tuesday heard oral argument in *Sorrell, et al.* v. *IMS Health, Inc., et al.*, a case concerning the constitutionality of a law that impacts the ways in which pharmaceutical manufacturers may market their products. Specifically, the case presents the question of whether a law that restricts access to information in nonpublic prescription drug records and affords prescribers the right to consent before their identifying information in prescription drug records is sold or used in marketing runs afoul of the First Amendment. Because several states are considering adopting laws similar to the one at issue in this case, the case has potentially far-reaching implications for the future of pharmaceutical drug marketing in the United States.

**Background.** Pharmacies collect information about the prescriptions they fill, and many sell it, stripped of identifying patient information, to data-mining companies. Those companies aggregate the data to reveal the prescribing patterns of individual physicians and sell the data to pharmaceutical manufacturers, who use it to market their products and to provide information about them to particular physicians. In 2007, the state of Vermont, expressing a desire to protect prescriber privacy, reduce healthcare costs, and protect public health from the dangers of potentially biased marketing, enacted a statute banning the sale or use of prescriber-identifiable data for marketing or promoting prescription drugs, unless the prescriber consents. Pharmaceutical Research and Manufacturers of America (PhRMA) and companies that aggregate prescription data, including IMS Health, Inc., filed a lawsuit alleging that the statute unconstitutionally restricts the messages pharmaceutical manufacturers deliver to physicians.

**Proceedings below.** The United States District Court for the District of Vermont upheld the Vermont statute, finding that its restriction on commercial speech is reasonably narrowly tailored to promote the state's substantial interests in cost containment and the promotion of public health. The Second Circuit reversed and remanded, holding that the statute does not advance the government's interests directly enough to survive the intermediate scrutiny test applicable to restrictions on commercial speech. The court explained that the law seeks to reduce drug costs and protect the public health too indirectly, by restricting speech in order to reduce the effectiveness of marketing campaigns and ultimately alter prescibers' behaviors. It also noted that the state's interests could be served just as well by more narrow restrictions that do not apply to all brand name drugs, regardless of their price or proven effectiveness. One Second Circuit judge dissented, concluding that the statute is a permissible restriction on access to private information and has only limited effects on expressive First Amendment activity.

**Petition for *certiorari*.** In support of their petition for *certiorari*, Vermont officials argued that by striking down the state's statute, the Second Circuit created a split with the First Circuit, which had upheld similar laws in New Hampshire and Maine. The respondents agreed that the Supreme Court should hear the case and resolve this conflict.

**Merits briefs.** Vermont officials and the Justice Department, which filed a brief in their support, sought to frame the case as one that principally concerns access to regulated, non-public information. They argued that the law granted doctors the ability to protect information about the prescriptions they wrote, but it did not limit the information that drug companies could provide to doctors when marketing their products.

Respondents argued in their briefs that the statute restricts non-commercial speech about the benefits of various drugs. They also contended that even if the restricted speech were characterized as commercial in nature, the Second Circuit properly concluded that the law does not survive the intermediate scrutiny test it applied.

**Amicus curiae.** The case has attracted attention from numerous stakeholders, and many filed *amicus curiae* before the Court. Thirty-five other states and the District of Columbia argued in support of Vermont and expressed concern that overly strong protection of commercial speech could endanger a variety of consumer protection measures. Other organizations warned about the threats that they perceive unregulated data mining might pose to personal privacy.

Scientists who use database information for medical research purposes and media companies like Bloomberg, L.P., who use it in connection with their reporting activities, filed *amici* in support of the respondents to emphasize the importance of making such data widely available. The U.S. Chamber of Commerce and a number of other organizations filed *amici* to voice support for the protection of business communities' free speech rights more generally.

**Oral arguments.** Attorneys representing the petitioners and the United States sought to characterize Vermont's statute as granting doctors more control over the private information they generate by allowing them to decide whether it may be used in marketing directed toward them. However, skeptical questioning by the justices suggested that because the statute permitted sale and use of the same information for other purposes, including academic research or clinical trials, it was actually targeted at impeding drug marketing efforts, not protecting private data.

Justice Sotomayor inquired about whether a system in which doctors are permitted to opt-out of having prescription information available to marketers might be less restrictive of speech rights, and Justice Ginsburg asked whether the statute seeks to unconstitutionally "lower the decibel" of speakers who promote brand-name drugs so that arguments in favor of less-costly generics could be better heard.

The respondents' argument sought to heighten the justices' concerns by highlighting statements by the Vermont legislature suggesting that the law impermissibly targeted a particular message that the legislature did not favor.

**Conclusion.** The Supreme Court is expected to rule on the case in June 2011. Because a number of states are considering the adoption of statutes similar to Vermont's, the Court's resolution of a circuit split regarding the constitutionality of these laws is likely to have a significant impact on the ways in which pharmaceutical companies are permitted to market their products.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:


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