NO. 10-779

IN THE
Supreme Court of the United States

WILLIAM H. SORRELL, *et al.*,
Petitioners,
v.
IMS HEALTH, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF FOR AMICUS CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the Nation's largest federation of business companies and associations. It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every sector, and from every region of the country. Over 96% of the Chamber's members are small businesses with 100 or fewer employees. One of the Chamber's primary functions is to represent the interests of its members by filing *amicus* briefs in cases implicating issues of national concern to American business.

This case presents a question of central importance to the Chamber's members because it concerns the First Amendment's protection of the truthful, non-misleading speech of businesses. Businesses – and consumers – will suffer if federal and state governments can restrict such speech when the reason for doing so is simply to try and rectify a perceived imbalance in the marketplace of ideas. Government must act consistently with the First Amendment. And contrary to Vermont's aggressive position in this case, government regulation is not

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[1] In accordance with S. Ct. Rule 37.6, *Amicus* Chamber of Commerce states that: (1) no counsel to a party authored this brief, in whole or in part; and (2) no person or entity, other than amicus, its members and counsel have made a monetary contribution to the preparation or submission of this brief. The general written consents of the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to S. Ct. Rule 37.3.

exempt from constitutional scrutiny simply because it declares information "non-public." It is vital to the interests of the Chamber's members that this Court strongly reaffirm that restrictions on commercial speech are subject to heightened scrutiny under the First Amendment and reject Vermont's selective and discriminatory restrictions on truthful expression in the marketplace.

SUMMARY OF ARGUMENT

This case concerns a Vermont law that bars pharmaceutical companies from obtaining and using certain basic prescription data to enhance the effectiveness of marketing directed at prescribers. It is undisputed that the information in question and the associated marketing efforts are non-misleading. Nor is there any question that the information and marketing efforts are useful. It is precisely because they are helpful to prescribers that Vermont has sought to ban them. Having decided that in the "marketplace for ideas on medicine . . . effectiveness is frequently one-sided," 2007 Vt. Legis. Serv. 80 § 1(4), Vermont has responded by banning pharmaceutical companies from making use of the information in question so as to limit the companies' effectiveness in marketing their products. At the same time, Vermont has placed no restrictions on what may be done by other participants in the health care market. The direct and intended result is that one voice in a major marketplace – pharmaceutical companies – is hindered when all should be free to speak.

Time and again, this Court has reaffirmed that restrictions on commercial expression are subject to

heightened scrutiny. This case, with its selective restrictions on the use of truthful information, presents a clear case of unconstitutionality under this Court's precedents. For an amicus that represents a broad cross-section of American business, three points are of particular importance.

First, the information and communications at issue are typical of marketing practices that many other businesses engage in every day. Vermont's law concerns basic information collected by pharmacies regarding the prescriber, medication, and dosage relating to a prescription (no information specific to the patient is at issue). Pharmaceutical companies use this information to determine which prescribers might be interested in the pharmaceutical products the companies manufacture, allowing them to focus their marketing and educational efforts on the prescribers who are likely to have an interest in their products.

This is known as targeted advertising, and it is a common and increasingly critical component of the promotional efforts by businesses. Advertising is useless to speaker and recipient alike when the recipient lacks interest in the promoted product. By obtaining information about what consumers are likely to be interested in, businesses are able to advertise more efficiently, and consumers have more attractive and useful options. Targeted advertising thus deserves as much protection as the less effective forms of advertising the Court has considered in the past.

Second, Vermont primarily seeks to defend its restrictions on the ground that the First Amendment simply does not apply to information "in an area where the government has substantial regulatory authority." Vermont Br. at 22. That is a staggeringly broad assertion and it is obviously incorrect. Regulation does not place information outside the First Amendment. Instead, the First Amendment demands that regulation meet constitutional scrutiny. Vermont proceeds from the mistaken premise that because its regulations have made the information in question "non-public," the First Amendment does not apply to them. But obviously, the First Amendment question is *whether* the information must remain "non-public" when a willing buyer and seller wish to use it. If Vermont's argument were adopted, it would open the door to untold restrictions on businesses, which rely on the protections of the First Amendment to make routine use of information subject to regulation.

Likewise, contrary to Vermont's heavy reliance on *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), this case is nothing like one where a private party is demanding that the *government* turn over information that it possesses. Whatever right the government may have to withhold information under the First Amendment, it does not have the power to restrict the flow of privately held information without satisfying First Amendment scrutiny. This Court should strongly reaffirm that the First Amendment applies to information in private hands and protects the willing buyers and sellers who seek to make truthful use of it.

Third, this is a straightforward case under settled First Amendment principles. If anything, the expression and restrictions at issue here demonstrate why heightened scrutiny above and beyond the *Central Hudson* framework is appropriate. Although the marketing activities restricted by the law have a commercial component, they also convey substantial scientific and safety information. Likewise, although Vermont purports to be regulating a commercial transaction, it is doing so to further its view of policy issues, and has selectively regulated to favor its preferred market participants. Taken together, these features of this case provide a perfect example of why the Chamber has urged this Court in the past to reject "automatically subjecting all 'commercial' speech to lower protection" than other speech regardless of the nature of the regulation and the content of the expression. *Amicus* Br. of Chamber of Commerce, at 19, *Nike v. Kasky*, 539 U.S. 655 (2003) (No. 02-575), 2003 WL 835350, at *19 ("Chamber *Amicus* Br. in *Nike v. Kasky*); s*ee also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring in part and concurring in judgment) (expressing "doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech").

In any case, it is plain that the Second Circuit was correct that the Vermont law does not satisfy even the *Central Hudson* factors. The law does not directly advance any state interest. To the contrary, as the Second Circuit found, it does not protect physician privacy, nor meaningfully serve any state interest in controlling health care costs or improving public

health. And, the government has numerous other less-speech-restrictive alternatives to accomplish its goals. This Court should affirm the judgment below.

ARGUMENT

The Vermont law at issue in this case restricts speech using prescriber-identifiable data ("PI data") in two ways. First, it prohibits pharmacies and other entities with access to PI data from selling the data without prescriber consent for use in the marketing of prescription drugs. Vt. Stat. Ann. tit. 18, § 4622(a). Second, it bars pharmaceutical manufacturers from using PI data without prescriber consent to market prescription drugs. *Id.* The law does not, however, restrict state health insurance officials, medical researchers, or law enforcement officials from using PI data without prescriber consent as they wish. *Id.* The law's selective restriction of expression, with the express goal of correcting a "massive imbalance in information presented to doctors and other prescribers," 2007 Vt. Legis. Serv. 80 § 1(6), cannot survive First Amendment review.

I. BUSINESSES AND PURCHASERS BENEFIT FROM TARGETED ADVERTISING.

Pharmaceutical manufacturers use PI data to tailor their marketing campaigns to the likely needs and preferences of prescribers. The Vermont law prohibits such marketing not because it is untruthful or misleading but because it is useful to prescribers and therefore effective. That rationale not only renders the law's restrictions on speech unconstitutional, *see infra* Part II, but threatens the

benefits both businesses and consumers reap from the widespread use of targeted advertising in a broad range of markets.

Advertising is most effective when it is directed at purchasers who are likely to be interested in the advertised product. Businesses have struggled to develop methods to better identify that target audience. The result is that "approximately $100 billion in U.S. advertising is wasted annually" on reaching purchasers who are not interested in the advertised product. David Grant, *Getting to Really Know the Customer*, Broad. & Cable, Jan. 5, 2009, at 26.

Targeted advertising – or behavioral advertising, as it is also known – helps address the problem of identifying an interested audience for particular advertisements. By drawing on available data about specific purchasers, businesses can identify their target market with greater precision. For example, without access to the purchaser-specific data, a golf club manufacturer might place an advertisement in a golf magazine, knowing that some percentage of readers would be interested in purchasing new clubs. But with access to more specific purchaser data, that manufacturer could identify purchasers who had recently received a gift card to a golf store or had performed a search online for golf club reviews. The manufacturer could then target those consumers, either through direct mailings or placement of online advertisements. In this manner, targeted advertising produces lower "error rates" "[c]ompared to traditional, non-personalized advertising," and

represents an "effective tool to achieve an efficient market." Bert-Jaap Koops, *Law, Technology, and Shifting Power Relations*, 25 Berkeley Tech. L.J. 973, 1007 (2010) (internal quotation marks omitted).

Simply put, targeted advertising allows businesses to get more bang for their advertising buck. According to a recent study by the former Director of the Bureau of Consumer Protection at the Federal Trade Commission, targeted advertisements online are more than twice as likely as non-targeted advertisements to result in sales. Howard Beales, The Value of Behavioral Targeting, at 13 (2010), *at* http://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf ("Beales Study"); *see also* Jun Yan, *et al.*, *How Much Can Behavioral Targeting Help Online Advertising?*, Proceedings of the 18th International Conference on the World Wide Web, at 262 (2009) (behavioral targeting improves the click-through rate for online advertisements by as much as 670%). And consumers are 32% less likely to change the channel during targeted television commercials. Suzanne Vranica, *Targeted TV Ads Set for Takeoff*, Wall St. J., Dec. 20, 2010, at B1.

Because of the efficiencies it offers, targeted advertising has become a key advertising strategy for many of America's largest and most prominent companies. And targeted advertising does not just help established companies; because it allows companies "to advertise exclusively to consumers who have demonstrated an interest in their particular product or service," it "significantly diminishes entry-level barriers encountered by small start-up

companies." Svetlana Milina, Note, *Let the Market Do its Job: Advocating and Integrated Laissez-Faire Approach to Online Profiling Regulation*, 21 Cardozo Arts & Ent. L.J. 257, 262 (2003). In 2008, 24% of all advertisers used behavioral targeting – up from 16% in 2007 and 13% in 2006 – and that percentage is expected to grow steadily. Becky Ebencamp, *Behavior Issues*, Brandweek, Oct. 20, 2008, at 21. Companies are expected to spend tens of billions of dollars annually on targeted advertising in the coming years. *See* Pete Barlas, *Online Ad Market Shift Seen*, Investor's Business Daily, Aug. 25, 2010, at A4 (sales of targeted ads online expected to reach approximately $10.4 billion in 2011); Vranica, *supra*, at B1 (sales of targeted television ads predicted to surpass $11 billion by 2015).

Consumers also benefit from the efficiencies produced by targeted advertising. By definition, targeted advertisements give purchasers access to information about products they are more likely to find useful or otherwise appealing. *E.g.,* Milina, *supra*, at 261-62; Jon Leibowitz, FTC Chairman, *Where's the Remote? Maintaining Consumer Control in the Age of Behavioral Advertising*, Prepared Remarks at the National Cable & Telecomm. Ass'n, The Cable Show (May 12, 2010), *available at* http://www.ftc.gov/speeches/leibowitz/100512nctaspeech.pdf (noting that targeted ads "are usually good for consumers, who don't have to waste their time slogging through pitches for products they would never buy"). In so doing, targeted advertisements allow consumers to make qualitative and quantitative comparisons of needed products more easily.

The growth of targeted advertising online helps consumers in particular, because it permits online content providers to deliver content for free. Online advertising was virtually non-existent 15 years ago. Julia Angwin, *The Web's New Gold Mine: Your Secrets*, Wall St. J., July 31, 2010, at W1. Now businesses spend more than $23 billion on online advertising, *id.*, and the sites that generate 77% of the page views on the Internet earn "most of their revenue from selling advertising." David S. Evans, *The Online Advertising Industry: Economic, Evolution, and Privacy*, 23 J. Econ. Persp. 37, 37 (2009). Because targeted advertisements are at least twice as effective as non-targeted advertisements, content providers tend to charge twice as much for placing such advertisements on their websites. Beales Study, *supra*, at 8. That extra revenue "helps publishers support free content without charging subscription fees." *Id.* at 15; *see also* Jessica A. Wood, *The Darknet: A Digital Copyright Revolution*, 16 Rich. J.L. & Tech. 14, 90 (2010), *at* http://jolt.richmond.edu/v16i4/article14.pdf.

Consumers strongly prefer websites providing free content and targeted advertisements to those without advertisements that require a subscription fee. *Behavioral Advertising, Industry Practices and Consumer Expectations*: Hearing Before Subcomm. on Communications, Technology and the Internet of the H. Comm. on Energy and Commerce, 111th Cong. (June 18, 2009) (Statement of Charles Curran, Exec. Dir., Network Advertising Initiative). Consumers also benefit from targeted advertisements because they help sustain "a greater diversity of content

offerings and viewpoints," and "help reduce the potential nuisance effect of non-relevant advertising." *Id.*

Vermont can hardly gainsay the usefulness of targeted advertising. Most obviously, it has cited the effectiveness of such advertising as the reason why it has chosen to ban pharmaceutical companies from engaging in it. But Vermont also can speak from first-hand experience, because it operates its *own* counter-detailing program that relies on PI data to "provide information and education on the therapeutic and cost-effective utilization of prescription drugs" to the most relevant prescribers and other health care professionals. Vt. Stat. Ann. tit. 18, §§ 4622(a)(1). *See generally* Vt. Stat. Ann. tit. 18, §§ 4621-4622 (codification of the "Vermont Evidence-Based Education Program").

Targeted advertising is a significant advance in the efficiency of advertising, and will likely grow more common as more business shifts to the Internet. But the continued growth and vitality of targeted advertising is dependent on continued access to consumer data. Restrictions on access to such data, or the use of such data, would "directly impact . . . companies' ability to monetize [data] and thus turn a profit." Christopher Soghoian, *Caught in the Cloud: Privacy, Encryption, and Government Back Doors in the Web 2.0 Era*, 8 J. Telecomm. & High Tech. Law 359, 396 (2010). In Europe, for example, new restrictions on targeted advertising are expected to decrease revenue for online content publishers by over 60%, contributing to the advantage American

Internet companies possess over their European counterparts. *"Do-Not-Track" Legislation: Is Now the Right Time?*: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce, 111th Cong. (Dec. 2, 2010) (statement of Daniel D. Castro, Senior Analyst, Information Technology and Innovation Foundation). Therefore, restrictions on access to consumer data – like the PI data addressed in the Vermont law – are only justified from a policy perspective if they promote compelling state interests.

II. THE VERMONT LAW VIOLATES THE FIRST AMENDMENT.

The Second Circuit held correctly that the Vermont law cannot survive First Amendment review. In tacit recognition of that fact, Vermont argues primarily that its restriction on truthful speech is not subject to First Amendment review at all. Vermont's stinting view of the First Amendment's scope is untenable and would permit dramatic restrictions on expression by business. This Court should affirm that the Vermont law is subject to and unconstitutional under the First Amendment.

A. The Vermont Law is Subject to First Amendment Scrutiny.

Vermont's "primary argument" is that the First Amendment is inapplicable to the Vermont law because it merely "restrict[s] … access to nonpublic information" produced pursuant to "regulation." Vermont Br. at 41-42. That assertion has staggeringly broad implications for business, and it is

incorrect. The protections of the First Amendment do not evaporate where information subject to regulation is concerned. Businesses and customers engage in expression every day using information "in an area where the government has substantial regulatory authority." Vermont Br. at 22. But restrictions on such expression are subject to, not exempt from, First Amendment scrutiny.

1. Even a cursory look at this Court's commercial speech cases reveals that "substantial regulatory authority" is the beginning, and not the end, of the First Amendment analysis. In *Thompson v. Western States Medical Center*, for example, the Court struck down federal provisions prohibiting the advertising and promotion of certain compounded drugs by pharmacies. 535 U.S. 357 (2002). There was no dispute that the compounded drugs were subject to substantial regulatory authority, but there was also no dispute that the restrictions were subject to heightened scrutiny under the First Amendment. Instead, the very question presented in *Thompson* was whether the government's regulatory interests were sufficient to withstand First Amendment scrutiny. *E.g.*, *id.* at 371 (striking down regulation because "the Government has failed to demonstrate that the speech restrictions are 'not more extensive than is necessary to serve those [regulatory] interests.'") (alterations omitted).

Indeed, it is fair to say that the substantial majority of this Court's cases applying heightened scrutiny to restrictions on expression concern the marketing of commercial products subject to

"substantial regulatory authority." Vermont's ban on the use of specific marketing practices by pharmaceutical companies is no less subject to First Amendment scrutiny than the regulations at issue in those cases. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (striking down ban on alcohol advertising); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (striking down ban on advertising alcohol content); *Lorillard*, 533 U.S. at 571 (striking down ban on tobacco advertising); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 348 (1986) (concerning ban on casino advertising); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (striking down ban on drug advertising); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm.*, 447 U.S. 557, 572 (1980) (striking down ban on advertising by regulated utility).

Vermont suggests that its law is different because it concerns information that is "non-public," Vermont Br. at 22, but of course that begs the very question about the extent to which the information can legitimately be made non-public, consistent with the First Amendment.[2] Likewise, that pharmacies are required by law to collect the information at issue here does not change the fact that pharmacies could surely collect such information – *e.g.*, the name of the

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[2] The United States as *amicus* similarly claims that the First Amendment does not apply to the Vermont law because it involves a "closed" system of regulation. *Amicus* Br. of United States at 15. But Vermont may not "close" off information from willing buyers and sellers unless the First Amendment allows it to do so.

prescriber, the drug prescribed, and the dosage – anyway, and in fact *are* already required to do so by their contracts with insurance providers. JA 318.

In any case, Vermont never explains how a regulatory obligation to track information eliminates the protections of the First Amendment for that information. Regulation is not a curtain that can be drawn over expression to hide it from the First Amendment. If this Court were to adopt Vermont's reasoning it would dramatically narrow the reach of the First Amendment in today's highly regulated marketplace. It is not hyperbole to say that every business in America is required by law to collect information about its activities, its finances, and its personnel.[3] It would thus be remarkable to hold, as Vermont expressly urges, that this information is deprived of any First Amendment protection simply because it is collected pursuant to regulation. Indeed, such a rule would give the government a clear path to stripping expression of First Amendment protection: It need only regulate the information on which the expression is based.

The terms and underlying rationale for the Vermont law provide a clear example of why First

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[3] Examples of regulated information abound. All businesses must keep extensive records on their employees. *See, e.g.*, 29 U.S.C. § 211 (Fair Labor Standards Act recording requirements). Businesses – and individuals – involved in certain financial transactions must collect and maintain additional records of their activities. *See, e.g.*, 12 C.F.R. § 551.50 (requiring brokers to maintain a chronological list of securities transactions dating back three years); 17 C.F.R. § 240.17a-1 (establishing recording requirements for national securities exchanges).

Amendment scrutiny must apply in these cases. The Vermont law denies *pharmaceutical manufacturers* access to PI data for the purpose of marketing prescription drugs, but gives health care professionals, law enforcement personnel, and researchers access to that very same information for whatever purpose they desire, Vt. Stat. Ann. tit. 18, § 4631(e)(1)-(7), and does so because Vermont has concluded that the "marketplace for ideas on medicine safety and effectiveness is frequently one-sided." 2007 Vt. Legis. Serv. 80 § 1(4). Accordingly, the express purpose for the restriction is to correct a perceived "massive imbalance in information presented to doctors and other prescribers." *Id.* § 1(6).

The Act thus represents Vermont's conscious choice to attempt to influence policy by limiting the expression of one player – pharmaceutical companies – in a large and complex market. It is a cornerstone First Amendment principle that "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group of Boston*, 515 U.S. 557, 579 (1995). And the law is particularly clear that "[e]ven under the degree of scrutiny that [is] applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193-94 (1999)

Vermont's position that it need not comply with the First Amendment *at all* when it restricts access to information to serve its policy ends turns First Amendment doctrine and values upside down.

That is why it is particularly telling that Vermont concedes that the First Amendment would apply to the extent that Vermont permitted selective disclosure of information based on the viewpoint of the user or consumer of the information. Vermont Br. at 22-23. That concession gives the game away because the Vermont law is a quintessential selective disclosure provision. A law that forbids pharmaceutical companies, but no other market participant, from *using* PI data is functionally equivalent to a law that prevents certain parties from *obtaining* information because of their viewpoint. And even beyond the statutory language's patent purpose, the legislative findings underlying the Act expressly embrace that purpose. If a state may limit the use of information by one group of market participants for the stated purpose of weakening those participants *without* having engaged in selective disclosure, then that term has no meaning. *E.g., United Reporting*, 528 U.S. at 43 (restrictions of dissemination of even government-held information are unconstitutional where based on on "an illegitimate criterion such as viewpoint." (Ginsburg, J., concurring)). To be sure, there is nothing wrong with allowing other participants in the health care market, like insurers, from making use of such information. But Vermont cannot pick and choose among the messengers whose message it favors free from First Amendment scrutiny.

2. Without a single commercial speech case to support its position, Vermont unsuccessfully invokes "several key principles that flow from this Court's rulings" in two wholly distinguishable cases. Vermont Br. at 23. Citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) – where this Court upheld a protective order precluding a newspaper from publishing information it obtained through civil discovery from a religious group, *id.* at 34-35 – Vermont asserts that the First Amendment's protections "do[] not extend to all information that the government compels citizens to create or provide." Vermont Br. at 24. But *Seattle Times* did not hold that the protective order was exempt from First Amendment scrutiny; it held that the order *survived* such scrutiny. The Court only approved the protective order after considering whether the order furthered "an important or substantial governmental interest unrelated to the suppression of expression, and whether the limitation of First Amendment freedoms [was] no greater than is necessary or essential to the protection of the particular governmental interest involved." 467 U.S. at 32 (internal quotation marks omitted); *see also id.* at 37 (noting that the Court "today recognizes that pretrial protective orders . . . are subject to scrutiny under the First Amendment") (Brennan, J., concurring). Therefore, even if the information at issue in this case were analogous to the information obtained through discovery in *Seattle Times*, Vermont's restrictions on the use of that information are subject to First Amendment scrutiny.

But the information at issue in this case is not comparable to the information produced in discovery in *Seattle Times*. The newspaper against which the protective order was entered in *Seattle Times* had no right or authority to demand information from its legal adversary were it not for federal discovery rules. By contrast, even in the absence of regulations, pharmacies in Vermont would have the right and the authority to demand basic information from doctors to fill their prescription requests. There is a difference between information exchanged in a commercial transaction that happens to be regulated, and information that would not be exchanged but for regulation. Much of the information transmitted in the today's economy falls into the former category. Governments should not be permitted to restrict speech based on that information without surviving First Amendment review.

Vermont's reliance on *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), also is misplaced. In *United Reporting*, the Court upheld a California statute that permitted access to arrestee information in the government's possession for "scholarly, journalistic, [and] political . . . purposes," but not for certain commercial purposes. *Id.* at 35, 40-41 (quotation marks omitted). The Court approved the statute without subjecting it to First Amendment scrutiny because it simply "regulate[d] access to information in the hands of the [government]," rather than restricting "anyone's right to engage in speech." *Id.* at 40.

On its face, *United Reporting* is inapplicable because the Vermont law involves information in private hands, not the government's. In Vermont's view, however, *United Reporting* still supports restricting access to that information because the information was produced to private parties pursuant to regulation. Vermont Br. at 28.

This argument distorts the meaning of *United Reporting*. Leaving aside the fact that pharmacies could and do obtain this information apart from any government regulation, *United Reporting* stands for the unremarkable and distinct proposition that a party has no First Amendment right to *compel* the government to turn over information it does not want to provide. But the Respondents in this case do not seek to compel anyone to provide them with information. Instead, the parties possessing the information in this case – the pharmacies – *want* to provide information to the Respondents, but cannot do so because of the Vermont law. Thus, in this case, unlike in *United Reporting*, the law restricts the willing communication of information by one party to another, and therefore constitutes an impingement on the "right to engage in speech." 528 U.S. at 40.

These arguments also refute Vermont's additional claim that the First Amendment right "not to speak" justifies exempting its law from First Amendment review. Vermont Br. at 25. Vermont and the federal government require prescribers to provide pharmacies with certain information to obtain prescription drugs. *See Amicus* Br. of United States at 1-3 (discussing regulations governing the purchase of prescription

drugs). Those laws may implicate doctors' First Amendment right not to speak, but those laws are not at issue here, and the doctors' speech – their disclosure of PI data – has already been compelled. Now that the information that has been compelled is in the hands of private parties, any restrictions on the rights of those private parties to communicate that information is subject to First Amendment scrutiny. The right not to speak does not extend to speech that has already been compelled.

Finally, Vermont seeks to evade First Amendment review by incorrectly characterizing its law as a regulation of "commercial conduct," not speech. Vermont Br. at 26-27. The Second Circuit rightly rejected that argument. This Court has held that drug price information in drug advertisements is speech. *Va. State Bd. of Pharmacy*, 425 U.S. at 761. The Vermont law restricts far more than the straightforward communication of drug pricing information. It prohibits any "marketing" that is based on PI data, which includes "advertising, promotion, or any activity that is intended to be used or is used to influence sales or the market share of a prescription drug." Vt. Stat. Ann. tit. 18, § 4631(b)(5). That includes quantitative and qualitative comparisons of various drugs, descriptions of possible side effects, and explanations of medical research, among other things. Labeling such communication "conduct" narrows the definition of "speech" beyond recognition.

Vermont cannot find support in this Court's precedents for its constrained view of the First

Amendment. The State's view is not only novel but also undesirable, as it would revoke First Amendment protection of any speech based on information from a highly regulated area of the economy, and permit the government to freely restrict speech simply by regulating the information underlying that speech. The Court should not radically depart from its First Amendment jurisprudence to hold that the Amendment does not apply to Vermont's restriction of truthful speech.

B. The Vermont Law Violates the First Amendment.

The Vermont law prohibits pharmaceutical companies from using PI data to tailor their marketing of prescription drugs because marketing based on that information is particularly effective. Therefore, while Vermont does not ban pharmaceutical manufacturers from marketing their products, it indirectly – but intentionally – inhibits their ability to do so successfully.

The First Amendment does not tolerate such restrictions. Applying intermediate scrutiny, this Court has invalidated a number of laws restricting certain forms of advertising. *See Thompson*, 535 U.S. at 371 (law prohibiting advertisements for compounded drugs); *44 Liquormart*, 517 U.S. at 516 (law banning advertising of the price of alcohol); *Rubin*, 514 U.S. at 491 (law prohibiting labels displaying alcohol content). These cases counsel the same result here.

But the speech that the Vermont law restricts goes beyond advertising the price or content of a particular product. Under the law's broad definition of the term "marketing," it prohibits any comparisons between drugs, discussions of medical research, or analysis of side effects that draws on the manufacturers' analysis of PI data. This is not simply "commercial speech," under this Court's narrow definition of that term. Thus, while the Court need not apply anything more than intermediate scrutiny to invalidate the Vermont law, it should recognize that the law restricts both commercial and non-commercial speech.

1. The speech restricted by the Vermont law is not simply "commercial speech."

This Court has repeatedly acknowledged in the past that several Justices have expressed doubt as to whether the *Central Hudson* framework adequately accounts for the First Amendment value of commercial speech. *Thompson*, 535 U.S. at 367; *see Greater New Orleans Broad.*, 527 U.S. at 197 (Thomas, J., concurring in judgment); *44 Liquormart*, 517 U.S. at 501, 510-14 (Stevens, J., joined by Kennedy and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment).

The expression and regulation at issue here demonstrate why the *Central Hudson* test is ill-suited for gauging what the First Amendment requires. Although it contains a commercial component, the expression that Vermont seeks to regulate is not speech that "does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Unlike the price advertising at

issue in *Liquormart* or *Virginia Board of Pharmacy*, the Vermont law seeks to cut off a discussion between a pharmaceutical company and a physician that implicates a wide range of expressive interests, including scientific and safety concerns, as well as commercial ones.

Specifically, the "marketing" forbidden by Vermont is defined to include:

> advertising, promotion, or any activity that is intended to be used or is used to influence sales or the market share of a prescription drug, influence or evaluate the prescribing behavior of an individual health care professional to promote a prescription drug, market prescription drugs to patients, or evaluate the effectiveness of a professional pharmaceutical detailing sales force.

Vt. Stat. Ann. tit. 18, § 4631(b)(5). That broad definition includes non-commercial speech, including information about medical conditions the prescribers treat and a manufacturer's potential treatments for those conditions. Although that speech may be intended in part to encourage the doctor to engage in a commercial transaction, it does not simply propose a commercial transaction and, as such, cannot accurately be described as commercial speech of the sort that was it issue in a case like *Virginia Board*. Whether it is considered a different form of commercial speech that goes beyond proposing a transaction, or is considered to be "inextricably intertwined with otherwise fully protected speech,"

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796 (1988), the expression in question here does not fit the *Central Hudson* model.

On top of this, as explained above, the stated purpose of the Vermont law is to prevent one participant in the market – pharmaceutical companies – from being able to market their product effectively, while leaving competitors, such as insurance companies, free to engage in such activities. Both the naked policy goals of the law as well as its favoritism in support of certain market participants take it far from the paradigm of a typical commercial speech case. Instead, "[e]ven under the degree of scrutiny that [is] applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broad.*, 527 U.S. at 193-94.

In the past, the Chamber has urged this Court to reject "automatically subjecting all 'commercial' speech to lower protection," regardless of the nature of the regulation and the content of the expression. Chamber's *Amicus* Br. in *Nike v. Kasky*, at 19; *Amicus* Br. of Chamber of Commerce at 12, *BASF Corp. v. Peterson*, 549 U.S. 1047 (2006) (No. 06-144), 2006 WL 2354948, at *12 (arguing that a business's "truthful discussion about regulatory matters of great importance to its audience" should be considered core speech, not commercial speech because it was not limited to "advertising its products' attributes"); *id.* at

13 (arguing that even if such speech could be considered commercial speech, commercial speech that goes beyond advertising is entitled to additional protection). The nature of Vermont's restriction on expression demonstrates once again the substantial limitations of treating all "commercial" expression under that test.

2. In any event, the Vermont law does not withstand intermediate scrutiny.

In all events, this is an easy case under the *Central Hudson* factors, and this Court should affirm the Second Circuit's ruling that the Vermont law fails intermediate scrutiny. There is no dispute that the expression here is truthful and lawful. The law does not "directly advance[]" the government's stated interests in protecting medical privacy, improving public health, and reducing health care costs. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566. And even if it did, it is "more extensive than is necessary" to serve those interests. *Id.*

The Law Does Not Directly Advance Any Government Interest. The law does not directly advance the privacy interests of either prescribers or patients. It permits any number of entities, including state health insurance officials, health care researchers, and law enforcement personnel, to review and use PI data for a variety of purposes, including marketing efforts directed at doctors. Vt. Stat. Ann. tit. 18, § 4631(e)(1)-(7). It allows data-mining companies and pharmaceutical companies to review and use PI data for any non-marketing purpose, such as providing safety updates on drugs

that doctors are prescribing. *Id.* § 4631(d). And it funds the State's own counter-detailing program, which uses advertising based on PI data to "provide information and education on the therapeutic and cost-effective utilization of prescription drugs." Vt. Stat. Ann. tit. 18, § 4622(a)(1). Therefore, the State must show that the use of PI data *by pharmaceutical manufacturers for marketing purposes* is uniquely damaging to the privacy interests of patients or doctors.

It cannot do so. Vermont asserts vaguely that marketing based on PI data "intrudes on the doctor-patient relationship." Vermont Br. at 47. But doctors retain the ability to insulate themselves from such marketing. Since 2006, doctors have had the option to enroll in the American Medical Association's Physician Data Restriction Program, which allows prescribing physicians to prevent their prescribing information from being used for data-mining. *See* Jeremy A. Greene, *Pharmaceutical Marketing Research and the Prescribing Physician*, 146 Annals of Internal Medicine 742, 746 (2007). They also retain the option to simply decline any detailing visits from pharmaceutical sales representatives. And, of course, they retain the ultimate authority to make prescribing decisions without relying on any information they may have learned during marketing visits. As a result, doctors can readily prevent marketing by pharmaceutical manufacturers from affecting their prescribing decisions.

Thus, the State's purported interest in maintaining privacy boils down to a desire to shield

doctors from exposure to speech by pharmaceutical sales representatives. This Court has dismissed that interest as illegitimate before, and should do so again. *See*, *e.g.*, *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977) (invalidating restriction motivated by fear that speech "will cause those receiving the information to act upon it"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (holding that the First Amendment does not "'permit the government to prohibit speech as intrusive.'") (quoting *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 542 (1980)).

Nor does the law directly advance the State's interest in reducing health care costs. Vermont claims that marketing based on PI data is likely to lead doctors to prescribe more brand-name drugs, which tend to be more expensive. Vermont Br. at 49-50. As the Second Circuit noted, the State's explanation of how the law promotes this interest is too attenuated to be considered "direct." Pet. App. 29a. Moreover, the State's position ignores that innovative new drugs can potentially reduce long-term health-care costs by preventing expensive surgeries and emergency room visits.

Nor has Vermont shown that the law directly advances its interest in public health. Vermont claims that the marketing practices of pharmaceutical manufacturers encourage doctors to prescribe new and needlessly risky drugs, and that doctors are swayed by these marketing efforts to make incorrect prescribing decisions. As the United States recognizes, that rationale is invalid because it

"depends on the unwarranted view that the dangers of such new drugs outweigh their benefits to patients." *Amicus* Br. of United States at 24 n.4. Indeed, this Court already has rejected "the questionable assumption that doctors would prescribe unnecessary medicine" if exposed to information about different treatment options. *Thompson*, 535 U.S. at 374. And, more broadly, the Court already has "rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with [that] information." *Id.*; *see also 44 Liquormart*, 517 U.S. at 503 ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."). The State's theory is too speculative, and too inadequately supported, to justify its restriction on truthful speech.

Less Restrictive Alternatives Are Available. The State could advance its interests in reducing health care costs and improving public health without restricting any speech. The State asserts that costs increase and health outcomes suffer because of the over-prescription of branded prescription drugs. Thus, the State could advance its claimed interests by either restricting doctors' ability to prescribe such drugs or adding inducements for doctors to prescribe equivalent generic drugs. The State should not restrict the speech of pharmaceutical manufacturers in lieu of regulating the conduct of doctors. *See Thompson*, 535 U.S. at 373 ("If the First Amendment

means anything, it means that regulating speech must be a last – not first – resort.").

At a minimum, the State could advance its stated interests by restricting far less speech. For example, to address its concerns about both costs and public health, the State could prohibit marketing based on PI data for only those drugs that have been on the market for less than a year.

Finally, the State can always combat expression it disfavors with its own expression. It is free to encourage the use of its preferred pharmaceuticals through its own marketing and promotion. And Vermont has done just that by creating and funding a counter-detailing program. *See supra*.

Although the Court has subjected restrictions on purely commercial speech to less stringent First Amendment scrutiny, it has recognized that the "free flow of commercial information is indispensible" because it "is a matter of public interest that [economic] decisions, in the aggregate, be intelligent and well informed." *Virginia Bd.,* 425 U.S. at 765. Indeed, a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763. To maintain the free flow of commercial information, the Court cannot exempt the Vermont law from First Amendment review, or accept Vermont's vague and unsubstantiated claims that its law directly advances compelling state interests.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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