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 *AMICUS CURIAE* OF AMERICAN BUSINESS MEDIA; THE COALITION FOR HEALTHCARE COMMUNICATION; THE CONSUMER DATA INDUSTRY ASSOCIATION; CORELOGIC; THE NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS; AND REED ELSEVIER INC. IN SUPPORT OF RESPONDENT

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Identity of the *Amici*[*]

Amici are entities or associations of entities who compile information into electronic databases and other publications and make that information available for commercial and noncommercial purposes. These compilations contain both public record information and information lawfully obtained from private parties. That information is used for a variety of important commercial and public purposes, including education, news reporting, research, business planning, and law enforcement.

American Business Media is a not-for-profit association serving business-to-business information providers. Its 236 members currently produce 1,500 business and professional periodical publications in both print and electronic form, including databases.

The Coalition for Healthcare Communication is comprised of trade associations and their members who engage in medical education, publishing, and marketing of prescription products and services, including drugs, devices, and biologics. Trade association members include the American Association of Advertising Agencies and

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[*] No counsel to a party has written any portion of this brief. No party or entity other than those listed on the cover of this brief has contributed monetarily to its preparation or submission. Consent to the filing of *amicus* briefs has been lodged with the Clerk of this court.

the Association of Medical Media. These members make extensive use of prescriber-identifiable data that enable them to increase the effectiveness and efficiency of education and communication programs on behalf of the manufacturers of prescription products.

The Consumer Data Industry Association is an international trade association that represents more than 200 companies that publish and use information obtained from public and private sources. Its members and their customers use that information for investigative background screening on behalf of public and private clients, for purposes such as prevention of fraud, assessment of credit risk, evaluation of prospective employees and tenants, locating witnesses and non-custodial parents, and apprehension of fugitives.

CoreLogic provides consumer, financial and property information, analytics and services to business and government. It has built comprehensive U.S. real estate, mortgage application, fraud, and loan performance databases used by over one million customers to assess risk, support underwriting, investment and marketing decisions, prevent fraud, and improve business performance.

The **National Association of Professional Background Screeners** represents over 600 employment background-screening firms in the United States. Its members use public record and other information to provide pre-employment background screening information to public and private entities, which use that information to decide

whether or not to extend job offers to prospective employees or rent apartments to prospective tenants. Its clients are among the more than 88% of U.S. companies that perform background checks on their employees and prospective employees.

Reed Elsevier Inc. and its several business units including Reed Business, Elsevier, and LexisNexis collect and publish public record and other information for a large number of commercial, educational, journalistic and governmental purposes. Their products include databases of judicial opinions, local, state and federal statutes and regulations, bankruptcy filings, property title records and liens, and other public records.

Summary of Argument

Databases are comprised of facts—the building blocks of discourse. They are used for a variety of valuable purposes, including academic research, law enforcement, fraud detection, and commerce. Digital technology makes this information user-friendly by enabling the sorting, collection, and sifting of this information in ways that would have been cumbersome in a print context. *Amici*, who are database proprietors, write in this case principally because of the suggestion by Vermont and its *amici* that the activity of database publishing receives either no First Amendment protection because the government has required the collection of the information, or because the information was collected for a commercial purpose and therefore treated like a commodity. Those contentions pose a dangerous threat to free speech values.

The publication of truthful information is essential to a democratic society in which the people, not the government, are entrusted with evaluating the worth of ideas. The fact that information is collected and disseminated for a profit has no bearing on whether the dissemination of information receives First Amendment protection.

Although the court of appeals correctly recognized that information in databases is entitled to First Amendment protection, it afforded the publication of that information only the limited protection afforded commercial advertising. Unlike advertising, however, the publication of information in a database poses no risk of deception, as there is

no incentive by the compiler to exaggerate its contents. That incentive, which in the past has warranted reduced free speech protection for advertising, finds no analog in the database-publishing context.

Once truthful, lawfully acquired information is in the hands of a private party, the First Amendment protects the ability of that private party to communicate it. Vermont's argument that the First Amendment is inapplicable with respect to information that the government requires to be collected is a non sequitur. The First Amendment affords protection to information based on its inherent value to public and private discourse, not because of the fact that the government did not mandate its collection.

Although the First Amendment does permit the government to regulate speech in order to protect compelling personal privacy interests such as the interest in personal medical privacy, no such interests are involved in this case. The judgment of the court of appeals should be affirmed.

I. The Communication of Truthful, Lawfully Acquired Information is Entitled to First Amendment Protection

Amici and others have invested billions of dollars in the creation, organization, and publication of searchable databases that make large quantities of reliable, useful and often essential information available to private and governmental users. The information in these databases is used for a variety of beneficial and important purposes, including

business planning, journalism, education, legal and scientific research, risk analysis, and detection of fraud. These publications fulfill the promise of the digital age by facilitating the acquisition of reliable information in efficient, complete, and user-friendly ways.

In defending the statute at issue in this case, 18 V.S.A. § 4631, the state of Vermont and the United States contend that the communication of information contained in these databases is bereft of First Amendment protection, either because that information is collected and sold for profit "like a commodity," see *IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 53 (1st Cir. 2008), *cert. denied,* 129 S.Ct. 2864 (2009) (cited in Pet. Br. at 33), or because the government requires private parties to collect the information. (*See* Pet. Br. at 28; Br. of United States at 13.) In the alternative, Vermont argues that, if the communication of such information is to be entitled to First Amendment protection, it should receive only the lesser degree of protection afforded to advertisements. (*See* Pet. Br. at 41-43.)

Vermont's approach is wrong and constitutes a dangerous threat to First Amendment values. The compelling reasons for giving constitutional protection to speech apply at least as strongly to the communication of accurate, lawfully obtained factual information as they do to the expression and communication of ideas and opinion. The First Amendment protects the transmittal of the information into and out of those databases to the same extent that it protects the communications of ideas and information contained in newspapers, books, movies, and periodicals. This Court has never

held, and should not hold, that a government requirement to collect information automatically authorizes the government to censor or to prohibit the communication of that information. If truthful information is used for improper or criminal purposes, the correct (and constitutionally required) course is to regulate or prohibit the unacceptable or criminal conduct, not to deny public access to truthful, lawfully acquired, and useful information.

For these reasons, more fully set forth below, *amici* agree with the court of appeals that the compilation, aggregation, and distribution of the content of informational databases is entitled to First Amendment protection. We disagree, however, with the court of appeals' conclusion that such activities are entitled only to the reduced level of First Amendment protection offered to commercial advertisements. Those activities instead are entitled to full First Amendment protection.

A. The Availability of Truthful, Lawfully Acquired Information Serves Important Public Purposes

First Amendment protection for the collection and publication of truthful, lawfully acquired information is essential in a democratic society. The freedom to publish information is "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting v. Cohn,* 420 U.S. 469, 495 (1975). That freedom applies both to the publication of public records, which "by their very nature are of interest to those concerned with the administration of government," *id.*, as well as to

information lawfully acquired from private sources through research and "routine newspaper reporting techniques." *Smith v. Daily Mail Publ'g Co.,* 443 U.S. 97, 103 (1979).

Amici and others collect public record and other lawfully available information by querying businesses, visiting courthouses and other record depositories, and interviewing private parties and public officials. Their publications enable businesses, scholars, journalists, law enforcement agencies, and others promptly to obtain accurate, comprehensive information for a wide variety of often essential purposes such as the investigating of political corruption, screening job applicants, locating parents who are defaulting on child support obligations, doing legal research, verifying that borrowers have sufficient assets to collateralize a loan, evaluating insurance risks, analyzing the state of the U.S. economy, and obtaining information about the health of a local business community.[1] The ability of databases to provide that information is greatly enhanced by the use of digital technology, which has made it possible to aggregate and explore

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[1] Many American Business Media members, for example, regularly publish information regarding companies, service providers, and key executives in a given industry. In the print era, their trade journals, delivered by mail, provided data from government and private sources relevant to the industries they cover—for example, government geological data for the oil and gas industries; crop data from USDA and price data from the commodities exchanges for the farming community; and import-export data. Today, ABM members continue to compile and sell industry-relevant data, though they now often make that data available electronically.

information in ways that were previously cumbersome or impracticable.[2]

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[2] For example:

> The FBI subscribes to various commercial on-line databases, such as LexisNexis' Accurint, Dun & Bradstreet, and others, to obtain public source information regarding individuals, businesses, and organizations that are subjects of investigations.…Subscription to these databases allows FBI investigative personnel to perform searches from computer workstations and eliminates the need to perform more time consuming manual searches of federal, state, and local records systems, libraries, and other information sources. Information obtained is used to support all categories of FBI investigations, from terrorism to violent crimes, and from health care fraud to organized crime.

Hearing on the 2000 Budget before the Senate Committee on Appropriations, Subcommittee for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies, at 280 (Prepared Statement of Louis Freeh, Director, FBI) (Mar. 24th, 1999), *available online,* www.gpo.gov (visited March 29, 2009). *See also* The Privacy Office, Department of Homeland Security, Privacy and Technology Workshop, Official Transcript at 19 (Sep. 8, 2005) ("[I]f you look back 23 years ago, if I wanted to gather information about a subject, ….We would have to physically go down to the courthouse to get real estate records, we would have to be sending these to another state to go get a driver's license record or a picture, we would have to go to a lot of different places, and manually gather this information.... So, I looked at commercial databases as a way to efficiently gather information....") (comments of Chris Swecker, Assist. Director of the Criminal Investigative Division for the FBI), *available online*, http://www.dhs.gov/files/committees/gc_1179177602761.shtm (last viewed Mar. 28, 2011).

Databases can be "mined" for a wide variety of enormously useful and valuable purposes—for example, in order to locate witnesses, trace family genealogy, discover a politician's ties to unsavory characters, uncover environmental hazards, locate blood, bone marrow or other organ donors, and assess the risk of natural disasters.[3] Their contents are the building blocks of discourse, education and learning in a free society.[4] Like newspapers and other traditional print publications that collect and disseminate information, databases are deserving of the full protection of the First Amendment whether they contain information in public records,

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[3] *Amicus* CoreLogic, for instance, brings a variety of information together that it acquires from courthouses and other public record repositories around the country. By using digital technology, it can create detailed maps that measure land slope, composition, and other criteria that, when combined with FEMA flood data, can help determine levels of risk of flooding for individual parcels. *See generally, e.g.,* http://www.corelogic.com/products-and-solutions.aspx?solution=429 (describing geospatial (e.g., map-based) products) (visited March 29, 2011). These and similar products are used for insurance underwriting and other purposes.

[4] The "mining" of databases for valuable information represents nothing other than the use of technology to perform the same kind of research that journalists, scholars and others have performed for centuries. If Thomas Jefferson had this technology, he likely would have provided multiple links to databases demonstrating how the king had "plundered our seas, ravaged our coasts, burnt our Towns," and "destroyed the lives of our people." Declaration of Independence, *available online*, www.archives.gov/exhibits/charters/declaration_transcript.html .

information lawfully gathered from private sources, or combinations of both kinds of information.

B. The Fact that a Database is Maintained for a Profit Is Irrelevant to the Level of Free Speech Protection that Database Enjoys

Information receives First Amendment protection despite the fact that it might be produced for a profit. "It is well-settled that the speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Federation for the Blind,* 487 U.S. 781, 801 (1988). The profit motive is "the engine of free expression" *Eldred v. Ashcroft,* 537 U.S. 186, 219 (2003) (citing *Harper & Row v. The Nation*, 471 U.S. 539, 558 (1985)), and its presence does not affect the level of protection afforded to database publications.

But for the ability of database proprietors and other authors to commercialize these products, they would not be available in the first instance. *Amici*'s databases are expensive to collect and maintain, and they invest billions of dollars in making sure that they are complete and up-to-date. Without incentives to collect that information for commercial uses, such compilations may cease to exist.

Citing the First Circuit's *Ayotte* decision, Vermont argues that databases lose their First Amendment protection when produced for "narrowly defined commercial ends." (Pet. Br. at 33 (citing *Ayotte,* 550 F.3d at 52).) Vermont's position confuses the purpose of the statute with the activity the

statute actually regulates. "If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category...." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (internal quotation and citation omitted).

The fact that the collection of such information is collected for a profit does not entitle Vermont, or any other government, to treat it like "beef jerky." "It is too late to suggest that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 n.23 (1978) (citing *Buckley v. Valeo*, 424 U.S. 1, 16 (1976). To be sure, the state may criminalize profit-making from certain kinds of speech, but that criminalization must *first* survive a First Amendment analysis. *E.g., Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). The reasons that such speech may be proscribed, however, are not because the speech is produced for a profit, but because the state has compelling interests in stopping activity that flows from that speech.

As this Court recently explained, the state cannot ban speech unless that speech falls into "historic and traditional categories long familiar to the bar." *U.S. v. Stevens*, 130 S.Ct. 1577, 1584

(2010); *see also id.* at 1586 (listing categories of unprotected speech).

Information produced for a commercial purpose or profit is not among these categories. "The profit motive is the engine that ensures the progress of science," *Eldred,* 537 U.S. at 212, and the fact that a database might have been created for profit, or a narrow commercial interest is of itself irrelevant to whether the information in that database receives First Amendment protection.[5] The First Circuit's suggestion that databases somehow become "beef jerky" by virtue of the very factor that generates enormous swaths of First Amendment activity is both ahistorical and unsustainable.

II. Commercial Databases Deserve Full First Amendment Protection, Not the Limited Protection Afforded Commercial Speech

The Second Circuit therefore correctly rejected Vermont's suggestion that the collection, organization, and communication of information is not afforded First Amendment protection on the ground that it is not speech, but a "commercial practice." *See IMS Health, Inc. v. Sorrell,* 630 F.3d 263, 272-73 (2d Cir. 2010). The court of appeals, however, applied only limited "commercial speech"

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[5] *Cf. Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 252 (1903) ("[Y]et if they command the interest of *any* public, they have a commercial value"); Federalist No. 43 (noting that self-interest created by exclusive rights to publish inures to the public's benefit).

protection because the information in the databases is used for a commercial purpose. *See id.* at 274. Databases of reliable information, however, do not become "commercial speech," subject to lesser First Amendment protections, merely because those who obtain the information from a publisher use it for advertising or other commercial purposes. The advertising *use* of such databases may be regulated as commercial speech in appropriate circumstances, but those potential uses do not denude the *databases themselves* of full First Amendment protection.

Databases like those involved in this case lack the hallmarks of commercial speech. They are compilations of facts, not proposals for commercial transactions. Unless the information in such a database is accurate, the database is of no value to those who use it.[6] The reduced First Amendment scrutiny reserved for commercial speech is therefore inappropriate. Databases pose no "risk of fraud," *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992) (cited in *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525, 576 (2001) (Thomas, J., concurring)), nor do they involve misleading or deceptive sales practices," see *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, Kennedy, & Ginsburg, J.J., concurring) dangers that have in the past permitted more robust regulation of commercial advertising. *E.g., Florida Bar v. Went For It*, 515 U.S. 618, 635

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6 *Cf. FTC v. Transunion,* 536 U.S. 915, 917 (2002) (Kennedy, and O'Connor, J.J., dissenting from denial of petition) (noting that it was questionable whether reduced First Amendment protection for false statements has "any place in the context of truthful, nondefamatory speech.").

(1995) (upholding 30-day ban on lawyer direct-mail solicitation to accident victims). *Cf. Lowe v. SEC*, 472 U.S. 181, 210 (1985) (noting that the dangers of "fraud, deception and overreaching" are "not replicated in publications [such as newspapers] that are advertised on the open market").

The presence of advertising and the ensuing incentive to exaggerate in a promotional context is the *sine qua non* that ties these cases together.[7] Justifications supporting commercial speech regulation apply only when a direct commercial incentive exists to exaggerate the message that the *speaker* wishes to communicate. This Court's prior

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[7] *See, e.g., Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 561 (1980) (describing speech that relates solely to the "economic interests of the speaker and its audience" in the context of a regulatory ban on advertising *by a utility*); *Board of Trustees of State University of New York v. Fox,* 492 U.S. 469, 473-74 (1989) (applying "propose a commercial transaction" test in the context of ban against advertising and sale of housewares); *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 424 (1993) (using same test in context of advertising placed in news racks); *In re R. M. J.*, 455 U.S. 191, 193-94, 204 n.17 (1982) (applying *Central Hudson* formulation to ban on certain kinds of attorney advertising). *See also, e.g., Thompson v. Western States Medical Center*, 535 U.S. 357, 366 (2002) (parties conceding that advertising and solicitation constitute commercial speech); *Lorillard Tobacco*, 533 U.S. at 534-37 (addressing tobacco advertising); *44 Liquormart,* 517 U.S. at 489 (ban on advertising liquor pricing); *Edenfield v. Fane*, 507 U.S. 761, 764 (1992) (face-to-face solicitation by certified public accountant); *Bolger v. Youngs Drugs Prod. Corp.,* 463 U.S. 60, 62 (1983); *Bates v. State Bar of Ariz.,* 433 U.S. 350, 355 (1977) (attorney advertising); *Virginia State Board of Pharmacy v. Virginia Citizens of Consumer Council*, 425 U.S. 748, 750-51 (1976) (ban on drug prices in advertisements).

decisions simply do not support application of the commercial speech doctrine to cases in which the speaker is not directly engaging in advertising of any kind and when incentives to exaggerate are completely absent. The lesser protection accorded commercial speech is therefore unwarranted.

III. The Fact That the Government Requires That Information be Collected and Preserved Does Not Itself Automatically Justify the Government in Prohibiting the Communication of that Information to Others

Vermont, however, claims that because the government *requires* collection of this information contained in the respondents' databases by private parties in a "nonpublic" system, there is no First Amendment right to communicate or distribute that information. (*See* Pet. Br. at 20; Br. of U.S. at 10-11.) That contention is dangerous and incorrect.

The fact that the government requires information be collected has no relevance whatsoever to whether communication of the information should enjoy constitutional protection. Once lawfully acquired, truthful information is in the hands of a private party, the First Amendment protects that person's ability to communicate that information for public and private purposes. That right is not an absolute one—justifications may exist for narrowly tailored government regulation. But the fact that the government required collection of the

information does not itself justify censorship or regulation.[8]

Vermont's position is a non sequitur. The communication of information contained in databases receives First Amendment protection because it is *information*, not because its collection was voluntary rather than required. Vermont relies on *LAPD v. United Reporting,* 528 U.S. 32, 40 (1999), holding that the government can prohibit the transfer of information in its own possession. (Pet. Br. at 22; Br. of U.S. at 14-15.) That case, however, has no bearing when the information is not possessed by the government, but has lawfully come into the hands of a private party that wishes to transmit it. *See* 528 U.S. at 40; *accord Sorrell*, 630 F.3d at 273. The adoption of a doctrine that, by requiring information to be collected, enables government automatically to suppress the

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[8] Indeed, almost every U.S. industry relies to some extent on accessing and using data that the government requires to be collected in some way. Knowledge is indeed power in the business world, as management expert Peter Drucker has long emphasized. "Knowledge is now fast becoming the one factor of production, sidelining both capital and labor … This change means that we now see knowledge as the essential resource." Peter Drucker, *Post-Capitalist Society* 20 (1993). " [T]he source of wealth is something specifically human: knowledge. If we apply knowledge to tasks we already know how to do, we call it 'productivity'. If we apply knowledge to tasks that are new and different we call it 'innovation'. Only knowledge allows us to achieve these two goals." Peter Drucker, *Managing for the Future* 23 (1982). If information compiled because of government requirements could be put under lock and key, both productivity and innovation suffer.

information, invites government abuse by creating a loophole in which the government could censor information by imposing statutory requirements that certain information be maintained by private entities or individuals.

The line that Vermont seeks to draw is also impracticable, since many databases are an amalgam of information that is required to be collected and information collected through private initiative. For example, many states require individuals (and businesses) to retain certain transaction information, and to report those transactions for the purposes of collecting a sales or use tax. A database owned by one of the *amici* is used by retailers to detect fraud by using identity and address verification tools to confirm both billing and shipping information. Software verifies each order's originating city, state, country and continent and compares that information against a customer's most current public address data. If, for example, someone living in Wisconsin wished to send large quantities of electronics to Eastern Europe, it would flag that transaction as posing a risk of fraud and warranting further investigation. Removing data collected as the result of government requirements would destroy the usefulness of the information.

IV. The Constitutional Requirement of a Compelling Justification for Prohibitions on the Communication of Truthful, Lawfully Acquired Information Is Not Satisfied in This Case.

The First Amendment's protection is not absolute, and the government may proscribe the transmission of certain information to protect legitimate individual privacy and similar interests. A patient's interest in medical privacy, for example, is certainly one justifiably protected by federal law, state confidentiality rules, and legal privileges. *See, e.g.*, 42 U.S.C. § 17935(d) (barring disclosure of health information); 15 U.S.C. § 1681b (g) (preventing disclosure of medical information in consumer reports under Fair Credit Reporting Act). Courts may also protect an individual's privacy in the context of a lawsuit via protective order, *e.g., Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 32 (1984), or a person's reading habits, *e.g.*, 18 U.S.C. § 2710(b) (protecting an individual's video rental information) or the right to be free from unwanted commercial intrusion in the home. *Mainstream Mktg. Serv. v. FTC*, 358 F. 3d 1228, 1236-46 (10th Cir.), *cert. denied*, 543 U.S. 812 (2004). Similarly, the government may penalize the issuance of *false* information about private individuals without constitutional concern in order to prevent reputational harm. *See Dun & Bradstreet v. Greenmoss Builders,* 467 U.S. 749, 756 (1985). For those reasons, *amici* agree with the United States that the statutes listed in its brief are not affected or endangered by this case. (*See* Br. of U.S. at 33-35.)

This case, however, does not involve such concerns. Vermont's statute does not address patients' personally identifiable care information. Vermont's legislature focuses on the effect of the commercial publication of physician prescribing habits in databases, because of the allegedly unfair advantage that pharmaceutical sales representatives or "detailers" gain in face-to-face sales meetings by using such information, the effect of that activity on health care costs, and the irritation of some doctors with the sales practices of pharmaceutical companies. *Sorrell,* 630 F.3d at 270 (describing legislature's views of detailing). (*See also* Pet. Br. at 13.) These pharmaceutical sales practices, which are non-misleading, created in the view of the Vermont legislature a "frequently one-sided" "marketplace of ideas" that the legislature sought to balance by cutting down the amount of information available to commercial users. *See Sorrell*, 630 F.3d. at 270 (describing "massive imbalance in information available to doctors") (Pet. Br. at 13.)

This Court has never "upheld a regulation on speech when the government interest in the regulation is to bring about some social good or alter some conduct by restricting the availability of information to those whose conduct the government seeks to influence." *Sorrell,* 630 F.3d at 277. It may be true that certain physicians do not want to receive detailing visits, but no physician is required to receive them. A doctor may protect his or her privacy interest by simply ignoring the detailer. No evidence exists that detailing visits occur under circumstances "inherently conducive to overreaching and other forms of misconduct," *Ohralik v. Ohio St.*

Bar Assn., 436 U.S. 447, 464 (1978), and this Court has rejected attempts to "level the playing field" merely because a speaker has the wherewithal to make its message widely known. *Cf. Davis v. FEC,* 554 U.S. 724, 753 (2008) (rejecting in discourse based on legislative desire to offset the natural advantage that wealthy individuals possess in running for political office as a legitimate state interest).

Vermont's interests in controlling health care costs and reducing the unnecessary prescription of brand-name high-priced drugs are legitimate, perhaps even compelling objectives. However, "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star Tribune v. Minnesota Comm'r*, 460 U.S. 575, 592 (1983). If a state wishes to prohibit or regulate what it believes to be the misuse of truthful information, the First Amendment requires that it regulate that misuse directly, rather than prohibiting the collection and communication of truthful information. Free speech protection for the acquisition and communication of truthful information does not disappear even when the information is available for an improper or illegal purpose. *See*, *e.g., Fla. Star v. B. J. F.,* 491 U.S. 524, 537 (1989) (holding it unconstitutional to prohibit the media from communicating an alleged rape victim's identity despite the possibility that information might be misused to harass the victim); *Daily Mail*, 443 U.S. at 104 (1979) (holding unconstitutional a state statute prohibiting the publication of the name of juvenile offenders despite the possibility some employers might refuse to hire

them).[9] "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia Pharmacy,* 425 U.S. at 770.

The reason for this rule is that truthful information is almost never of interest solely to a particular commercial market. The facts contained in a financial newspaper, even a specialized one, are often of interest well beyond those markets for which it is initially collected. Here, the information that the database respondents collect is of interest to researchers and public health authorities, see *Sorrell*, 630 F.3d at 268 (2010), in the same way that the information published by *amici* can be used by both nonprofit and commercial entities.[10]

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[9] *See also, e.g.*, *Carey v. Population Servs.*, 431 U.S. 678, 700-701 (1977) (finding it unconstitutional to ban the advertising of contraceptives despite the possibility that the advertisements might cause teens to engage in sexual activity); *Cox Broadcasting*, 420 U.S. at 496 (holding unconstitutional a state statute barring release of a rape victim's identity because of the potential effect on the victim's privacy).

[10] For example, *amicus* CoreLogic's real estate and geospatial data are created and used for unquestionably commercial purposes such as real estate sales and insurance and mortgage underwriting, as well as for marketing. CoreLogic also provides that very same kind of real estate data to a nonprofit, Social Compact, www.socialcompact.org, an organization dedicated to the development of underserved urban areas. Through the donation of CoreLogic employee time and the company's data, Social Compact assisted the city of Detroit in responding to the housing foreclosure crisis in that city by producing maps of neighborhoods integrated with census, banking, and other information to determine which communities are being underserved by retailers and financial

Rather than cut off the publication of information because of concerns over how such information was being used by pharmaceutical manufacturers, the First Amendment requires Vermont to address its concerns directly through other means that do not infringe on free speech protections, such as requiring the use of generic drugs in state formularies, requiring physicians to undergo state-sponsored continuing education as a condition of a license to practice medicine, prohibiting the receipt of items of value from detailers, or similar regulations.[11] (*See also, e.g.,* Br. of Resp. IMS Health at 53 (providing other examples).) "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the

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institutions on a highly localized level. *See generally* www.socialcompact.org/index.php/site/map-tools (visited March 28, 2011).

[11] Suppose a hypothetical city government decided that it would prohibit the commercial resale and use of real estate sales information and tax assessment data in order to preserve neighborhood market values and their tax base in the wake of a real estate collapse. Suppose further that it could be shown that such data was being used by real estate agents to persuade homeowners to sell, and that the residents' exodus would shrink the city's tax base. If this hypothetical statute existed, *amici* like CoreLogic could not collect, aggregate, and publish the underlying data and profit from its sale to commercial vendors, and the data collection simply would not exist for the use of nonprofits, journalists and historians. In the same vein, it does not follow that *amicus* LexisNexis and others would be able to provide the same collections of information for use by the Federal Government if states could destroy the value of those products by prohibiting publication of certain kinds of truthful, lawfully acquired information for the commercial purposes that enable their very existence.

costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Stevens*, 130 S.Ct. at 1585. Vermont's prohibition of the communication of truthful information flouts this fundamental principle.

V. Conclusion

For the foregoing reasons, the judgment of the court of appeals should be AFFIRMED.

Respectully Submitted,

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