No. 10-779

In the
Supreme Court of the United States

WILLIAM H. SORRELL ET AL.,

Petitioners,

v.

IMS HEALTH INC. ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENT IMS HEALTH INC.

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston, Massachusetts.[1] Its membership consists of corporations, law firms, individuals, and others who support NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses and other organizations from all parts of New England, including the State of Vermont.

NELF's members are concerned by the State of Vermont's restriction of the transfer and use of prescriber-identifiable information, which in NELF's view violates the First Amendment. In this "information age," sales and other voluntary transfers of data between businesses are fundamental to the free enterprise system and often serve, as in this instance, broader societal interests beyond the interests of individual businesses. Treating these many information transfers between businesses either as not

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[2] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.3, amicus notes that counsel for petitioners and respondents have filed letters with the Court giving blanket consent to the filing of amicus curiae briefs, in support of either or neither party.

constituting speech at all, and therefore entitled to no First Amendment protection, or as constituting commercial speech, and thus entitled to less First Amendment protection than other informational communications, could have serious ramifications for both the economic and social interests served by the free flow of information in our society.

Moreover, if pharmaceutical companies are unable to focus their marketing activities based on prescriber-identifiable information, those marketing efforts will be less efficient and more expensive. This could lead to higher prescription drug prices and associated higher health insurance costs for both employees and employers, including the businesses among NELF's members who pay for employees' healthcare needs.

Finally, NELF is concerned that if the transfer of prescriber-identifiable information for business purposes is proscribed or restricted, the transfer of prescriber-identifiable information for other purposes, such as healthcare research, may also be curtailed. Market forces provide the incentives and resources for dissemination of most information in our society. Efforts to restrict the transfer and use of information for business purposes, as in this case, may have the unintended negative consequence of sharply limiting the collection and availability of that information for uses that would benefit the public good. For these and other reasons discussed below, it is critical that business-to-business speech not be inappropriately evaluated, either as not being protected at all by the First Amendment or as deserving only intermediate-level scrutiny under the commercial speech doctrine.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to New England's business community.[2] This is such a case, and NELF believes that this brief provides an additional perspective that may aid the Court in deciding the issue presented.

SUMMARY OF ARGUMENT

The prescriber-identifiable information at issue in this case is speech protected by the First Amendment. Vermont's Prescription Restraint Law, Vt. Stat. Ann. tit. 18, § 4631(d), bans the transfer for value of prescriber-identifiable information when it is used for marketing or promoting prescription drugs without the prescriber's consent. This law imposes a ban on the disclosure of certain truthful information and therefore constitutes a restriction on speech cognizable under the First Amendment. The Court's clear precedent establishes that the First Amendment protects all expression having even the slightest

[2] *See, e.g.*, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.,* 130 S. Ct. 2592 (2010); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1 (2007); *Rapanos v. United States,* 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.,* 547 U.S. 370 (2006); *Kelo v. City of New London,* 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280 (2005); *Comm'r v. Banks,* 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001).

redeeming social importance. The Court has also explained that the First Amendment forbids the State from banning speech based on its own assessment of the value of the speech. Instead, the First Amendment preserves this value judgment for the speaker and audience.

The fact that Vermont's Prescription Restraint Law only prohibits paid transfers of prescriber-identifiable information does not diminish the First Amendment's protection in any way. The Court has consistently held that speech does not lose its protection under the First Amendment simply because it is sold for a profit. A holding to the contrary would not only depart from well-established precedent, but it could also allow the State to inhibit the transfer of any information that happened to be bought and sold.

Vermont's Prescription Restraint Law restricts noncommercial speech and is therefore subject to, and cannot survive, strict scrutiny under the First Amendment. The Court has consistently held that speech is commercial under the First Amendment only if it proposes a commercial transaction. In applying this clear, content-based test for commercial speech, the Court has consistently found speech to be commercial only when it has advertised or promoted a product or service.

The Court's content-based test for commercial speech best serves the primary rationale for according less First Amendment protection to commercial speech--namely, the prevention of economic harm that can arise from false or misleading advertising to promote the sale of a product or service. Commercial

speech therefore implicates the well-established governmental interest in regulating the underlying transaction by ensuring the accuracy and clarity of its promotional "pitch" to consumers.

Under this precedent, the prescriber-identifiable information at issue is clearly noncommercial speech because it does not advertise a product or service or otherwise propose any commercial transaction whatsoever. Instead, the prescriber-identifiable information simply provides the names of drug prescribers and related accurate information concerning their prescribing patterns. This unadorned information cannot satisfy the definition of commercial speech and should be accorded full First Amendment protection.

While the prescriber-identifiable information may ultimately be used by pharmaceutical company representatives as a tool in the marketing of their companies' products, such use of the information is irrelevant to determining whether the *content* of the information proposes a commercial transaction. The incidental or indirect commercial use of the information cannot transform it into commercial speech for First Amendment purposes, when the information on its face simply does not propose a commercial transaction. Accordingly, Vermont's Prescription Restraint Law warrants strict scrutiny and, as forcefully argued by IMS in its brief, cannot survive this standard of review and should be declared invalid under the First Amendment.

Finally, amicus argues that, because market forces fuel the compilation and publication of most

information in modern society, efforts to restrict the transfer of information that serves a business purpose could have significant, unintended consequences to the detriment of the public interest. It is therefore critical that legislative measures restricting transfers of information that does not propose a commercial transaction receive strict First Amendment scrutiny, even if the restricted information does serve a business's economic interests. Vermont's Prescription Restraint Law should accordingly be subject to strict scrutiny and should be invalidated as an unconstitutional suppression of speech under the First Amendment.

ARGUMENT

I. VERMONT'S PRESCRIPTION RESTRAINT LAW REGULATES SPEECH THAT IS PROTECTED BY THE FIRST AMENDMENT.

As the Second Circuit in this case correctly concluded, the prescriber-identifiable information[3] at issue is speech protected by the First Amendment.[4] *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 271-72 (2d. Cir. 2010). This Court has held that the First

[3] Prescriber-identifiable information provides the names and addresses of prescribing physicians and detailed information associated with their prescription practices, including the names of the drugs prescribed, the dosages and quantities prescribed, and the dates and places where the prescriptions were filled. See *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 267 (2d. Cir. 2010).[3]

[4] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

Amendment protects "[a]ll ideas having even the slightest redeeming social importance . . . ." *Roth v. United States*, 354 U.S. 476, 484 (1957). The Court has also explained that the First Amendment forbids the State from banning speech based on its own assessment of the value of the speech. Instead, the First Amendment preserves this value judgment for the speaker and audience: "The commercial marketplace . . . provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

In this case, State law bans the transfer for value of prescriber-identifiable information when it is used for marketing or promoting prescription drugs without the prescriber's consent. Vt. Stat. Ann. tit. 18, § 4631(d) ("Prescription Restraint Law"). This law imposes a ban on the disclosure of certain truthful information and therefore constitutes a restriction on speech cognizable under the First Amendment. The fact that the Prescription Restraint Law only prohibits paid transfers of prescriber-identifiable information does not diminish the First Amendment's protection in any way. The Court has consistently held that speech does not lose its protection under the First Amendment simply because "it is carried in a form that is 'sold' for profit . . . ." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). *See also Smith v. California*, 361 U.S. 147, 150 (1959) ("It is of course no matter that the dissemination takes place under commercial auspices."); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) ("It should be

remembered that the pamphlets of Thomas Paine were not distributed free of charge.").

Under this clear precedent, then, the Prescription Restraint Law restricts speech protected by the First Amendment. A holding to the contrary would not only depart from well-established precedent, but it could also allow the State to inhibit the transfer of any information that happened to be bought and sold. This potentially limitless governmental regulation of speech would clearly violate the First Amendment and would harm society at large. Prominent First Amendment scholars have voiced these very concerns in discussing other statutes similar to the Prescription Restraint Law.[5]

In this case, a willing speaker in lawful possession of truthful information wishes to transfer that information to an audience that values it. Because the Prescription Restraint Law forbids that transfer of this information, it clearly regulates speech that is protected by the First Amendment.

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[5] *See, e.g.*, Rodney A. Smolla, *Free Speech Does a Body Good: Restrictions on Pill Data Choke Off Valuable Information*, Legal Times, Apr. 20, 2009 ("The First Amendment cannot be avoided by deftly declaring certain banned data 'a commodity' and its sale mere 'conduct,' thereby turning information into contraband."); Robert Post, *Prescribing Records and the First Amendment – New Hampshire's Data-Mining Statute*, 360 New Eng. J. Med. 745, 746 (2009) ("[The] argument that data miners are engaged in conduct rather than speech is essentially a claim that judges should be authorized to decide which channels of information transmission deserve First Amendment coverage and which do not.").

II. VERMONT'S PRESCRIPTION RESTRAINT LAW RESTRICTS NONCOMMERCIAL SPEECH AND IS THEREFORE SUBJECT TO STRICT SCRUTINY.

Amicus joins IMS Health Inc. in arguing that Vermont's Prescription Restraint Law restricts noncommercial speech and is therefore subject to, and cannot survive, strict scrutiny under the First Amendment. Unlike the strict scrutiny that generally applies to state regulation of noncommercial speech, commercial speech does not receive full First Amendment protection and is subject only to intermediate-level scrutiny, affording the state more latitude in controlling the content of speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-63 (1980).

In this case, the challenged law imposes an outright ban on certain speech--i.e., the transfer for value of prescriber-identifiable information that is used for marketing or promoting prescription drugs without the prescriber's consent. Vt. Stat. Ann. tit. 18, § 4631(d). Because the law interdicts speech, the task of properly categorizing the prescriber-identifiable information at issue should be approached with caution, "to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

The Court has consistently held that speech is commercial under the First Amendment only if it

proposes a commercial transaction. *See United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (commercial speech is "usually defined as speech that does no more than propose a commercial transaction."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (describing the proposal of a commercial transaction as "'*the test* for identifying commercial speech'") (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (emphasis supplied by Court in *City of Cincinnati*).[6] Otherwise put, speech that does not

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[6] While there may have been language in the Court's earlier decisions suggesting a more expansive definition of commercial speech, the Court in *City of Cincinnati* apparently resolved any potential doctrinal confusion on the issue in a thorough discussion, substantially reproduced below, which reinforced the salient point that commercial speech must, by definition, propose a commercial transaction:

> We have also suggested that such lesser protection [for commercial speech] was appropriate for a somewhat larger category of commercial speech--"that is, expression related solely to the economic interests of the speaker and its audience." . . . We did not, however, use that definition in either *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60 (1983), or in *Board of Trustees of State University of N.Y. v. Fox,* 492 U.S. 469 (1989). . . . It is noteworthy that in reaching th[e] conclusion [in *Bolger* that informational pamphlets were commercial speech,] we did not simply apply the broader definition of commercial speech advanced in *Central Hudson*--a definition that obviously would have encompassed the mailings--but rather "examined [them] carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." 463 U.S., at 66. . . . In [*Board of Trustees of State University of New York v.*] *Fo*x,

propose a commercial transaction is not commercial speech and is therefore entitled to full First Amendment protection.

In applying this clear, content-based test for commercial speech, the Court has consistently found speech to be commercial only when it has advertised or promoted a product or service. *See, e.g.*, *United States v. United Foods,* 533 U.S. at 408 (advertisements promoting mushroom sales); *City of Cincinnati v. Discovery Network*, 507 U.S. at 412-13 (magazines advertising, *inter alia*, adult educational courses and real estate sales)*; Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. at 472 (on-campus Tupperware parties demonstrating housewares for sale); *Cent. Hudson*, 447 U.S. at 558-59 (electric utility's advertisements promoting greater consumption of electricity).[7] In short, "[t]he First Amendment's

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> [492 U.S. 469 (1989),] we described the category even more narrowly, by characterizing the proposal of a commercial transaction as "*the test* for identifying commercial speech." 492 U.S., at 473-474, 109 S.Ct., at 3031 (emphasis added).

City of Cincinnati v. Discovery Network, 507 U.S. at 422-23. *See also* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 Stan. L. Rev. 1049, 1081-82 (2000) (discussing same).

[7] *See also Ibanez v. Florida Dep't of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142 (1994) (professional titles provided on attorney's letterhead and business cards); *Friedman v. Rogers*, 440 U.S. 1, 11 (1979) (optometrist's trade name: "Once a trade name has been in use for some time, it may serve to identify an optometrical practice and also to convey information about the type, price, and quality of services offered for sale in

concern for commercial speech is based on the informational function of *advertising*." *Cent. Hudson,* 447 U.S. at 563. (emphasis added).

The Court's content-based test for commercial speech best serves the primary rationale for according less First Amendment protection to commercial speech--namely, the prevention of economic harm that can arise from false or misleading advertising. As the Court has stated, "[i]t is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'" *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996) (quoting *Cincinnati v. Discovery Network*, 507 U.S. at 426). That is, commercial speech warrants less First Amendment protection, and consequently greater state regulation, primarily because the speech makes representations about a product or service to promote a sale. Commercial speech is therefore "linked inextricably with the commercial arrangement that it proposes, so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." *Edenfield v. Fane*, 507 U.S. at 767 (internal quotations omitted).

Since the content of commercial speech describes or identifies a product or service with the goal of inducing a sale, the speech is part and parcel of the underlying proposed transaction. Commercial

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that practice. In each role, the trade name is used as *part of a proposal of a commercial transaction*.") (emphasis added).

speech therefore implicates the well-established governmental interest in regulating the underlying transaction by ensuring the accuracy and clarity of its promotional "pitch" to consumers. As the Court has observed:

> Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

Friedman v. Rogers, 440 U.S. 1, 9-10 (1979) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 771-72)).

Under this precedent, the prescriber-identifiable information at issue is clearly not commercial speech because it does not advertise a product or service or otherwise propose any commercial transaction whatsoever. That is, the information does not implicate the State's interest in protecting the public from deceptive advertising because the speech does not make any claims or representations about a product or service. Instead, the prescriber-identifiable information simply provides the names of drug prescribers and related accurate information concerning their prescribing patterns. *IMS Health Inc. v. Sorrell*, 630 F.3d at 267 This unadorned information cannot satisfy the definition of commercial speech and should be accorded full First Amendment protection.

While the prescriber-identifiable information may ultimately be used by pharmaceutical company representatives as a tool in the marketing of their companies' products, such use of the information is irrelevant to determining whether the *content* of the information proposes a commercial transaction. After all, the test for commercial speech is confined exclusively to evaluating the content of the speech at issue--here, lean factual information that does not propose a commercial transaction. *See City of Cincinnati*, 507 U.S. at 423 The incidental or indirect commercial use of the information cannot transform it, as if by a feat of alchemy, into commercial speech for First Amendment purposes, when the information on its face simply does not propose a commercial transaction. *See Cent. Hudson*, 447 U.S. at 562 (noting that there is a "commonsense distinction" between speech proposing a commercial transaction and other varieties of speech).

In sum, the prescriber-identifiable information at issue is noncommercial speech because it does not propose a commercial transaction. Accordingly, Vermont's Prescription Restraint Law warrants strict scrutiny and, for all of the reasons set forth by IMS in its brief, cannot survive this standard of review and should be declared invalid under the First Amendment.[8]

[8] *See* Brief of Respondents IMS Health Inc., Verispan, LLC, and Source Healthcare Analytics, Inc., at pp. 32-62.

III. SUBJECTING VERMONT'S PRESCRIPTION RESTRAINT LAW TO STRICT SCRUTINY IS NECESSARY TO PRESERVE THE UNTRAMELLED EXCHANGE OF INFORMATION PROTECTED BY THE FIRST AMENDMENT.

It is well recognized that market forces often provide the necessary incentives and resources to meet the ever-increasing demand for information in our society. *See Buckley v. Valeo*, 424 U.S. 1, 19 (1976) ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money."). *See also* Solveig Singleton, *Privacy as Censorship: A Skeptical View of Proposals to Regulate Privacy in the Private Sector*, Cato Policy Analysis No. 295, Jan. 22, 1998, http://www.cato.org/pub_display.php?pub_id=1154 ("The formal mechanisms that businesses have developed to transfer information about consumers, borrowers, and other businesses serve valuable economic and social purposes formerly served by person-to-person informal information networks.").

Just as speech "does not lose its First Amendment protection because money is spent to project it," *Va. State Bd.*, 425 U.S. at 761, neither should speech suffer diminished First Amendment protection merely because it has been transferred for a profit by one business to another. In our "information age," sales and other voluntary transfers of information by and between businesses are fundamental to the efficient operation of the free enterprise system. As

this case illustrates, a robust marketplace of information often serves larger societal needs as well as the interests of individual businesses.[9] Thus, treating the sale of information for a business purpose as less deserving of First Amendment protection than other informational transfers can be expected to have undesirable consequences on both economic and social interests that depend upon a free flow of information.

For example, the prohibition on transfers of prescriber-identifiable information for business purposes may chill the collection, analysis, and publication of this information for non-business purposes, such as healthcare research and promoting patient access to information about healthcare providers.[10] Moreover, if pharmaceutical companies

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[9] In fact, the Vermont Legislature has expressly acknowledged the many societal uses of prescriber-identifiable information, apart from any marketing purposes. *See* Vt. Stat. Ann. tit. 18, § 4631(e). The Second Circuit in this case also recognized that the information has many non-commercial uses. *See IMS Health Inc. v. Sorrell*, 630 F.3d at 268.

[10] According to a *USA Today* article, the First Circuit's decision in *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), to uphold New Hampshire's version of the Prescription Restraint Law has already begun to limit patients' access to useful information about their physicians. *See* Steven Sternberg *et al.*, *In patients' hunt for care, doctor database "a place to start,"* USA Today, May 14, 2009, http://www.usatoday.com/news/health/2009-05-14-influential-doctors-qforma_N.htm. Using a variety of information about doctors' professional activities, including prescribing records, the medical information firm Qforma developed a database for *USA Today* of the nation's "Most Influential Doctors." *Id.* The article explains: "Because of the ban [on transfers of prescriber-identifiable data for commercial purposes], no New Hampshire doctors appear in the Qforma database." *Id.*

cannot focus their marketing activities with the help of prescriber-identifiable information, those marketing efforts will be less efficient and more expensive. This could lead to higher prescription drug prices and other associated health insurance costs for both employees and employers, including the businesses among amicus's members who pay for employees' healthcare needs.

In short, because market forces fuel the compilation and publication of most information in modern society, efforts to restrict the transfer of information that serves a business purpose could have significant, unintended consequences to the detriment of the public interest. It is therefore critical that legislative measures restricting transfers of information that does not propose a commercial transaction receive strict First Amendment scrutiny, even if the restricted information does serve a business's economic interests. Vermont's Prescription Restraint Law should accordingly be subject to strict scrutiny and, under that standard, should be invalidated as an unconstitutional suppression of speech under the First Amendment.

This unintended consequence of the New Hampshire law leaves patients less informed when making important healthcare decisions:

> For patients . . . the database represents a new resource for assessing doctors. Little of the information available to health firms, the government and drug companies trickles down to patients, who can obtain the 10-year sales history of the house next door but typically come up empty-handed when they seek details about doctors.

Id.

CONCLUSION

For the reasons stated above, NELF respectfully requests that the Court affirm the judgment of the United States Court for the Second Circuit.

Respectfully submitted,

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