No. 10-779

IN THE
Supreme Court of the United States

WILLIAM H. SORRELL, as Attorney General of the State of Vermont, *et al.*,
Petitioners,
v.

IMS HEALTH INC., *et al.*,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Date: March 31, 2011

QUESTION PRESENTED

Does the First Amendment allow the government to freely permit the publication and use of prescription-history information, but ban the use of the identical information to promote prescription drugs, in order to correct a supposed "imbalance" in the "marketplace for ideas," Vt. Acts No. 80, §§ 1(4), 1(6) (2007)?

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government.

In particular, WLF regularly appears before this and other federal courts to promote the free speech rights of the business community. *See, e.g., Nike, Inc v. Kasky*, 539 U.S. 654 (2003). WLF has successfully challenged the constitutionality of Food and Drug Administration restrictions on speech by pharmaceutical manufacturers. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd*, 202 F.3d 331 (D.C. Cir. 2000). WLF filed briefs in this case in support of Respondents in both the district court and the court of appeals.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increased understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

standards. The NAM has regularly appeared in this Court to support broad First Amendment rights. *See, e.g. Philip Morris v. United States*, 130 S. Ct. 3501 (2010); *McConnell v. FEC*, 540 U.S. 93 (2003).

Amici are concerned that by unduly restricting the dissemination of information by pharmacists and others, the State of Vermont is hindering improvements in public health. *Amici* believe that when a State seeks to impose speech restrictions of the sort at issue here, it should be required to introduce evidence demonstrating, at a minimum, that the restrictions will alleviate real harms to a *material* degree. *Amici* believe that the district court and the Second Circuit dissent erred in their willingness to lighten that evidentiary burden and instead to defer to findings made by the Vermont legislature. Such deference is inappropriate in First Amendment cases where, as here, the challenged speech restrictions are neither content-neutral nor viewpoint-neutral. Deference is particularly inappropriate in this case in light of the overwhelming evidence that the legislative findings did not result from a well-considered review of the facts but rather were last-minute additions, pasted on to the statute for the sole purpose of strengthening Vermont's litigating position.

Amici strongly support the privacy rights of patients to prevent disclosure of their medical records. But nothing in this case implicates those rights. In particular, the Second Circuit's decision does not call into question the ability of HIPPA and other federal statutes protecting patient privacy to withstand First Amendment challenge. The privacy expectations of doctors and others engaged in businesses/professions are significantly lesser than those of patients. *Amici*

believe that a determination in this case that Respondents' First Amendment rights outweigh the privacy interests of doctors has little or no bearing on how the scales should be balanced when the privacy interests of patients are at stake.

STATEMENT OF THE CASE

Section 17 of Vermont Act No. 80 (the "Act") imposes severe restrictions on the dissemination of information regarding what drugs are prescribed by Vermont doctors. Respondents (the"Publishers" and "PhRMA") filed suit against Vermont, seeking a declaration that § 17(d) of the Act violates their First Amendment rights, and a permanent injunction against its enforcement.

Prior to adoption of the Act, the Publishers regularly purchased prescription information from Vermont pharmacies. Such information contained no patient-identifiable data but did contain data regarding prescriptions written by identifiable Vermont doctors. By analyzing the data, the Publishers could determine which doctors prescribe which drugs, information that is extremely valuable in a wide variety of commercial and noncommercial contexts. However, § 17(d) now prohibits the Publishers from using or selling the results of their analysis (or even arranging for the transfer from pharmacies of prescriber-identifiable data ("PI data")) under any circumstances that could be deemed "use . . . for marketing or promoting a prescription drug." Respondents contend that the Act, by imposing content-based restrictions on their rights to convey truthful information to others and/or to receive such information, violates their rights under the First

Amendment.

Vermont contends that the Act directly advances three substantial government interests: (1) controlling health care costs; (2) protecting public health and safety; and (3) protecting medical privacy. It contends that the First Amendment is inapplicable to this case because the Act does not regulate speech. It also contends that the federal courts ought to defer to the Vermont legislature's conclusion that the Act will achieve its stated goals.

In the course of its decision upholding the Act, the district court agreed that the courts ought to provide deference to the "legislative findings, predictions, and judgments" of the Vermont legislature, "to the extent they are reasonable and based on substantial evidence." Pet. App. 86a. The court said that it would "assure that [the Vermont] legislature has 'drawn reasonable inferences based on substantive evidence' in formulating its judgments; not 'reweigh the evidence de novo' or replace the legislature's factual predictions with its own." *Id.* (quoting *Turner Broadcasting System, Inc. v. FCC* ["*Turner I*"], 512 U.S. 622, 666 (1994). The court determined that Respondents' speech should be categorized as "commercial speech" and said that deference to the legislature's findings, predictions, and judgments was particularly appropriate given "the subordinate position of commercial speech in the scale of First Amendment values." *Id.* at 89a.

The district court couched its own finding in deferential language. It determined that the legislature's findings were reasonable, not that it would

have arrived at the same conclusions if it had weighed the evidence *do novo*. *See, e.g.*, Pet. App. 92a-93a ("The Legislature predicted that prescribing decisions made without the covert influence of PI data should lead to a better balance between new and generic prescriptions and an attendant cost savings. . . On this record, the Court will not substitute its judgment for that of the Legislature.").

The Second Circuit reversed and remanded. Pet. App. 1a- 67a. The court stated that it was reviewing the district court judgment *de novo* because "this case turns on constitutional issues." *Id.* at 13a. It determined that the Act restricted speech, not conduct. *Id*. at 14a-17a. Because it determined that the Act "cannot survive even the lower intermediate scrutiny that applies to regulations of commercial speech," it "assume[d] without deciding" that the speech being restricted was commercial in nature. *Id.* at 20a. The court held that the Act violated the First Amendment because it did not directly advance Vermont's substantial interests, nor was it sufficiently narrowly tailored. *Id.* at 24a-29a.

Judge Livingston dissented. She would have found that the Act constituted a reasonable regulation of commercial speech. *Id.* at 35a-68a. She disagreed with the majority's assessment that Vermont's interest in "medical privacy" was too speculative to qualify as a "substantial" state interest, *id.* at 52a, and would have found that the Act advanced all three State interests in a narrowly tailored manner. *Id.* at 57a-64a. She also faulted the majority for failing to defer to the State's choices. *Id.* at 64a.

SUMMARY OF ARGUMENT

This brief focuses on two principal issues: (1) the degree to which federal courts should defer to the findings, predictions, and judgments of state legislatures in cases raising First Amendment issues; and (2) the degree to which a State's interests in protecting the privacy of doctors can justify restrictions on speech.

Deference. The Court has long recognized that the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages conveyed by private individuals. While the Court has very occasionally upheld content-based speech restrictions, they have always imposed on the government a heavy burden of demonstrating the necessity of such restrictions. Even when the speech on which restrictions are imposed is deemed "commercial speech" – that is, speech that does no more than propose a commercial transaction – courts have made clear that it is the regulators who bear the burden of justifying their content-based speech restrictions. In none of its commercial speech cases has the Court so much as suggested that it was willing to defer to a legislature's determinations regarding the need for such restrictions or their likely effectiveness.

Respondents contend that the speech restrictions imposed by the Act are fully protected speech subject to strict judicial scrutiny. Should the speech silenced by the Act be deemed by the Court to constitute commercial speech, Respondents argue in the alternative that the Act cannot survive review under the

Central Hudson test, the test normally applied to restrictions imposed on commercial speech. Regardless which of those two standards of review is ultimately adopted, there is no support in First Amendment case law for an argument that the Court should defer to fact-finding engaged in by the Vermont legislature when it adopted the Act. The district court erred in applying a deferential standard of review to the Vermont legislature's fact-finding.

The Court has counseled deference to legislative fact-finding in one and only one type of First Amendment challenge: cases in which government regulations have an incidental impact on speech but the regulations are content-neutral; that is, the regulations impose restrictions without regard to the content of the speech at issue. *Turner I* and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"), are the most prominent examples. The Court held that the content-neutral speech restriction imposed in those cases should be reviewed under an intermediate standard of First Amendment scrutiny set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).[2] *Turner I*, 512 U.S. at 662. Nothing in *Turner I* or *Turner II* suggests that the deference afforded

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[2] Under *O'Brien*, a content-neutral regulation will be sustained if:

> [I]t furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

congressional findings made in connection with content-neutral statutes should extend to legislative findings made in connection with statutes, such as the Act, that quite clearly are *not* content-neutral.

Deference to the Vermont legislature is also unwarranted for a second reason. There is no evidence that the Vermont legislature ever engaged in a fact-finding enterprise even remotely similar to the extensive fact-finding engaged in by Congress before it adopted the provisions at issue in *Turner I* and *Turner II*. The "findings" incorporated into the Act by the Vermont legislature were last-minute additions adopted at the suggestion of lobbyists seeking to ward off First Amendment challenges; they were not developed as a result of any fact-finding studies conducted by the legislature.

Privacy. Petitioners assert that the Second Circuit's decision "calls into question" the constitutionality of a "wide range" of federal statutes designed to protect the privacy of consumers. Pet. Br. 35-36. That assertion is misguided. For one thing, the Second Circuit struck down the Act not because it questioned Vermont's authority to restrict speech in the name of privacy, but because it questioned whether the Act could legitimately be deemed a privacy statute at all. Pet. App. 22a-24a. *See also* Publishers Br. 32-47.

Moreover, the principal privacy interest asserted by Petitioners – the privacy of doctors in the conduct of their profession, Pet. Br. 46-47 – is simply not on a par with that of the consumers whose privacy is being protected by the federal statutes cited by Petitioners. As the United States recognizes, "physicians' privacy

interest in their prescribing practices is diminished" by the extensive regulation of those practices under federal and state law. U.S. Br. 29. The common law has traditionally afforded significantly less protection to the privacy of individuals in their conduct of a business or profession than in their private lives as consumers. In light of that difference, there is no reason to fear that the Second Circuit's decision calls into question laws protecting patients and other consumers.

After years of closely regulating the affairs of doctors, Vermont has suddenly discovered an interest in protecting the privacy of their businesses. States are, of course, entitled to grant recognition to previously unprotected privacy interests. But courts cannot allow newly created privacy rights to trump First Amendment rights in all instances, lest all restraints on speech restrictions be eliminated. Resolving conflicts between competing privacy and First Amendment interests requires a careful balancing process. When undertaking that balance, courts should have little difficulty distinguishing between alleged privacy rights that are newly enacted and have a thin common law pedigree and the privacy rights of consumers that have garnered considerable protection throughout our Nation's history.

ARGUMENT

I. COURTS TRADITIONALLY APPLY EXACTING SCRUTINY TO STATUTES CHALLENGED UNDER THE FIRST AMENDMENT, WITHOUT DEFERRING TO STATUTORY FINDINGS

The Court has long recognized that the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages conveyed by private individuals. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989). "As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Bartnicki v. Vopper,* 532 U.S. 514, 527 (2001) (quoting *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 102 (1979)). While the Court has very occasionally upheld content-based speech restrictions, it has always imposed on the government a heavy burden of demonstrating the necessity of such restrictions. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 665 (2005) ("When plaintiffs challenge a content-based speech restriction, the burden is on the government to prove that the proposed alternatives will not be as effective as the challenged statute."); *Burson v. Freeman*, 504 U.S. 191, 198 (1992). As Justice Stevens recently noted:

> We have repeatedly held that "[d]eference to a legislative finding" that certain types of speech are inherently harmful "cannot limit judicial inquiry when First Amendment rights are at stake," reasoning that "the judicial function

> commands analysis of whether the specific conduct falls within the reach of the statute and if so whether the legislation is consonant with the Constitution."

Morse v. Frederick, 551 U.S. 393, 443 n.6 (2007) (Stevens, J., dissenting) (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 844 (1978)).

Even when the speech on which restrictions are imposed is deemed "commercial speech" – that is, speech that does no more than "propose a commercial transaction," *Bd. of Trustees v. Fox,* 492 U.S. 469, 473 (1989) – courts have made clear that it is the regulators who bear the burden of justifying their content-based speech restrictions. *See, e.g., Edenfield v. Fane,* 507 U.S. 761, 770 (1993) ("[T]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it."); *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002). The evidentiary burden is not light; for example, the government's burden of showing that a commercial speech regulation advances a substantial government interest "in a direct and material way . . . 'is not satisfied by mere speculation or conjecture; rather, a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will alleviate them to a material degree.'" *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 487 (1995) (quoting *Edenfield*, 507 U.S. at 770-71). In none of the cases in which the U.S. Supreme Court has addressed First Amendment challenges to restrictions on commercial speech has the Court so much as suggested that it was willing to defer to a legislature's

determinations regarding the need for such restrictions or their likely effectiveness. Such willingness would be inconsistent with the language quoted above; the burden of demonstrating that harms are "real" and that commercial speech restrictions alleviate those harms to "a material degree" would amount to nothing if the government could meet that burden by simply pointing to legislative fact-finding.

Respondents contend that the speech restrictions imposed by the Act are fully protected speech subject to strict judicial scrutiny. *See, e.g., Burson*, 504 U.S. at 198 (content-based restrictions on non-commercial speech are subjected to "exacting scrutiny," and will be upheld only if the government can show that the restrictions are necessary to serve a "compelling state interest" and are "narrowly drawn to achieve that end.") Should the speech silenced by the Act ultimately be deemed commercial speech, Respondents argue in the alternative that the Act cannot survive review under the *Central Hudson* test, the test normally applied to restrictions imposed on commercial speech.[3] Regardless which of those two standards of review is ultimately adopted, there is no case law support for an argument

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[3] Under the four-part *Central Hudson* test, courts consider as a threshold matter whether the commercial speech concerns unlawful activity or is inherently misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, then the challenged speech regulation violates the First Amendment unless government regulators can establish that: (1) they have identified a substantial government interest; (2) the regulation "directly advances" the asserted interest; and (3) the regulation "is no more extensive than is necessary to serve that interest." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980).

that the Court should defer to any fact-finding engaged in by the Vermont legislature when it adopted the Act. The district court erred in evaluating the evidence under a deferential standard of review.

A. *Turner I* and *II* Established That Deference to Legislative Fact-Finding May Be Appropriate When Reviewing Content-Neutral Speech Restrictions

The Court has counseled deference to legislative fact-finding in one and only one type of First Amendment challenge: cases in which government regulations have an incidental impact on speech but the regulations are content-neutral; that is, the regulations impose restrictions without regard to the content of the speech at issue. *Turner I* and *Turner II* are the most prominent examples of Supreme Court willingness to defer to congressional fact-finding when reviewing First Amendment challenges to content-neutral speech restrictions. They are wholly inapplicable here.

Turner I and *II* involved a challenge to Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534 and 535 (the "must carry" provisions). After extensive hearings, Congress determined *inter alia* that: many cable companies had effective monopolies on cable operations within their jurisdictions; because many households were equipped to receive television signals only through their cable systems, over-the-air television stations could not compete effectively with cable companies unless their signal was carried by those companies; cable companies had a strong economic incentive to stop

carrying the signals of over-the-air stations; because cable companies had, in fact, ceased carrying the signals of many over-the-air stations, those stations were being driven out of business; and the public interest would be served by maintaining the greatest possible diversity in television programming. Accordingly, Congress adopted the "must carry" provisions to: (1) preserve the benefits of over-the-air broadcasting; (2) promote "fair" competition in the television programming market; and (3) promote the widespread dissemination of information from a multiplicity of sources. The law required cable operators to devote a percentage of their available channels to the transmission of local broadcast stations.

Turner I and *II* ultimately upheld the "must carry" provisions, in each instance by 5-4 votes. *Turner I* focused primarily on whether the "must carry" provisions should be deemed content-neutral. The Court held that the provisions were, indeed, content-neutral because they were imposed without regard to the content of programming broadcast by the over-the-air stations whose signals the cable operators were required to carry. Under those circumstances, the Court determined that the "must carry" provisions should be reviewed under an intermediate standard of First Amendment scrutiny set forth in *O'Brien*. *Turner I*, 512 U.S. at 662.

In determining whether the "must carry" provisions could meet the *O'Brien* test, the Court said that it was appropriate for courts to defer to congressional fact-finding regarding the need for those provisions, and whether those provisions would actually further the federal government's goals. *Turner I*, 512

U.S. at 665 ("We agree that courts must accord substantial deference to the predictive judgments of Congress."); *Turner II*, 520 U.S. at 195 ("We owe Congress' findings deference in part because the institution is far better equipped to amass and evaluate the vast amounts of data bearing upon legislative questions") (citations omitted). Thus, the Court in *Turner II* deferred to Congress's factual conclusion that the cable industry posed a threat to broadcast television. *Id.* at 199, 208, 211.[4]

Although the Court in *Turner I* and *II* deemed it appropriate to defer to some degree to Congress's explicit fact-finding in connection with its adoption of the "must carry" provisions, it is important to recognize the limited scope of that deference. In particular, nothing in *Turner I* and *II* suggests that the deference accorded congressional findings made in connection with content-neutral statutes should extend to legislative findings made in connection with statutes, such as the Act, that quite clearly are *not* content-neutral.[5] Moreover, the deference extends only to fact-

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[4] *Turner I* determined that the "must carry" provisions were content-neutral and thus should be subject to intermediate review under the *O'Brien* test. The Court then remanded the case for additional fact-finding. *Id.* at 668. The "must carry" provisions were upheld under the *O'Brien* test on remand, and the Court affirmed that decision in *Turner II*.

[5] Justice Stevens's separate opinion stated explicitly that *Turner I*'s statements regarding deference apply only in the context of *content-neutral statutes* whose primary focus is economic regulation and whose speech regulation is only secondary. He explained:

finding, not to conclusions of constitutional law. *Turner I* and *II* do not suggest, for example, that courts should defer to a legislative determination that a particular speech restriction satisfies *Central Hudson*'s "narrowly tailored" test. Furthermore, the Court made clear that it was not intending to foreclose independent judicial review of congressional fact-finding. *Turner I,* 512 U.S. at 666 ("[T]he deference afforded to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law."). Also, the Court granted deference to congressional fact-finding only after noting: Congress had addressed the factual issues explicitly and extensively; the "inherent complexity" of the applicable regulatory scheme; and the "rapid economic and technological change[s]" in the area. *Turner II*, 520 U.S. at 196. Those statements suggest that deference is far less warranted when the legislative fact-finding is not based on any in-depth studies, is not extensive, or involves less complex issues (and thus judges are better equipped to independently review the fact-finding).

> [W]e cannot abdicate our responsibility to decide whether a restriction on speech violates the First Amendment. But the factual findings accompanying economic measures that are enacted by Congress itself and that have only incidental effects on speech merit greater deference than those supporting content-based restrictions on speech.

Turner I, 512 U.S. at 671 n.2 (Stevens, J., concurring in part and concurring in the judgment). Because Justice Stevens's vote provided the crucial fifth vote for the majority in *Turner I*, his opinion is particularly meaningful.

B. Deference to Legislative Fact-Finding Is Unwarranted Here

1. Deference to Legislative Fact-Finding Is Unwarranted When, As Here, the Challenged Statute Is Not Content-Neutral

Nothing in *Turner I* or *Turner II* suggests that the deference afforded congressional findings made in connection with content-neutral statutes should extend to legislative findings made in connection with statutes, such as the Act, that quite clearly are *not* content-neutral. As noted above, Justice Stevens's controlling opinion in *Turner I* stated explicitly that deference should *not* extend beyond content-neutral statutes. Moreover, First Amendment decisions issued in the years after *Turner I* and *II* were decided (in 1994 and 1997, respectively) have provided no indication that the Court intended such an extension. That is true of post-*Turner* commercial speech cases (*e.g., Thompson v. Western States*) and as well as post-*Turner* cases in which strict scrutiny was applied to the challenged speech restriction (*e.g., Bartnicki v. Vopper*). In both types of cases, the Court not only makes no mention of deference but also continues to use language indicating that the government bears a heavy evidentiary burden of justifying its content-based speech restriction. Indeed, *Bartnicki* refused to defer to congressional fact-finding that a blanket prohibition against disclosure of illegally intercepted telephone calls would reduce the number of illegal interceptions (and instead applied strict scrutiny to strike down the blanket prohibition as a First Amendment violation), despite the dissent's claim that

Turner I and *II* required that the Court exercise such deference. *Bartnicki*, 532 U.S. at 550 (Rehnquist, C.J., dissenting).

Moreover, the Court recently declined to defer to legislative fact-finding even in a First Amendment case involving a content-neutral speech restriction – a law imposing dollar limits on contributions to and expenditures by political campaigns.[6] In *Randall v. Sorrell*, 548 U.S. 230 (2006), the Court struck down a Vermont statute limiting amounts that candidates for public office could spend on their own campaigns, and limiting campaign contributions from third parties; it expressly declined to defer to the legislature's determination that the limitations were necessary to preserve electoral fairness. The Court held that even when a challenged speech restriction is content-neutral, deference is not warranted where "a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote." *Id.* at 249. The Court explained that courts must exercise "independent judicial judgment" whenever "danger signs" exist that the statute may be imposing a disproportionate speech restriction – *e.g.*, speech restrictions that are content-based, or (as in *Randall*) extreme campaign finance restrictions that threaten to impede the ability of candidates to challenge incumbents. *Id.*

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[6] Uniformly applied dollar limits on political contributions and expenditures are inherently content-neutral because, given cash's fungible nature, such limits affect the quantity of speech but not its content. *See, e.g., Randall v. Sorrell,* 548 U.S. 230, 277 (2006) (Stevens, J., dissenting).

As *Turner I* and *II* recognized, there are valid grounds for deferring to congressional fact-finding undertaken in connection with content-neutral statutes, because under those circumstances there is no reason to suspect that speech restrictions imposed by the statute are motivated by legislative hostility to the content of the affected speech. But such suspicion inevitability arises whenever speech is made subject to regulation based on its subject matter, rendering inappropriate any overriding presumptions of regularity. As one commentator has stated, in such situations "both the content-based act and the motives of the actor are constitutionally suspect. In this context, it makes no sense for courts to accord any deference to the determinations made by those actors." Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312, 2324 (1998).

The Act is not content-neutral: the speech restricted by the Act (prescription information containing PI data) is defined *solely* by its content. *See Turner I*, 512 U.S. at 643 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based."). Indeed, as Respondents demonstrate, the Act is not even viewpoint-neutral. Publishers Br. 49-56 (Vermont finances and favors speech that runs counter to the pharmaceutical industry speech suppressed by the Act). Under those circumstances, the judicial deference outlined in *O'Brien* and *Turner I* & *II* is wholly unwarranted. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723 (2010) (*Turner* and *O'Brien* held inapplicable to challenge to federal statute that was not content-

neutral).

Moreover, by asking the Court to apply *Turner* deference on top of the somewhat deferential commercial speech standards, Petitioners are asking the Court to adopt an unprecedented, doubly-deferential standard. *Turner I* & *II* were not commercial speech cases; given that many statutes restricting commercial speech are content-based, there is little reason to conclude that the Court contemplated that the *Turner* decisions would apply in the commercial speech context.

2. Deference Is Also Unwarranted Because the Fact-Finding Here Was Not Remotely Similar to the Extensive Fact-Finding in *Turner*

A key feature of *Turner I* and *II* was the extensive investigation undertaken by Congress over a three-year period before it adopted the "must carry" provisions. In upholding those provisions, the Court made clear that Congress's extensive investigation of a complex subject and its adoption of findings of fact within the legislation played a significant role in the Court's willingness to defer to legislative fact-finding. *Turner II*, 520 U.S. at 195, 196. In contrast, the Court has made clear that it is far less likely to defer to congressional fact-finding in First Amendment cases when Congress has failed to make particularized findings of the type at issue in *Turner I* and *II*. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 21 (2006) (Court will insist on particularized factual findings from Congress in connection with legislation, when there is "a special concern, such as the protection of free speech.").

There is no evidence that the Vermont legislature ever engaged in an even remotely similar fact-finding enterprise. It adopted the Act without conducting – or even being aware of – any studies concluding that a law prohibiting the sale of truthful prescriber-identifiable information for marketing a prescription drug without prescriber consent would directly or materially advance the interests that caused Vermont to enact the Act. *See* J.A. 371 (Testimony of Dr. Aaron Kesselheim).

Although the Act included (in Section 1) legislative findings regarding why § 17(d)'s speech restrictions were warranted, those findings were not the product of a lengthy fact-finding process but rather were added as last-minute amendments to the legislation – in response to the April 2007 district court decision striking down New Hampshire's nearly identical speech restrictions. *IMS Health, Inc. v. Ayotte*, 490 F. Supp. 2d 163 (D.N.H. 2007).[7]

The rapid sequence of events following the New Hampshire decision belie any claim that the findings were the product of careful legislative deliberations. The district court issued its decision on April 30, 2007. As documented in the emails cited by PhRMA, during the

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[7] The New Hampshire federal district court determined that it should not defer to the New Hampshire legislature's predictive judgments, in part because the legislature had made no formal findings regarding its determination that speech restrictions would lead to improved health care. *Id.* at 177 n.12. As Respondents demonstrate, supporters of the Act concluded that adding the last-minute factual findings (drafted by a lobbyist) would improve the State's ability to raise a deference claim in subsequent litigation. PhRMA Br. 13-15, 35-36, 1a-12a.

next two days lobbyists proposed "findings" that could be added to the legislation, which was then pending in the Vermont House of Representatives. By the third day (May 3, 2007), all of the following had occurred: the 31 findings were drafted, the legislation had been amended to include those findings, and the bill was adopted by the House. Legislators clearly did not have adequate time between April 30 and May 3 to carefully consider whether the "findings" fed to them by lobbyists were well-supported.

Moreover, the 31 "findings" included in the Act consist largely of broad-based criticisms of marketing activities conducted by the pharmaceutical industry; the vast majority bear little or no relation to issues relevant to a First Amendment lawsuit. The only legislative finding relevant to whether the Act directly advances its three stated purposes is the 31st and final finding:

> This act is necessary to protect prescriber privacy by limiting marketing to prescribers who choose to receive that type of information, to save money for the state, consumers, and businesses by promoting the use of less expensive drugs, and to protect public health by requiring evidence-based disclosures and promoting drugs with longer safety records.

Vermont Acts No. 80, § 1(31).

Finding 31's conclusory statements are not the type of detailed legislative findings deemed worthy of deference by *Turner I* and *Turner II*. Finding 31 fails to explain why the legislature concluded that its speech restrictions would lead to reduced marketing efforts, or

would save money, or would promote the use of less expensive drugs, or would promote public health, or would protect prescriber privacy. The district court erred in granting deference, thereby tainting its factual findings.

II. THE SECOND CIRCUIT DECISION DOES NOT CALL INTO QUESTION FEDERAL PRIVACY STATUTES

Petitioners assert that the Second Circuit's decision "calls into question" the constitutionality of a "wide range" of federal statutes designed to protect the privacy of consumers. Pet. Br. 35. That assertion is misguided. The Second Circuit rejected Petitioners' privacy defense not because it denigrated the importance of privacy rights but because it questioned whether the Act could legitimately be deemed a privacy statute at all. Pet. App. 22a-24a. Moreover, the principal privacy interest asserted by Petitioners – the privacy of doctors in the conduct of their professions, Pet. Br. 46-47 – is simply not on a par with that of the consumers whose privacy is being protected by the federal statutes cited by Petitioners.

A. The Act Was Not Intended to Protect Doctor Privacy, Nor Does It Do So

Respondents have explained at length why the Second Circuit was correct in concluding that the Act cannot legitimately be deemed a privacy statute. Publishers Br. 32-47; PhRMA Br. 21. The Act permits and encourages widespread dissemination of PI data, provided only that the data not be used by

pharmaceutical companies to market or promote prescription drugs. *Amicus* will not repeat those arguments here. Rather, we wish to highlight several additional points regarding Petitioners' privacy claims.

First, while conceding that the Act permits substantial dissemination of PI data, Petitioners assert that "the *Central Hudson* standard tolerates under-inclusiveness." Pet. Br. 48. That assertion makes little sense. The goal of a privacy statute of this sort is to prevent disclosure of "personal" information. Because the Act permits numerous uses of PI data – indeed, all uses other than marketing and promoting prescription drugs – it does not prevent disclosure. Numerous stakeholders other than drug companies have an interest in the prescribing patterns of physicians, and thus regularly seek access to such information. The Act cannot be said to have advanced physician privacy "to a material degree," *Edenfield*, 507 U.S. 771, if access to PI data has been limited for only a single group, brand-name drug manufacturers – a group that has no interest in sharing with others any PI data it manages to acquire. For example, as the Second Circuit noted, nothing in the Act prevents the disclosure of PI data to newspapers "for journalistic reports about physicians." Pet. App. 22a.

Indeed, in other contexts the underinclusiveness of speech restrictions has led the Court to question the credibility of the government's explanation for the restrictions. In *United States v. Nat'l Treasury Employees Union*, 513 U.S. 514 (1995), the Court considered a First Amendment challenge to a statute that prohibited federal employees from accepting an honorarium for a speech or article – adopted because of

concern that payments might be viewed as a form of bribery. But the Court "attach[ed] significance" to the fact that implementing regulations excepted honoraria paid for "sermons, fictional writings, and athletic competitions." 513 U.S. at 477. Far from condoning those exceptions on the grounds that underinclusiveness is not a First Amendment vice, the Court concluded that they undermined Congress's rationale for applying the honorarium ban even to low-level federal employees. *Id.* The Court explained, "The exclusions, of course, make the task of [government administrators] somewhat easier, but they diminish the credibility of the Government's rationale that paying lower level employees for speech entirely unrelated to their work jeopardizes the efficiency of the entire federal service." *Id.* (citation omitted). *See also, Anderson v. Cryovac, Inc.*, 805 F.2d 1, 8-9 (1st Cir. 1986) (district court protective order violated First Amendment due to underinclusiveness; it denied some interested parties access to discovery materials but granted it to others). For similar reasons, the Act's underinclusiveness provides ample reason to doubt the credibility of claims that the Act was adopted to promote physician privacy – particularly given Vermont's repeated assertions that the Act's speech restrictions were also adopted to correct a supposed "imbalance" in the marketplace of ideas.

Finally, we note that Petitioners assert that the Act serves a second privacy interest: protecting against "intru[sions] on the doctor patient relationship." Pet. Br. 47. They assert that patient trust in their doctors is potentially undermined by the knowledge that prescribing decisions are public and that use of the information might alter future treatment decisions. *Id.*

As the Second Circuit correctly determined, this "medical privacy" concern is too conjectural to warrant the speech restrictions imposed on Petitioners. Pet. App. 23a. The appeals court stated:

> To the extent that the record might suggest PI data has damaged the relationship between doctors and patients, the evidence is either speculative or merely indicates that some doctors do not approve of detailing or the use of PI data in detailing. For example, Vermont's expert witness Dr. David Grande opined that the use of PI data "will make patients only feel more anxious about whether or not in fact their interests are being put first," but he had not conducted any studies of patient perception of PI data to support that conclusion.

Id.

B. The Privacy of Doctors in the Conduct of Their Profession Is Not on a Par With That of Consumers Protected by Federal Privacy Statutes

Even if the Act could properly be deemed a privacy statute, the Second Circuit's decision to strike down the Act does not call into question any federal statute that protects the privacy of consumers. There is no parallel with the federal statutes because the consumer privacy rights they protect have, throughout our Nation's history, been afforded far greater recognition than the commercial privacy rights being

asserted by Vermont. As the United States recognizes, "physicians' privacy interest in their prescribing practices is diminished" by the extensive regulation of those practices under federal and state law. U.S. Br. 29. Vermont's attempts to protect those limited privacy rights count for far less on the constitutional scales than do statutes protecting well-established consumer privacy rights.

American common law began providing explicit protection to privacy rights in the years following the 1890 publication of an influential law review article by Samuel Warren and Louis Brandeis. *See*, S. Warren and L. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). A decision from the Georgia Supreme Court is often deemed the seminal case in the recognition of tort-based privacy rights. The court held that a young woman's privacy rights were violated by a life insurance company when the company, without her permission, used her photograph in one of its advertisements. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190 (1905). It stated, "All will admit that the individual who desires to live a life of exclusion can not be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land." *Id.* at 196. The court explained, however, that "[t]he right of privacy is unquestionably limited by the right to speak and print," *id*. at 204, and that one's privacy diminishes in direct proportion to one's increased involvement in public and commercial affairs. In explaining the diminished privacy expectations of public officials and professionals, the court stated:

> One who holds public office makes a waiver of a similar character, that is, that his life may be

> subjected at all times to the closest scrutiny in order to determine whether the rights of the public are safe in his hands; but beyond this the waiver does not extend. So it is in reference to *those belonging to the learned professions,* who by their calling place themselves before the public and thereby consent that their private lives may be scrutinized for the purpose of determining whether it is to the interest of those whose patronage they seek to place their interests in their hands. In short, any person who engages in any pursuit or occupation or calling which calls for the approval or patronage of the public submits his private life to examination by those to whom he addresses his call.

Id. at 200 (emphasis added).

In the years that followed, court decisions recognizing a right to privacy uniformly involved claims asserted by individuals acting in a private capacity or as consumers, not in a commercial capacity. Many of those decisions explicitly adopted *Pavesich*'s holding that "those belonging to the learned professions" possessed a more limited right to privacy in connection with their commercial affairs. *See, e.g. Martin v. Dorton*, 210 Miss. 668, 673-74 (1951); *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 649 (1949) ("It has been held frequently that a person who enters a business or calling which gives the public a legitimate interest in his character, activities and affairs, thereby relinquishes his right of privacy. See cases cited in 138 A.L.R. 58."). Thus, a court dismissed a dentist's claim that a newspaper had invaded his privacy by printing allegations that he sexually harassed several patients, reasoning that "the

public has a legitimate interest" in the allegations, "which would reflect upon whether it would be wise to seek plaintiff's professional services." *Ramsey v. Georgia Gazette Publishing Co.*, 164 Ga. App. 693 (1982).

While the right to privacy (including protection against unreasonable publicity given to another's private life) has been recognized by the Restatement of Torts since 1939, the Restatement has never extended that protection to corporations. *See* RESTATEMENT (SECOND) OF TORTS § 652I, *cmt. c* (1976) ("A corporation, partnership or unincorporated association has no personal right of privacy."). *Accord*, W. Prosser, *Privacy*, 48 CAL. L. REV. 383, 408-09 (1960). The refusal to extend common law privacy rights to corporations is based in part on the recognition that corporations are inanimate and thus cannot be said to "take it personally" when others expose their private affairs. *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 2011 U.S. LEXIS 1899 at *21 (2011). But it is also based on the common law's recognition that corporations generally engage in commercial matters and that those engaged in commercial matters generally are entitled to a reduced level of privacy. *See, e.g.,* 62 Am.Jur.2d *Privacy* § 11 at 692 (1972) ("The right of privacy . . . does not extend to protect corporations from disclosure of information acquired or maintained in the regular course of business."); *Health Central v. Comm'r of Ins.*, 152 Mich. App. 336, 346 (1986) ("Since the right of privacy is primarily designed to protect the feelings and sensibilities of human beings *rather than to safeguard property, business, or other pecuniary interests*, the courts have denied this right to corporations) (emphasis added). *See also United States v. Morton Salt Co.*, 338

U.S. 632, 652 (1950) ("corporations can claim no equality with individuals in the enjoyment of the right to privacy.").

Accordingly, when courts must determine whether privacy rights outweigh First Amendment rights, the privacy rights of patients and other consumers are entitled to significantly more weight than the privacy rights of doctors in the conduct of their profession – conduct that is increasingly likely to be undertaken by professional corporations. In light of that difference, there is no reason to fear that the Second Circuit's decision calls into question laws protecting patients and other consumers. The Court has imposed strict limits on the circumstances under which privacy rights can be allowed to trump First Amendment rights. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (State may not impose invasion-of-privacy sanctions for publication of truthful information in a public court record).[8] But the

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[8] Petitioners assert that the Act does not even implicate Respondents' First Amendment rights. Pet. Br. 22-41. That assertion is based on a misreading of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1982). According to Petitioners, *Seattle Times* stands for the proposition that individuals who obtain information pursuant to government compulsion (in that instance, discovery in a civil case that was subject to a protective order) have no First Amendment right to disseminate the information. *Seattle Times* did not so hold; to the contrary, it held that the First Amendment was fully applicable but declined the newspaper's request to apply "strict scrutiny" to its First Amendment claims. 467 U.S. at 31-32. Later federal appeals court decisions have understood *Seattle Times* to mean that litigants resisting public disclosure of documents produced during litigation must, in order to overcome First Amendment considerations, demonstrate that they meet the "good cause" standard set forth in Fed.R.Civ.P. 26. *See, e.g., Chicago*

arguments advanced by Respondents – that their First Amendment rights outweigh any privacy interests doctors may have in avoiding disclosure of their prescribing patterns – do not suggest that laws protecting the privacy of consumers are similarly outweighed.

In cases arising in other contexts, the Court has repeatedly afforded individuals a lesser degree of privacy rights while acting in a business capacity than while acting as consumers or while present in their own homes. Thus, the Fourth Amendment affords a lesser degree of protection against government searches to individuals engaged in businesses (particularly businesses in "closely regulated industries") than to individuals within their own homes. *New York v. Burger*, 482 U.S. 691, 699-701 (1987). The Court explained: "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. This expectation is particularly attenuated in commercial property employed in 'closely regulated' industries," because of the lengthy "history of government oversight." *Id.*

Similarly, the Court has imposed higher First Amendments hurdles on plaintiffs who claim to have been defamed in connection with their public activities (such as the operation of a business that deals with the public) than on plaintiffs who indisputably are not

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Tribune Co. v. Bridgestone/Firestone, Inc., 265 F.3d 1304, 1310 (11th Cir. 2001). More fundamentally, there is no factual support for Petitioners' assertion that pharmacies and other third parties obtain PI data only as a result of government compulsion.

"public figures." *See, e.g., Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Even individuals who have not assumed prominent roles in society are nonetheless deemed "limited" public figures – and thus must meet more rigorous First Amendment standards in order to prevail in a libel suit – if they "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* Similarly, doctors should not be deemed to have abandoned privacy rights in their personal lives, but by holding themselves out to the public as members of a learned profession they have invited public inquiry into their professional undertakings – including their prescribing practices.

After years of closely regulating the affairs of doctors, Vermont has suddenly discovered an interest in protecting the privacy of their businesses. States are, of course, entitled to grant recognition to previously unprotected privacy interests. But courts cannot allow newly created privacy rights to trump First Amendment rights in all instances, lest all restraints on speech restrictions be eliminated. Resolving conflicts between competing privacy and First Amendment interests requires a careful balancing process. When undertaking that balance, courts should have little difficulty distinguishing between alleged privacy rights that are newly enacted and have a thin common law pedigree and the privacy rights of consumers that have garnered considerable protection throughout our Nation's history. As Warren and Brandeis recognized, the right of privacy is an outgrowth of the common law's recognition of "a man's home as his castle"; it has far less applicability to matters that have a "legitimate

relation" to "any act done by him in a public or quasi public capacity." *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

CONCLUSION

Amici curiae request that the Court affirm the decision of the court of appeals.

Respectfully submitted,

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Dated: March 31, 2011