No. 10-779

# In The Supreme Court of the United States

WILLIAM H. SORRELL,
Attorney General of Vermont, 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 OF *AMICI CURIAE* BLOOMBERG L.P., THE MCGRAW-HILL COMPANIES, INC., HEARST CORPORATION, PROPUBLICA, THE ASSOCIATED PRESS, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE TEXAS TRIBUNE IN SUPPORT OF RESPONDENTS**

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## QUESTION PRESENTED

Whether any of the theories that have been advanced in support of State restriction of prescriber-identifiable information justify treating the gathering and publication of truthful, lawful, privately-held computerized data, on or illuminating matters of public interest and concern, differently than any other kind of constitutionally-protected speech, and if so on what basis and to what extent?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

## STATEMENT[1]

The Second Circuit in the decision below correctly ruled that the Vermont statute violated the First Amendment. It recognized that even seemingly dry, electronically-distributed information is no mere commodity and that data can inform public debate as much as political speech or literary prose. Information about commerce, or used by those engaged in commerce, is not itself necessarily "commercial" speech.

Appellant and its supporting *Amici* would uphold prescription information ("PI data") restraint statutes on a variety of theories. The result, however, would allow Vermont and other States to make laws that restrict and penalize data they prefer to suppress, simply because it may be used by some of its recipients for a disfavored commercial purpose, thus severely impairing if not destroying the incentive to gather and publish the data.

Some have even likened the PI data to a commodity like "beef jerky," with "scant" communicative value, deserving of no First Amendment protection,

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[1] In accordance with Supreme Court Rule 37.6, Amici Curiae state that (1) no counsel to a party authored this brief, in whole or in part; and (2) no person or entity, other than Amici, their members and counsel have made a monetary contribution to the preparation or submission of this brief. The written consents of the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

subject to regulation on any rational basis. Or they have viewed gathering and publishing the data as conduct, not speech, simply one part of a "commercial" transaction.

Proponents of PI data restriction argue that, even if gathering and publishing the data warrants a degree of constitutional protection, such protection is only *de minimis*. They argue that the statutes should be analyzed under this Court's "commercial speech" doctrine, even though the data itself is clearly not advertising and its dissemination by the Respondent publishers does not in any way propose a commercial transaction.

Some have contended that the PI data is speech on matters of only private rather than public concern. This is also said to justify some lesser degree of First Amendment protection. But publication of the data in this case informs discussion of undeniably consequential healthcare issues, not only by pharmaceutical marketers but by many other interested parties who can obtain and use the data for these important purposes only if it can be effectively gathered and published.

Finally, Appellant and others argue that information generated in a regulated field like PI data can be treated as if it were in the government's possession, and any restriction on it as merely a limitation on "access" to government information, subject to no special First Amendment protection. This dangerous theory could sanction unprecedented limitations on

access to a broad range of information by publishers, journalists and the public.

The ways in which publishers and journalists actually gather, publish and report on computerized data in today's data-intensive world demonstrate the need to recognize the vital importance of such information, and the need for its robust protection under the First Amendment.

The *Amici* respectfully submit that for these reasons Vermont's and the other PI data restriction statutes cannot pass constitutional muster and that this Court should foster – not approve suppression of – this increasingly important form and medium of communication.



## INTERESTS OF THE *AMICI*

The *Amici* are leading publishers and journalism organizations who have a professional and institutional interest in assuring that First Amendment rights – their own and the public's – are appropriately defined and protected.

In this case, the *Amici* are concerned that the Courts below – even including the Second Circuit majority notwithstanding that it found Vermont's statute unconstitutional – have failed to adequately understand, define and protect First Amendment rights to gather, publish and report on computerized

data and the important information and analysis that is based on such data.

In order to avoid any such misunderstanding in this Court, a central purpose of this brief is to inform the Court of the range of uses that publishers and journalists make of computerized data and the ways in which they currently gather, analyze, publish and report on it. These are vitally-important activities that could be abridged if data publishing, and the gathering of such data, were treated as either not subject to First Amendment protection at all or as subject only to some lesser degree of protection.

**Bloomberg News** is a trade name for Bloomberg L.P. ("BLP"), registered in Delaware and operating a principal place of business in New York. BLP is not a publicly traded company. BLP, based in New York City, operates Bloomberg News and other information services and databases.

**The McGraw-Hill Companies, Inc.** is a global information provider, with over 300 offices in more than 30 countries. McGraw-Hill's publishing units focus on education, financial services and business information through its McGraw-Hill Education, McGraw-Hill Financial, McGraw-Hill Information & Media, and Standard & Poor's business segments.

**Hearst Corporation** is one of the nation's largest diversified media companies. Its major interests include ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle*, *San Antonio Express-News* and

*Albany Times Union*; approximately 200 magazines around the world, including Good Housekeeping, Cosmopolitan and O, The Oprah Magazine; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E, History and ESPN; as well as business publishing, including a minority joint venture interest in Fitch Ratings; Internet and marketing services businesses, television production and newspaper features distribution.

**ProPublica** is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It publishes its work on its own Web site, propublica.org, and also often in partnership with leading news organizations, including the *New York Times*, *Washington Post*, *USA TODAY*, NPR, PBS's *Frontline*, the *Atlantic*, the *New Yorker*, *Slate*, *Politico* and metropolitan newspapers across the country. In 2010, ProPublica became the first online news organization to be awarded a Pulitzer Prize.

**The Associated Press** is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 5,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in more than 300 locations worldwide.

**The Reporters Committee for Freedom of the Press** is a voluntary, unincorporated association

of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

**The Texas Tribune**, formed in 2009, is a nonpartisan, nonprofit media organization that promotes civic engagement and discourse on public policy, politics, government, and other matters of statewide concern. The Tribune's model of nonprofit journalism, supported by individual contributions, major gifts, corporate sponsorships, and foundation grants, has already been recognized with two Edward R. Murrow Awards as well as a General Excellence Award from the Online News Association.

## SUMMARY OF ARGUMENT

Gathering, publishing and reporting on computerized data plays an increasingly important role in today's information society that should be fostered, not restricted. Virtually all publishers, not just Respondents pejoratively called "data miners," are active in publishing computerized data that is used for many legitimate purposes, including commercial purposes. (Point I.A.)

Journalists and other media of all kinds increasingly rely on access to computerized data to report on issues of public interest and concern. In fact, the

importance of computerized data to journalists is greater than ever; to restrict its availability, or to deny access to its sources, would unjustifiably abridge future development of this important form and medium of expression. (Point I.B.)

Evaluating the Respondent data publishers' claim to First Amendment protection in the context of a more complete understanding of the public importance of computerized data and its increasing usage by publishers and journalists, it is apparent that PI data restraint statutes should be fully protected under the First Amendment; that they regulate speech, not conduct (II.A.); that most if not all manifestations of data publishing and analysis are in fact non-commercial speech addressed to matters of undoubted public interest and concern (II.B.); and that to hold otherwise would inappropriately expand the definition of commercial speech and thus deprive important speech of full constitutional protection. (Point II.C.)

Finally, courts and legislatures cannot turn privately-held data and information into government data, thus rendered inaccessible, merely because the data is gathered and generated in a regulated environment. (Point III.)

## ARGUMENT

### I. GATHERING, PUBLISHING AND REPORTING ON COMPUTERIZED DATA SERVES AN INCREASINGLY IMPORTANT FUNCTION IN OUR 21ST-CENTURY INFORMATION-DRIVEN DEMOCRACY

#### A. Computerized data is gathered and published by the *Amici*, and other traditional publishers, on a wide array of subjects of undoubted public interest and concern

Gathering and publishing data – stored, organized and analyzed with the assistance of computers – is a centerpiece of freedom of speech in today's 21st-Century information-driven democracy. To accord lesser First Amendment protection to such data than to other forms of speech would be to ignore its importance in traditional publishing on matters of public interest and concern.

*Amicus* Bloomberg L.P. maintains a wide range of computerized data and databases. In addition to photo libraries and archives containing hundreds of thousands of news stories, like a traditional wire service, Bloomberg also provides to hundreds of thousands of financial professionals, analysts, investors, government economists and law firms a far-reaching palette of information products, gathered from private as well as public sources, often in regulated environments. The Bloomberg Professional Service provides bond and equity pricing data, sales

information, market indices, analytic charts and public and private company history and personnel and technical data for every publicly traded financial instrument and institution in the world. Bloomberg's BGOV is a database providing news and information about state and federal appropriations indexed by industry (Health Care, Technology, Financial, Transportation and Energy). This information is presented to Bloomberg's subscribers in a searchable and sortable application. Bloomberg's BLAW provides subscribers with access to a database of pleadings, court opinions, regulatory findings and filings in the United States, Africa, the United Kingdom, Asian and Pacific Rim Countries and most of Western Europe. Although Bloomberg is a for-profit company and complete access to Bloomberg's computerized databases and terminals is made available for a profit, no one has ever suggested that Bloomberg's gathering and publication of its data, news and analysis is anything other than non-commercial speech on matters of great public interest and concern subject to full protection under the First Amendment or that the use of Bloomberg's data by many of its subscribers for commercial purposes would in any way reduce the constitutional protections accorded to Bloomberg.

*Amicus* McGraw-Hill relies heavily, across almost all of its publishing units, on the gathering and dissemination of computerized data and information, from public and private sources, often in regulated environments. For example, McGraw-Hill Education, through Access Medicine and other products, provides

information on medical procedures and drugs to medical professionals for both study and use in daily practice. McGraw-Hill Information & Media publishes information online and in print for business in the fields of Aviation, Construction, and Commodities. McGraw-Hill Construction, for example, collects and disseminates information and analysis for bidders and policymakers on construction projects around the country, including a database of actual architectural plans generally obtained from willing private owners, for distribution in electronic form to potential bidders and others. Without this critical service, the entire bidding process in the construction industry would slow down and it would become more expensive for market participants to bid on construction projects. Platts, McGraw-Hill's oil, natural gas, coal, energy, petrochemical and metals information publisher, has been providing business-critical market data and analysis in those fields for more than 100 years, contributing significantly to the transparency of the vital markets in which it operates. Its oil reporting, for example, provides online data on oil sale transactions in markets around the world and also publishes market assessments based on that data. McGraw-Hill Financial collects and maintains business and financial data from around the world, including the well-known S&P 500 Index and other leading market indices, Capital IQ fundamental and quantitative corporate data, MarketScope and other equity research products, and the suite of Valuation and Risk Strategies products and services for risk driven investment analysis. Standard & Poor's is one

of the major credit rating agencies, disseminating credit information to investors and the markets around the world. Although none of these data publishing operations itself constitutes "commercial speech," self-evidently McGraw-Hill's readers and subscribers use this information every day for vitally-important commercial purposes.[2]

*Amicus* Hearst Corporation is an active publisher of data and information, gathered from both private and governmental sources, on a wide range of topics. In the healthcare field, for example, Hearst's wholly owned subsidiary First DataBank, Inc. is a leading publisher of drug information, gathered from both public (FDA and other government agencies) and

[2] In fact, Courts presented with the issue have consistently held, in a variety of factual contexts, that McGraw-Hill's publications, even when they involve computerized data used for commercial purposes, are entitled to the full First Amendment protections traditionally accorded to all publishers and journalists. *See, e.g., In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir.) (*per curiam*), *cert. denied*, 459 U.S. 909 (1982) (holding that Platts was a constitutionally-protected publisher for purposes of its assertion of the journalist's privilege); *In re Pan Am Corp*., 161 Bankr. Rptr. 577, 22 Med. L. Rptr. 1118 (S.D.N.Y. 1993) and *In re Scott Paper Co. Securities Litigation*, 145 F.R.D. 366 (E.D. Pa. 1992) (holding that Standard & Poor's is entitled to the protection of the journalist's privilege for its publication of credit ratings); *see also First Equity Corp. v. Standard & Poor's Corp*., 690 F.Supp. 256, 258 (S.D.N.Y. 1988), *aff'd on other grounds*, 869 F.2d 175, 16 Media L. Rep. 1282 (2d Cir. 1989) (holding that S&P was entitled to assert First Amendment defenses to a claim of "negligent publication" in connection with data about the features of a corporate bond in S&P's *Corporation Records*).

private (non-governmental) sources. First DataBank's various publications are made available through subscriber data feeds to health insurance companies, government agencies, hospitals, pharmacies and others, and in hard copy and over the internet to consumers. A central purpose of this data is to help reduce the incidence of medication errors and adverse drug events, matters of substantial public interest and concern.[3] Hearst's wholly owned subsidiary Zynx Health Incorporated also publishes healthcare data and information, gathered from public and private sources, the central purpose of which is to improve the quality, safety, and efficiency of patient care. Thousands of hospital organizations use Zynx Health clinical evidence, order sets, plans of care, clinical decision support rules, quality forecasters, and practice guidelines. In the field of automotive data, for another example, Hearst Business Media Corporation's National Auto Research publishes the Black Book vehicle appraisal guides and databases which provide values for both new and used vehicles (including cars,

[3] In fact, the California Court of Appeal recently held that First DataBank's "patient education monographs" – publications summarizing important information about prescription drugs – are fully protected non-commercial speech involving "a public issue or an issue of public interest" for purposes of Cal. Code Civ. Proc. § 425.16 (anti-"SLAPP" suit statute). *Rivera v. First DataBank, Inc.*, 115 Cal. Rptr. 3d 1 (Ct. App. 4th Dist. 2010). It did so in dismissing wrongful death claims against First DataBank for negligence and breach of contract based on publication of one of its monographs, while allowing claims to go forward against decedent's prescribing doctor and dispensing pharmacy.

light trucks, motorcycles, ATVs, snowmobiles, personal watercraft, and heavy duty commercial trucks and trailers). Black Book data, gathered from public and private sources, primarily vehicle auctions and dealerships, is published daily in multiple electronic formats including data feeds, Internet-based applications, handheld PDAs, Web enabled cell phones, Pocket PCs, BlackBerry and Palm devices, SmartPhones, Micro Browsers, online trade appraisal services, and in a variety of other custom products and printed versions of the data are also available on a weekly basis.

### B. Journalists increasingly rely on computerized data to report on issues of public interest and concern. To restrict the availability of such data, or to deny access to its sources, would unjustifiably abridge future development of this important form and medium of speech

In this case, some have found it expedient to dismiss the gathering and publication of computerized data as a mere mechanical or commercial process – "data mining" – with little or no significance for the exercise of First Amendment rights. But data publishing is already a major function of many traditional media companies, including a number of these *Amici*. *See* Point I.A., *supra*.

And the importance of data publishing and data-driven journalism will almost certainly increase in the future, promising significant benefits to the

public, so long as these forms of protected speech are not unjustifiably abridged by heavy-handed government regulation:

> "*[D]ata-driven journalism* is one of the big potential growth areas in the future of journalism. A lot of the forward-thinking discussion about the future of news focuses on the 'glamorous' possibilities, like video journalism and interactivity, but I often see data journalism being ignored.
>
> In fact, I believe it *is journalism in its truest essence: uncovering and mining through information the public do not have enough time to do themselves*, interrogating it, and making sense of it before sharing it with the audience. If more journalists did this (rather than relying on 'data' from press releases) we would be a far more enlightened public. Adam Westbrook, Author of *Next Generation Journalist* (2010)."[4]

*Amicus* ProPublica's nonprofit investigative journalism, as a leading example, has increasingly been advanced by the use of data, often related to the critical functions of business and government, which has yielded information of truly fundamental public interest and concern.

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[4] Adam Westbrook, quoted comments made at European Journalism Centre Conference on "Data-Driven Journalism/ Journalism Meets Data" (Amsterdam, August 2010), available online at http://mediapusher.eu/datadrivenjournalism/pdf/ddj_paper_final.pdf (emphasis supplied).

Of particular relevance to the pending case, ProPublica in 2010 embarked on a project to compile thousands of records in order to track the financial ties between doctors and drug companies.[5] The resulting data, gathered from public and private sources, has been used by ProPublica, but has also been shared with several of ProPublica's partners in the project, including PBS, NPR, the Boston Globe, the Chicago Tribune and Consumer Reports. In addition, more than 75 other news organizations have utilized ProPublica's "Dollars for Docs" database to generate local news stories focused on the serious ethical questions that can be raised about the practices of the pharmaceutical industry in paying doctors for speeches and other consulting services and the effect of those payments on doctor's prescribing practices.[6]

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[5] *See* Tom Detzel, October 18, 2010, "About the Dollars for Docs Data," available online at http://www.propublica.org/article/about-our-pharma-data.

[6] *See, e.g.*, "Dollars for Docs: How Pharma Money Influences Physician Prescriptions," October 21, 2010, available online at http://www.npr.org/series/130598927/dollars-for-docs-how-pharma-money-influences-physician-prescriptions; Gary Schwitzer, "'Dollars for Doctors' – Investigative Public Service Journalism," October 19, 2010, available online at http://www.healthnews review.org/blog/2010/10/dollars-for-doctors-investigative-public-service-journalism.html; Liz Kowalczyk, "Prescription for Prestige: Drug Firms' Speaking Fees Flow to Harvard Doctors; Concerns About Influence Prompt New Restrictions," October 19, 2010, available online at http://www.boston.com/news/health/articles/2010/10/19/mass_doctors_earn_drug_firms_dollars/; Susan Perry, "Thousands of Doctors Get Payments from Drug Firms, Investigation Reveals. Is Your Doctor Among Them?" October 19, 2010, available online at

(Continued on following page)

The Dollars for Docs database has spawned articles raising important questions about the practices of the pharmaceutical industry and has also identified participating doctors, by name and affiliation. Other databases developed by ProPublica in support of its investigative reporting have focused on the quality of care at dialysis facilities across the country, on recipients of federal bailout and stimulus funds, and interlocking ownership of collateralized debt obligations that helped fuel the financial crisis. The point is not that the development of such data by ProPublica supports one side or another in any particular public debate. The point is that gathering, publishing and reporting on computerized data is without question itself an important form of speech that informs the public debate. Restricting, or according second-class constitutional protection to, such data can only result in a public debate that is restricted, and second-class, in its scope.

*Amicus* Texas Tribune has also extensively used databases it has developed as centerpieces in its investigative news coverage in the State of Texas. The Tribune has created more than 50 data-driven projects, of public interest and concern, that its readers are using, for example, to locate their lawmakers

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http://www.minnpost.com/healthblog/2010/10/19/22498/thousands_of_doctors_get_payments_from_drug_firms_investigation_reveals_is_your_doctor_among_them; "Dollars for Docs," February 7, 2011, available online at http://www2.nbc4i.com/news/2011/feb/07/dollars-for-docs-40223-vi-24858/.

in the Capitol, to access information about prison inmates, and to see how minorities have driven population growth in Texas. The Texas Tribune's database of annual salaries for more than 550,000 public employees has generated a lot of attention among taxpayers. The database is designed so that users can search for salaries by entering a public official's name, job title or the agency for which the official figure works. The Tribune creates such databases in order to increase transparency, open government, and greater access to information.[7]

Data contained in private databases has also been essential in reporting on critical economic issues. For example, in February 2011, seeking to shed light on the recovery of the housing market in the wake of the Great Recession, the *Wall Street Journal* reported that the National Association of Realtors (NAR), which produces widely watched data on monthly sales of previously owned homes, was examining the possibility it had overestimated U.S. housing sales in 2010. The article reported on other data that offer new ways to track home sales, including one database developed by Core Logic that

[7] *See generally* Mallary Jean Tenore, "Texas Tribune Databases Drive Majority of Site's Traffic, Help Citizens Make Sense of Government Data," March 2, 2011, available online at http://www.poynter.org/latest-news/top-stories/121281/texas-tribune-databases-drive-majority-of-sites-traffic-help-citizens-make-sense-of-government-data/.

measures home sales by tracking property records through local courthouses.[8]

At the beginning of the financial meltdown, *The New York Times* reported that a credit card crisis was following on the heels of the mortgage crisis. The source of that article was mined data from the internet marketing research firm comScore, which revealed that online credit card applications had fallen for the first time in five quarters, in part because customers had received fewer mail offers that led them to apply online.[9]

And the *Sarasota Herald Tribune* recently undertook an ambitious, data-intensive, one-year project that involved gathering and reviewing nearly 19 million Florida real estate transactions. The resulting exposé of the high costs of fraud in such transactions was a 2010 Pulitzer Prize finalist for investigative reporting.[10]

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[8] *See* Nick Timiraos, "Home Sales Data Doubted: Realtor Group May Have Overstated Number of Existing Houses Sold Since 2007," February 22, 2011, available online at http://online.wsj.com/article/SB10001424052748704476604576158452087956150.html?mod=googlenews_wsj.

[9] *See* Eric Dash, "Consumers Feel the Next Crisis: It's Credit Cards," October 28, 2008, available online at http://www.nytimes.com/2008/10/29/business/29credit.html?pagewanted=1.

[10] *See* Michael Braga, Chris Davis & Matthew Doig, July 19, 2009, "'Flip That House' Fraud Cost Billions," available online at http://www.heraldtribune.com/article/20090719/ARTICLE/907191031.

Data has also been critical in reporting on healthcare and the healthcare industry, and the importance of access to factual data in that field is only likely to grow.

For example, *Amicus* The Associated Press mined information databases created by Medco Health Solutions Inc., which manages prescription benefits for about one in five Americans. The result was an article reporting that – for the first time – more than half of insured Americans are taking prescription medications.[11]

In 2008, the *New York Times* used, cited and reproduced Respondent IMS Health's data – the very PI data that Vermont and the other States are seeking to restrict – in an important article exploring the recession's impact on prescription drug usage.[12]

The *Wall Street Journal* last year embarked on a continuing project to investigate Medicare fraud in the American healthcare system. The *Journal* obtained and analyzed a computer database of Medicare payment data in order to evaluate Medicare payments made to specific doctors or practice groups. The

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[11] *See* Associated Press, May 14, 2008, "Study shows more Americans taking prescription drugs," available online at http://www.usatoday.com/news/health/2008-05-14-medication-nation_N.htm.

[12] *See* Stephanie Saul, "In Sour Economy, Some Scale Back on Medications," October 21, 2008, available online at http://www.nytimes.com/2008/10/22/business/22drug.html.

*Journal* project has resulted in a ground-breaking series, *Secrets of the System*.[13] The Medicare data thus far made available to the *Journal* represents only 5% of the relevant information held in the hands of government agencies and the *Journal*'s parent company, Dow Jones, is currently litigating its right to broader and less restricted access to the Medicare database. However, even the partial data has enabled the *Journal*'s team of journalists and data analysts to identify and report on suspicious billing activity by some doctors and reimbursement patterns carrying strong indicia of fraud, according to the *Journal*, including doctors receiving multi-million dollar payments, practices that funnel patients into controversial and unproven high-cost treatments and other questionable practices. Most recently, the *Journal*'s mining of the same database revealed a questionable pattern of repetitive spinal surgeries by some doctors.[14]

Finally, in another example that is also highly pertinent to the case at bar, in 2009 *USA TODAY* published a "Most Influential Doctors" database, created for that newspaper by Santa Fe medical

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[13] *See* Mark Schoofs and Maurice Tamman, "In Medicare's Data Trove, Clues to Curing Cost Crisis," October 25, 2010, available online at http://online.wsj.com/article/SB10001424052748704696304575538112856615900.html.

[14] *See* John Carreyrou and Tom McGinty, March 29, 2011, "Medicare Records Reveal Troubling Trail of Surgeries," available online at http://online.wsj.com/article/SB10001424052748703858404576214642193925996.html?mod=WSJ_hp_MIDDLENexttoWhatsNewsSecond.

information firm Qforma, which in turn received much of the underlying data from Wolters Kluwer, parent company of Respondent Source Healthcare Analytics. Unlike standard best-doctor lists compiled by opinion-based surveys, the Qforma analysis represents a national effort to track subtle differences in doctors' practice patterns that reveal, on a local level, which doctors most influence their peers. The project's goal was to offer readers a resource that they may factor into the complex decision of how to choose a doctor. According to an accompanying news story in *USA TODAY*, the purpose of developing and publishing the database was to empower consumers, who are "demanding more openness and accountability in medical care," with information to enable them to "tak[e] medical care into their own hands." Notably, out of concern for the ban then in effect on PI data in New Hampshire, the *USA TODAY*/Qforma database was published with the names of doctors in all states – *except New Hampshire*. According to *USA TODAY*, "because of the ban, no New Hampshire doctors appear in the Qforma database."[15]

[15] *See* Steve Sternberg, Anthony DeBarros and Jack Gillum, "In Patients' Hunt for Care, Database 'A Place to Start,'" May 14, 2009, available at http://www.usatoday.com/news/health/2009-05-14-influential-doctors-qforma_N.htm. Vermont doctors were apparently included on the *USA TODAY* list at that time because the article appeared before the Vermont statute went into effect.

## II. GATHERING, PUBLISHING AND REPORTING ON COMPUTERIZED DATA IS NON-COMMERCIAL SPEECH SUBJECT TO FULL PROTECTION UNDER THE FIRST AMENDMENT

The Vermont statute purports to be limited to a ban – at the source – on the provision by pharmacies (and other private parties) of the PI data, if it will be used "for marketing or promoting a prescription drug" and – at the end user level – if it will be used by pharmaceutical manufacturers and marketers "for marketing or promoting a prescription drug." Vt. Stat. Ann. tit. 18, § 4631(d). The statute purports to exempt from these restrictions gathering and publishing the data for a variety of regulatory, research and educational purposes. Inevitably, however, the overbroad reach of the statute restricts data publishers both from obtaining truthful, otherwise lawful information from willing sources and from publishing the information to all interested recipients. Given the often high cost of developing comprehensive databases, the end result of restricting dissemination solely to government approved recipients may be to render maintaining the data economically infeasible for commercial publishers. This, in turn, may assure that such data will become unavailable, not only for disfavored commercial purposes, but also for the important non-commercial purposes that even the PI data statute purports to allow.

### A. Prescription data restraint statutes regulate speech, not conduct

In recognizing that the Vermont statute does regulate protected speech, the Second Circuit rejected a central element of the First Circuit's analysis in *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), *cert. denied*, 2009 U.S. LEXIS 4744 (2009). *Ayotte* was based on the extreme and erroneous view that the New Hampshire law regulates "conduct" rather than "speech," and that any speech affected by this conduct regulation is of "scant" social value and that thus the law could be upheld on any rational justification.

But neither the New Hampshire nor the Vermont law is addressed to conduct. As the Second Circuit ultimately recognized, the laws are instead aimed squarely at prohibiting the communication of information, and do so based solely on government's antipathy to certain uses of its content. ("Here the legislature explicitly aimed to correct the 'massive imbalance in information presented to doctors and other prescribers.' Vt. Acts No. 80 § 1(6). The statute is therefore clearly aimed at influencing the supply of information, a core First Amendment concern." *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 272 (2d Cir. 2010)).

### B. Gathering, publishing and reporting on computerized data, including PI data, is not "commercial speech" but rather non-commercial speech that should be fully protected by this Court under the First Amendment

Since *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, *Inc.*, 425 U.S. 748 (1976), this Court has mandated First Amendment protection for "commercial speech," but it has accorded less protection to such speech than to fully-protected, non-commercial speech. *Amici* respectfully submit that gathering, publishing and reporting on computerized data, including the PI data here, is clearly not "commercial speech" but rather non-commercial speech that should be fully protected by this Court under the First Amendment.

#### 1. Even dry information, devoid of political or artistic analysis or expression, is protected under the First Amendment

The Second Circuit correctly held, citing and following its own and this Court's precedent, that the Vermont statute regulates speech that is protected under the First Amendment. *See IMS Health Inc. v. Sorrell*, *supra*, 630 F.3d at 271-72 ("[e]ven dry information, devoid of advocacy, political relevance, or artistic expression" is protected speech under the First Amendment) (*quoting Universal City Studios v. Corley,* 273 F.3d 429, 446 (2d Cir. 2001)); *see also id*.

at 272 (information about prescription drug prices is protected speech) (*citing Virginia State Board of Pharmacy*, *supra*).

Indeed, it can hardly be debated that the speech at issue – once it has been gathered, organized and analyzed – possesses significant societal value. *See* II.B.2., *infra*. Although it does not convey an obvious political message, in the aggregate this information may be just as important. Such information reveals large patterns and trends of great interest and concern to scientists, researchers and medical decision-makers, and may reveal similarly important information about specific actors or enterprises.

### 2. Computerized data and analysis often address or inform matters of substantial public concern, even if the data itself does not always convey an obvious social or political message

*Amici* have already demonstrated the increasing relevance of computerized data in their own publishing and journalism as a basis for informed reporting and analysis on matters of undoubted public interest and concern. *See* Point I, *supra*.

In this case, the Respondents' PI data also relates to and illuminates important health-related matters of clear public interest and concern. This Court's most recent discussion of the line between public and private matters established in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), is

not to the contrary. *See Snyder v. Phelps*, 562 U.S. __ (2011), Slip. op. at 5 (First Amendment limits state law tort claim where the speech at issue is of "public" as opposed to "private" concern).

Simply stated, healthcare and healthcare policy are surely among the predominant issues of public interest and concern in our country today.[16] Moreover, the undisputed factual record developed at trial makes clear that there is a strong public interest in the data Respondents gather and publish well beyond drug marketing. Respondents' data are used in scientific research as well as government enforcement and policy development. For example, Respondents' data was used to study overuse of antibiotics in children and to examine the incidence of usage of prophylactic medications following the anthrax scare in 2001. JA142. Reports published by one of the Respondents enabled the Centers for Disease Control to determine that some physicians were prescribing older-generation medications and to assess the speed with which physicians adjusted to the CDC's communications suggesting that these medications may not be the best drugs available to treat the flu. JA167. And the FDA has used Respondents' publications to assess

[16] *See Rivera v. First DataBank, Inc., supra*, 115 Cal. Rptr. 3d at 6 (collecting California state cases consistently holding that health issues are matters of public interest, including reporting on treatment for depression, equivalence of a name brand and generic drugs, use of Ritalin for attention deficit disorder and the accuracy of lab tests).

how medications are used in combination. JA168. These undeniably important uses are of the same data whose gathering and publication Vermont and other states with PI data statutes have purported to ban or restrict.

Thus, the case at bar is readily distinguishable from *Dun & Bradstreet*, where this Court held that the erroneous credit report at issue did not involve a matter of public concern, for purposes of a libel action, because the information was about one private company that was of interest to only five D&B subscribers. In marked contrast, there is no dispute that Respondents' data is of interest and made available not only to their pharmaceutical subscribers but also to a variety of "academic researchers, universities [and] even newspapers . . . ," normally free of charge. JA141.[17]

### 3. Gathering, publishing and reporting on computerized data, like any other form and medium of expression, cannot be classified as commercial speech simply because it is done for profit

Commercial motive has never been viewed as a basis for denying First Amendment protection to

[17] Some of Respondent IMS Health's data was used, cited and reproduced, for example, in a 2008 *New York Times* article exploring the recession's impact on prescription medication usage. *See* Point I.B., *supra*.

what is otherwise protected speech. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) ("If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases . . . would be little more than empty vessels."); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) ("[that] books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."); *see also Smith v. California*, 361 U.S. 147, 150 (1959) (books); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) (religious literature); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967) (magazines); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (newspapers with paid advertising).

#### 4. Gathering, publishing and reporting on computerized data cannot be transformed into a mere commercial transaction, subject to no First Amendment protection, or into "commercial speech" subject to lesser protection, simply because a recipient uses it for a commercial purpose

The Vermont statute abridges the Respondent publishers' protected non-commercial expression by proscribing and thus "chilling" the non-commercial speech of their sources *and* by proscribing and thus drying up the most economically significant market for their publications.

Whether or not pejoratively labeled as mere "data miners," for First Amendment purposes there is no principled difference between the data gathering and publishing activities of the Respondents and those of traditional publishers and journalists such as those cited in Points I.A. and I.B., *supra*. Indeed, for present purposes, the only significant difference appears to be that the content of the Respondents' specialized publications have come to be disfavored by the State of Vermont because a primary – but not exclusive – market is the pharmaceutical companies that use the data for the "detailing" which Vermont seeks to suppress.

To separate out such data for special treatment, based on its disfavored content, and to attack "data mining" on some theory that data is a mere commodity subject to no or lesser First Amendment protection, is to undermine development of a powerful and highly promising new and expanding source of information, research and analysis. The fact that such powerful data might ultimately be used for arguably "commercial" purposes by some recipients is no more relevant here than the fact that many subscribers to Bloomberg's or McGraw-Hill's or Hearst's databases use the information gleaned through such subscriptions to inform their commercial activities.

### C. This case is an appropriate occasion for the Court to clarify the contours of its "commercial speech" doctrine "to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed"

This Court has emphasized that the nature of the speech that government seeks to regulate "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983). Unfortunately, this Court's preferred means of separating speech that is fully protected under the First Amendment from speech afforded lesser protection as "commercial speech" is easily mischaracterized.

This Court originally defined commercial speech narrowly as "speech that does no more than propose a commercial transaction." *Virginia State Board of Pharmacy*, *supra*, 425 U.S. at 762. Although it has on occasion referred more broadly to "expression related solely to the economic interests of the speaker and its audience," *see, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557, 561 (1980), it has more recently referred to *Virginia Pharmacy*'s narrower formulation as "the test for identifying commercial speech." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989).

The Court's different expressions of the definition of commercial speech have been mistaken, as in this

case, to unduly expand the scope of commercial speech.

Thus, in *Ayotte*, the First Circuit acknowledged but rejected the narrower definition of commercial speech reiterated by this Court in *Fox*, claiming that "the case law is inhospitable to this argument," albeit citing only First Circuit precedent in support of its position. 550 F.3d 42, 54-55 (1st Cir. 2008).

In contrast, the Second Circuit in this case cited its own prior decisions which narrowly identified the "'core notion' of commercial speech as that 'which does no more than propose a commercial transaction.'" *Anderson v. Treadwell*, 294 F.3d 453, 460 (2d Cir. 2002) (quoting *Bolger*, 463 U.S. at 66). Indeed, in a decision with particular application herein, the Second Circuit had previously raised concerns that "[u]se of the *Central Hudson* description as a definition of commercial speech might, for example, permit lessened First Amendment protection and increased governmental regulation for most financial journalism and much consumer journalism simply because they are economically motivated, a notion entirely without support in the case law." *Commodity Futures Trading Comm'n v. Vartuli*, 228 F.3d 94, 110 n.8 (2d Cir. 2000).

The *Amici* suggest that this case is an appropriate occasion for confirming the narrow *Virginia State Board of Pharmacy* definition of commercial speech and for reaffirming this Court's admonition that any government restriction on speech must be "examined

carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger*, 463 U.S. at 66.

Here, the Second Circuit adopted the narrower definition of commercial speech and observed that the "data miners' regulated speech is therefore one step further removed from the marketing goals of the pharmaceutical manufacturers." 630 F.3d at 274. *Amici* respectfully submit that this should have been the end of the inquiry. Instead, the Second Circuit went on to label Respondents' speech merely "as a necessary step in the pharmaceutical manufacturers' marketing efforts," in contrast to the computer program involved in *Universal City Studios*, which "was not a step in a chain intended to influence marketing efforts."

In so ruling, the Second Circuit essentially ignored the broader totality of Respondents' information gathering and publishing activities. Like these *Amici*'s data publications, the PI data inform not only pharmaceutical marketers but also many other interested recipients, including scientists, researchers and policy-makers.

The Second Circuit improperly allowed its determination that some of its subscribers' activities in the doctors' office constituted commercial speech to reach back in time to when the publisher collected the information. Although the Second Circuit ultimately ruled that the Vermont statute did not pass muster under even the intermediate scrutiny standard used

for commercial speech, its broader reasoning could potentially abridge clearly non-commercial information gathering and publishing activities unrelated to advertising or marketing.

Simply stated, and as previously illustrated, the fact that information deserving of the highest constitutional protection might ultimately be used for arguably "commercial" as well as clearly non-commercial purposes by some recipients should be no more relevant here than the fact that subscribers to *Amici* Bloomberg's or McGraw-Hill's or Hearst's leading financial databases use that data to guide their investment or commercial activities. *See* Point II.B.4., *supra*.

## III. PRIVATELY-HELD DATA CANNOT BE TRANSMUTED INTO GOVERNMENT INFORMATION, AND RENDERED INACCESSIBLE, SIMPLY BECAUSE THE DATA IS GENERATED IN A REGULATED ENVIRONMENT

### A. Private pharmacies that hold the PI data are the data publishers' willing sources

Under any proper definition, the provision of raw data of public interest by a private information source to a publisher for analysis and dissemination – regardless of the profit-making motive of the source or

the publisher[18] – should *not* be deemed commercial speech. This is so even if one (but not the only) end use of that disclosed data may ultimately be to assist in marketing or promoting the sale of a product.

These pharmacies, as willing speakers who wish to communicate the PI data to the publisher plaintiffs, are directly censored by Vermont's ban on the content of their communication. They are deterred as sources by the threat that they will be punished for providing certain content should it later be used for a prohibited end purpose. Indeed, the essential intent of the statute is surely to "chill" the pharmacies from speaking.

But, as this Court has noted, "[f]reedom of speech presupposes a willing speaker. Where a willing private speaker exists, as is the case here, the protection afforded is to the communication, to its

[18] Although journalistic "sources" are often unpaid, it is also not unusual for certain kinds of sources to be paid for information – without ethical concern or loss of First Amendment protection. For example, polling is a costly operation that generates information of undeniable public importance. Yet polling frequently involves "mining" large bodies of data, organized and analyzed by computers, often performed by paid independent contractors. No one would argue that such polling, or the data it produces, is unprotected by the First Amendment or that it is commercial speech, no matter what end use is made of it. And, of course, the profit motive of publishers, whether of data or other information of public interest and concern, has also never been viewed as a bar to First Amendment protection. *See* Point II.B.3., *supra*.

sources and to its recipients both. . . ." *Virginia State Board of Pharmacy*, *supra*, 428 U.S. at 753-54.

### B. To hold that States can deny or restrict access to data or information in private hands, simply because there is government regulation in any particular field, would breach the fundamental line established by this Court for First Amendment purposes between private and government information

It is a fundamental principle of this Court's First Amendment jurisprudence that "[t]hough government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming." *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 845 (1978) (Stewart, J., concurring). *See also Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) ("it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party").

*A fortiori*, government cannot prohibit or punish the publication of information that is in private hands and indeed never was in government hands. Yet this is exactly what Petitioner asks of the Court when it argues that *Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32 (1999) (addressing First Amendment right of access to

government-maintained arrest records), should be extended to cover information that is in private hands, such as the PI data in this case.

In seeking to breach this fundamental principle, Petitioner first argues that "it matters how the pharmacy obtained" the records it sells, citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and contends that government is permitted to restrict access to information that is in private hands only because of "legislative grace." Pet. Br. 28. But *Seattle Times* is readily distinguishable because there the information had only been obtained "pursuant to a court order that both granted . . . access to that information and placed restraints on the way in which the information might be used." 467 U.S. at 32.

By contrast, pharmacies in Vermont gain access to prescriptions in the normal course of their business and not merely by "legislative grace." Thus, the statute at issue here did not grant access to information that would otherwise have been unavailable. Rather, it was enacted to restrict the use of information *already* in the private hands of pharmacies – information which the pharmacies had traditionally made available to the Respondent publishers.

Moreover, *Seattle Times* does not stand for the proposition that information in private hands by "legislative grace" is subject to government restriction by fiat and without any scrutiny. Indeed, in the sentence immediately following the one quoted by Petitioner, the Court in *Seattle Times* went on to

analyze whether the governmental interest overcame the petitioner's First Amendment rights. 467 U.S. at 32 ("In addressing that question it is necessary to consider whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'").

Vermont also cites a series of federal and state laws that restrict the disclosure of confidential information held in private hands. Pet. Br. 35. But these are all readily distinguishable, because in every instance they involve personally identifiable information about an *individual's* health, finances, private legal communications or purchasing habits. Here, all personally identifiable information about individual patients has been stripped away by Respondents in order to protect such personal interests. Indeed, and tellingly, many of the statutes cited by Vermont specifically exclude aggregated information (e.g., 47 U.S.C.A. § 222(c)(3)), or information that is not personally identifiable (e.g., Cal. Fin. Code § 4056).

In sum, there is no basis in precedent or policy for the potentially drastic constriction of access to privately-held information contemplated in Judge Livingston's dissent or urged by Petitioner and the United States before this Court.

## CONCLUSION

For the reasons stated, this Court should affirm the judgment of the Court of Appeals for the Second Circuit, albeit on broader constitutional grounds under the First Amendment.

Respectfully submitted,

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Dated: March 31, 2011