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

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BRIEF OF AMICI CURIAE PUBLIC CITIZEN, THE CENTER FOR SCIENCE IN THE PUBLIC INTEREST, CONSUMER ACTION, PUBLIC GOOD, U.S. PIRG, AND NEW HAMPSHIRE PIRG IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Public Citizen is a consumer advocacy organization founded in 1971, with approximately 150,000 members and supporters nationwide. Public Citizen has long been active before Congress, regulatory agencies, and the courts in matters relating to public health in general and regulation of prescription drugs in particular. In addition, Public Citizen has substantial interest and expertise in commercial speech doctrine. Among other cases, its lawyers have argued *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *Edenfield v. Fane*, 507 U.S. 761 (1993).

The Center for Science in the Public Interest (CSPI) is an independent non-profit organization supported by more than 750,000 individual members as well as charitable donations and foundation grants. CSPI accepts no funding from industry or government agencies. As part of its advocacy efforts, CSPI publishes an award-winning Nutrition Action Healthletter to inform its members of health topics of interest. CSPI's Litigation Project represents individuals and organizations in lawsuits involving deceptive and unfair marketing practices, where it repeatedly encounters marketers claiming a First Amendment right to engage in deceptive marketing. CSPI is concerned that the expansion of free-speech rights under the Second Circuit's decision will embolden

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[1] Pursuant to this Court's Rule 37.6, counsel states that this brief was not authored in whole or in part by counsel for a party and that no one other than amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief. Letters from each of the parties consenting to the filing of all amicus briefs are on file with the Clerk.

more marketers to engage in deceptive marketing using the First Amendment as a shield.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A nonprofit 501(c)(3) organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. For 40 years, Consumer Action has been focused on advocating for the strongest possible privacy protections for consumers in all aspects of their lives, including in the workplace, while banking or performing other financial transactions, as they surf and carry out other activities on the Internet, and in their doctors' offices. Consumer Action works to ensure an environment in which individuals own and have the right to control their personal information, particularly sensitive information including health data. Consumer Action believes that consumers should not have to agree to data collection and reuse without their explicit consent and knowledge, certainly not when used for marketing and other purposes unrelated to the original point of collection.

Public Good is a public interest organization dedicated to the proposition that everyone is equal before the law. Through amicus participation in cases of particular significance for consumer protection and freedom of speech, Public Good seeks to ensure that legal safeguards remain robust and broadly accessible. Public Good believes that distortion of the First Amendment to place a constitutional imprimatur on the dubious commercial practices addressed by Vermont's data-mining law would act in derogation of both freedom of speech and the public interest.

U.S. PIRG (Public Interest Research Group) is a non-profit, non-partisan federation of 26 state Public Interest Research Groups, working on behalf of American

consumers for a fair and competitive marketplace, a sustainable economy, and a responsive, democratic government. U.S. PIRG is supported by thousands of citizens via membership contributions and receives a significant portion of its funding from foundation grants. Its specific issue areas include consumer protection, public transportation, product safety, health care, and good government. This case involves two areas of concern to U.S. PIRG: health care costs and privacy. "Detailing," the practice facilitated by Respondent's collection of prescriber data, increases the costs of health care by encouraging unnecessary prescriptions and the use of brand-name drugs where less expensive generic drugs are equally effective. The law at issue also protects the privacy of doctors' decisions and, to the extent that the information obtained by Respondent, although cleansed of explicit identifying information on patients, nevertheless contains enough information to compromise patient privacy in certain situations, the private medical information of patients.

New Hampshire PIRG is the New Hampshire affiliate of U.S. PIRG. New Hampshire PIRG is especially interested in this case because New Hampshire has a law similar to the law at issue here. New Hampshire's law was upheld by the First Circuit, *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), and the validity of the law may be affected by the Court's decision.

BACKGROUND

Vermont requires pharmacies in the state to keep records of prescriptions that they fill, including the name of the patient and prescribing physician. *See* Vt. Bd. of Pharmacy Admin. Rules §§ 9.24-9.27. The state uses these records for law enforcement and other official purposes. In recent years, however, pharmacies have also sold copies of the records to "data mining" companies for substantial profit. JA 376-78, 399-400, 421. The data min-

ers then bundle data from multiple pharmacies and resell it in bulk to drug companies. *Id.* The drug companies, in turn, use the purchased prescription data to target their marketing to individual physicians—a practice known as "detailing." Pet. App. 71a; JA 168-69.

Drug companies make use of doctor-identifying data in several ways: to identify doctors likely to prescribe the companies' drugs or who have recently switched to prescribing a competing or generic drug, to evaluate the effectiveness of a particular pitch following a sales visit, and to compensate salespeople based on their rate of success. JA 469, 473, 481, 488-90, 494-95. Importantly, however, drug companies do not communicate the contents of the prescription data to doctors as part of their sales pitches. JA 152-53, 463. To the contrary, data miners license the data to drug companies on the condition that the companies do not directly reference prescription data in their presentations. *Id.*

As a result of this secrecy, doctors are often unaware that drug companies have access to their prescription histories. JA 343. The record in this case demonstrates that, when they learn that this information has been sold without their knowledge or consent, many doctors feel that their privacy and the privacy of the doctor-patient relationship has been violated. JA 404-20. The Vermont Medical Society has sharply objected to the practice for this reason, concluding that the "use of prescription information by sales representatives is an intrusion into the way physicians practice medicine." JA 376-78.

Following the passage of similar laws in New Hampshire and Maine, Vermont's legislature in 2007, with the strong support of doctors, passed the Prescription Confidentiality Law to regulate the sale and use of prescription records containing the names of individual prescribing doctors who have not consented to the release of the

information. Vt. Stat. Ann. tit. 18, § 4631. The law's purpose, as set forth in the statute, is "protecting the public health of Vermonters, protecting the privacy of prescribers and prescribing information, and to ensure costs are contained in the private health care sector." *Id.* § 4631(a). The law pursues these goals in two ways:

(1) It prohibits pharmacies and similar entities from "exchang[ing] for value" prescription records that contain the names of prescribing doctors without those doctors' consent, and

(2) It prohibits drug companies from using such records without consent "for marketing or promoting a prescription drug." *Id.* § 4631(d).

Respondents, three data-mining companies and a drug-company trade group, filed suit to enjoin the law's enforcement, claiming, among other things, that pharmacies and data miners have a First Amendment right to sell prescription records and that drug companies have a First Amendment right to use those records to target their marketing efforts at particular doctors. The district court concluded that the law did not violate the First Amendment. The Second Circuit, however, reversed, holding that Vermont's restriction of access to this data was an unconstitutional restriction on commercial speech because it "affect[ed] manufacturers' ability to promote brand-name drugs to doctors …, for example, by making it harder to identify those physicians for whom the message will be most relevant and to tailor the detailing messages based on individual physicians' prescribing histories." Pet. App. 18a. The court expressly disagreed with two First Circuit decisions, which, in upholding similar laws in New Hampshire and Maine, concluded that those laws did not violate the First Amendment because they governed conduct rather than speech.

See IMS Health Inc. v. Mills, 616 F.3d 7 (1st Cir. 2010); *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008).

In dissent, Judge Livingston sharply disagreed with the majority's characterization of the law as restricting speech, concluding that the statute regulates only *access* to nonpublic information and thus "has very limited, if any, effects on First Amendment activity." Pet. App. 35a.

SUMMARY OF ARGUMENT

Neither the sale of private information about individual doctors nor the use of that data to single out doctors for marketing efforts is "speech" under the First Amendment. First, selling the identities of individual prescribing doctors cannot reasonably be characterized as proposing a commercial transaction and involves no expressive content or matter of public concern that would trigger First Amendment scrutiny. The sale of that data is like the sale of any other product in commerce and should not be subject to a higher level of constitutional protection. If adopted by this Court, the Second Circuit's decision would jeopardize a wide range of federal and state privacy laws that protect the confidentiality of consumers' private information, but would advance no interests the First Amendment is understood to protect.

Second, the First Amendment does not provide pharmaceutical companies a right to use records about doctors' prescriptions for marketing purposes. Such information is confidential under state law, and drug companies have no more right to access it than they have to access a doctor's private bank records. Moreover, the state's restriction on use of prescription data does not restrict the content or manner of the companies' communications during sales visits and is thus not a restriction on speech. The First Amendment does not protect drug companies' interest in using private data to select

individual doctors for solicitation or to evaluate the success of sales pitches.

Because Vermont's law does not restrict speech, it is subject to review only under a rational-basis standard. The evidence on which Vermont relies demonstrates that its law is rational.

ARGUMENT

I. The Vermont Law Does Not Restrict Speech.

Respondents claim First Amendment protection for two distinct activities. The first is the sale by pharmacies and data miners of the identities of prescribing doctors. The second is the use of that data by drug companies to select particular doctors for solicitation and to evaluate the success of sales pitches. Because neither of these activities constitutes speech, Vermont's decision to restrict them does not violate the First Amendment.

A. The Sale of Identifying Information About Prescribing Doctors Is Not Speech.

1. The first activity for which Respondents claim First Amendment protection is the sale of prescription data by pharmacies and data miners. Vt. Stat. Ann. tit. 18, § 4631(d) (prohibiting pharmacies and similar entities from "exchang[ing] for value" prescription records that contain the names of prescribing doctors without those doctors' consent). Importantly, the law prohibits only the transfer of *one type* of prescription data—data that identifies the patient or prescribing doctor. Pharmacies, data miners, and drug companies remain free to traffic in prescription data that does not contain such identifying information or from which such information has been redacted. *Id.* Moreover, the law prohibits only the *sale* of this data, thus allowing the transfer of even identifying information for noncommercial purposes such as academic research or law enforcement. *Id.* The right

claimed by Respondents is thus an extremely narrow one. Properly framed, it is the right to *sell the names of individual prescribing doctors for a profit*.

As the First Circuit concluded in upholding New Hampshire's similar prescription-data law, the law does not regulate expression—it regulates *sales*, and is thus "a restriction on the conduct, not the speech" of pharmacists and data miners. *Ayotte*, 550 F.3d at 52. The sale of prescription data is not commercial speech that "propos[es] a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Rather, the sale *is* the transaction.

That Vermont's law addresses sale of *data* rather than some other product does not transform what is otherwise a commercial regulation into a restriction on speech. "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language … ." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). For example, as the Second Circuit recognized, software is a form of data, JA 20a, and sometimes transfer of software can involve the "exchange of ideas and expression." *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001). Nonetheless, not *every* law regulating the sale of software is subject to First Amendment scrutiny. *See Commodity Futures Trading Comm'n v. Vartuli*, 228 F.3d 94, 111 (2d Cir. 2000) (holding that "the values served by the First Amendment [would not be] advanced" by affording First Amendment protection to software that automated the buying and selling of stock). Just because a product is "information instead of, say, beef jerky" does not mean that "any regulation constitutes a restriction of speech." *Ayotte*, 550 F.3d at 52-53.

The commercial conduct at issue here involves no "significant expressive element" that would implicate the First Amendment. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986); *see Rumsfeld*, 547 U.S. at 47 (holding that the First Amendment does not protect conduct that is not "inherently expressive"). Neither pharmacies nor data miners have any expressive interest in the identities of the doctors contained in the prescription records they sell. As the dissent noted below, the data "communicates nothing about [the pharmacists or data miners] nor allows them to express or communicate anything at all." Pet. App. 46a. Respondents are in the "business of aggregating and selling data" for a profit, and, assuming a willing buyer, they will sell the data regardless of the information it contains. *Id.* To the extent the law restricts communication at all, that restriction is thus "plainly incidental" to the law's primary "regulation of conduct." *Rumsfeld*, 547 U.S. at 62; *cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (holding that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news").

To be sure, the Second Circuit was correct that the First Amendment protects the communication of "dry" commercial information, such as the prices of drugs. *See Va. State Bd. of Pharmacy*, 425 U.S. at 770. But this Court's protection of such information "is justified principally by the value to consumers of the information." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Even dry advertising information "inform[s] the public of the availability, nature, and prices of products and services" and thus serves "individual and societal interests in assuring informed and reliable decisionmaking." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996). Indeed, this

Court has recognized that a "consumer's interest in the free flow of commercial information … may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Va. State Bd. of Pharmacy*, 425 U.S. at 763.

In contrast, the doctor-identifying information that Respondents seek to sell communicates no information to consumers because data miners distribute the information subject to license agreements that prohibit public distribution. Restricting the data thus does not affect "the public's interest in receiving accurate commercial information." *44 Liquormart*, 517 U.S. at 496; *see also Ayotte*, 550 F.3d at 100 (Lipez, J., concurring). Nor does the restricted data involve any matter of public concern that might implicate the "free exchange of ideas the First Amendment is designed to protect." *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 740 (1996). Although, as the Second Circuit noted, prescription data *in general* may be of interest to researchers and academics, they typically have no interest in knowing the identity of a *particular* physician who has in the past prescribed any given drug. And in the few contexts where the identity of the doctor may be relevant, Vermont's law does not prohibit transfer of the data. Vt. Stat. Ann. tit. 18, § 4631; *cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality opinion) (holding that a consumer reporting agency's credit report warranted "reduced constitutional protection" because it "was speech solely in the interest of the speaker and its specific business audience" and concerned "no public issue"); *Trans Union Corp. v. FTC*, 245 F.3d 809, 818 (D.C. Cir. 2001) (same). Accordingly, the public interests that motivated the Court to recognize that First Amendment protection extends to commercial speech do not apply here.

2. The Second Circuit's holding that the First Amendment protects the sale of private data that lacks public interest or expressive content casts the constitutionality of numerous federal and state consumer-protection laws into doubt. For example, federal law prohibits disclosure of private financial information by financial institutions, 12 U.S.C. § 3417 (Right to Financial Privacy Act) (penalizing unauthorized disclosure of financial records); credit-reporting agencies, 15 U.S.C. § 1681b (Fair Credit Reporting Act) (prohibiting disclosure of certain debts); debt collectors, 15 U.S.C. § 1692c (Fair Debt Collections Practices Act) (prohibiting disclosure of debts to third parties); and tax preparers, 26 U.S.C. §§ 6103, 7213, 7413 (Internal Revenue Code) (providing criminal and civil penalties for unauthorized disclosure of tax return information). Federal law also prohibits disclosure of email and other private communications, 18 U.S.C. §§ 2520, 2707 (Electronic Communications Privacy Act); telephone calling records, 18 U.S.C. § 1039(b) (Telephone Records and Privacy Protection Act); cable-company account records, 47 U.S.C. § 551 (Cable Communications Policy Act); university records, 20 U.S.C. § 1232g(b)(1) (Family Educational Rights and Protection Act); and video rentals, 18 U.S.C. § 2710 (Video Privacy Protection Act). Similarly, numerous state laws protect the privacy of information such as Social Security Numbers and employment, student, and motor-vehicle records; and state ethics rules prohibit professionals such as doctors and lawyers from disclosing the confidences of their patients and clients. *See* Vt. Stat. Ann. tit. 8, § 10201 (financial privacy); *id.* tit. 9, § 2480e (credit reports); Vt. Rules of Prof'l Conduct 1.6 (information related to a lawyer's representation of a client); *see also, e.g.*, Cal. Civ. Code § 1798.85(a)(3) (Social Security Numbers); Ohio Rev. Code Ann. § 4501.27(A) (driver's license data).

These laws have not generally been subjected to First Amendment challenge, but the Second Circuit's decision, if allowed to stand, would quickly change that. Each of these laws prohibits the transmission of private information, and each would implicate the First Amendment under the Second Circuit's analysis. If adopted by this Court, the Second Circuit's holding would unleash a landslide of litigation by financial institutions, communications companies, health-care providers, and others that stand to profit from the sale of private customer data they are charged by law to protect. It would also cast a pall over future efforts to protect privacy. For example, state and federal lawmakers have only recently begun to consider legislation to protect the privacy of people's online activities. *See* Julia Angwin, *Lawmaker Introduces New Privacy Bill*, *Wall Street Journal Blog*, Feb. 11, 2011, *available at* http://blogs.wsj.com/digits/2011/02/11/lawmaker-introduces-new-privacy-bill/. The Second Circuit's holding suggests, however, that advertisers may have a First Amendment right to surreptitiously track the websites that users visit and sell that data, complete with identifying information, for a profit.

Moreover, although Respondents have limited their challenge to the law's limits on doctor-identifying information, their arguments could equally be made in regard to *patient* information. If the communication of a doctor's identity on prescription records is a form of speech under the First Amendment, it is unclear why a patient's identity on those same records would not also constitute speech. The Second Circuit's holding thus opens up federal and state laws protecting the privacy of patient records to constitutional attack. *See* 42 U.S.C. § 17935 (Health Insurance Portability and Accountability Act) (restricting distribution of health records by health-care providers and insurance companies).

In rejecting arguments that the Constitution protects the privacy of personal information, this Court has concluded that privacy protections are better left to state and federal law. *See, e.g., NASA v. Nelson*, 131 S. Ct. 746, 764 (2010) (Scalia, J., concurring) ("Like many other desirable things not included in the Constitution, 'informational privacy' seems like a good idea—wherefore the People have enacted laws at the federal level and in the states restricting the government's collection and use of information."). In *Whalen v. Roe*, for example, this Court rejected a due-process challenge to a New York law requiring doctors to send copies of prescriptions for dangerous drugs to the state. 429 U.S. 589 (1977). While recognizing that the "accumulation of massive amounts of personal information" may pose a threat to privacy, the Court found these concerns ameliorated by a "statutory or regulatory duty to avoid unwarranted disclosures." *Id.* at 605; *see also Nelson*, 131 S. Ct. at 761-62 (concluding that the Privacy Act of 1974, 5 U. S. C. § 552a, "satisf[ies] any interest in avoiding disclosure that may arguably have its roots in the Constitution"). *Whalen* reflects an awareness that, when regulating the emerging problem of privacy, states need "broad latitude in experimenting with possible solutions to problems of vital local concern." 429 U.S. at 597.

Like the law at issue in *Whalen*, Vermont's prescription-data law requires pharmacies to collect private information about drug prescriptions and imposes limits on the distribution of that information. Because the law does not restrict speech, Vermont should be free to make the judgment that such limits are necessary to protect privacy.

B. Use of Private Data for Marketing Purposes is Not Speech.

1. In addition to a restriction on the sale of doctor-identifying information, the Vermont law restricts *use* of an individual doctor's prescription history for marketing purposes. *See* Vt. Stat. Ann. tit. 18, § 4631(d) (restricting use of the data "for marketing or promoting a prescription drug"). Drug companies use the prescription histories of individual doctors in several ways: as a "targeting tool" to identify "the most valuable doctors" for marketing efforts, JA 469, 473, 481, 488-90, to identify doctors who have recently switched to prescribing a competing or generic drug, JA 489-90, to evaluate the effectiveness of a particular pitch following a sales visit, JA 494-95, and to compensate drug salespeople based on their rate of success, *id.* Respondents claim that Vermont's law infringes their First Amendment rights by interfering with their ability to carry out these activities.

The restriction on the use of doctor-identifying prescription histories for marketing purposes, however, does not regulate speech—it "neither limits what [the companies] may say nor requires them to say anything." *Rumsfeld*, 547 U.S. at 47. The law does not prohibit drug companies from soliciting doctors or from communicating any particular information to anyone in their efforts to sell drugs. Pet. App. 32a (noting that Vermont's law "does not prohibit detailing and does not proscribe any particular claim or message"). Moreover, Respondents do not claim any interest in communicating identifying information about prescribing doctors—the only information at issue in this case—in their sales presentations. In fact, the terms of the data mining Respondents' license agreements *prohibit* drug companies from directly referencing such information in their sales pitches, and, in any event, doctors already have access to their own

prescription histories. JA 135, 152-53, 166-67; 473; *see* Pet. App. 49a (Livingston, J., dissenting) ("There is also no dispute, however, that pharmaceutical detailers do not refer to [prescription information] data in their conversations with doctors."); *see also Ayotte*, 550 F.3d at 106 (noting that "[d]etailers do not routinely disclose a physician's prescribing history to that physician" and that "many physicians who interact with detailers never discover that the detailers possess such information").

Although it recognized that Vermont's law does not prohibit or restrict the content of solicitations, the Second Circuit concluded that the law nevertheless violates the First Amendment because it impairs the ability of drug companies to craft "messages *informed* by [prescription information] data." Pet. App. 32a (emphasis added). Drug companies, however, have no First Amendment right to have their solicitations "informed" by private information. "[T]he First Amendment does not guarantee the press"—much less drug companies—"a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972); *see also Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (plurality opinion) (holding that the First Amendment does not "compel[] others—private persons or governments—to supply information"); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (holding that the First Amendment "does not carry with it the unrestrained right to gather information"); *United States v. Miami Univ.*, 294 F.3d 797, 820-24 (6th Cir. 2002) (holding that there is no "First Amendment right of access to student records").

To be sure, this Court has held that the First Amendment protects commercial solicitation, and a restriction on solicitation of doctors would thus be subject to First Amendment scrutiny. *See Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (striking down a restriction on in-

person solicitation by accountants). It does not follow, however, that the First Amendment provides a right of access to any information that would make a marketing pitch more effective. Drug companies might also credibly claim that access to information about doctors' television viewing habits would allow them to better select the stations on which to air their advertisements and the most effective times to air them. But surely drug companies do not have a First Amendment right to access doctors' cable company records. *See* 47 U.S.C. § 551(c) ("[A] cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber."). Nor do drug companies have a First Amendment right to access doctors' tax returns, bank account balances, or credit-card purchases, no matter how useful that information would be to their marketing efforts.

The Second Circuit also concluded that Vermont's law violates the First Amendment because it "curbs the ability of pharmaceutical manufacturers to market brand-name drugs." Pet. App. 32a. The Vermont law, however, affects drug-company marketing only to the extent that it affects their development and implementation of marketing plans and strategies—for example, choosing which doctors to target and evaluating the success of sales pitches. Such activities, though related to marketing, are not "speech." As the First Circuit wrote in upholding the New Hampshire law, the restriction "is on the conduct (detailing) not on the information with which the conduct is carried out." *Ayotte*, 550 F.3d at 53; *see Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (holding that a restriction on "use" of an intercepted communication "[is] a regulation of conduct"); *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 49 (1st Cir. 2005) (holding that the "provision of advertising services, including designing advertisements, arranging for their

placement in various media, and licensing the common use of trade names" was conduct, not speech).

A law is not a commercial speech restriction simply because it affects a company's marketing efforts. For example, although limiting the number of hours that bakers are allowed to work would surely curb their ability to market bread, *see Lochner v. New York*, 198 U.S. 45 (1905), that fact would not turn an essentially economic regulation into a restriction on speech. Similarly, Vermont's limit on access and use of doctors' prescription histories—even if it affects drug companies' profits—does not implicate the First Amendment. *See Wine & Spirits*, 418 F.3d at 49 ("The First Amendment's core concern is with the free transmission of a message or idea from speaker to listener, not with the speaker's ability to turn a profit.").

2. Like Respondents' claimed right to sell data that identifies particular doctors, their claimed right to *use* that data to inform their marketing decisions would apply equally to data that identifies individual patients. Federal law prohibits the sale of private health-care records for marketing and other non-health-related purposes. *See* 42 U.S.C. §§ 17935-36 . Respondents' position, however, suggests that the First Amendment protects the right of health-care providers and insurance companies to sell those records for marketing or any other purpose without a patient's consent.

Respondents' position, if adopted by this Court, would also endanger a range of other laws limiting the uses to which private information can be put. For example, the federal Drivers Privacy Protection Act imposes limits on use of motor-vehicle records by authorized recipients of those records. 18 U.S.C. § 2721. The law allows use of this data for marketing purposes only with "the express consent of the person to whom such per-

sonal information pertains." *Id.* § 2721(b)(12). Similarly, the Gramm-Leach-Bliley Act prohibits disclosure of account numbers and other information "for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer." 15 U.S.C. § 6802. And the Fair Credit Reporting Act restricts use of a consumer's credit report to a narrow list of permitted uses, prohibiting the use of such reports in marketing and allowing use by employers only if the subject of the report consents in writing. 15 U.S.C. § 1681b(b); *see Trans Union Corp.*, 245 F.3d at 812.

Laws limiting certain uses of private information reflect the common-sense judgment of federal and state governments that consumers who supply their private information for a specific purpose—such as applying for a driver's license or a credit card—do not expect that information to be sold to mass marketers. That problem is essentially the one that Vermont sought to address here—doctors writing private prescriptions for their patients do not expect that information to come back to them in the form of drug-company marketing efforts. Because such laws do not restrict what anyone can say or to whom they can say it, federal and state governments should be free to make such judgments with the same "broad latitude" that this Court has given to other essentially economic regulations. *Whalen*, 429 U.S. at 597.

II. Vermont's Law Survives Rational-Basis Scrutiny.

Because Vermont's law "does not come within the First Amendment's scope," it is a "species of economic regulation" that, like other economic regulations, is subject to a rational-basis standard of review. *Ayotte*, 550 F.3d at 52. The evidence supporting Vermont's law easily satisfies the rational-basis test.

The Vermont legislature found that "[h]ealth care professionals in Vermont who write prescriptions for

their patients have a reasonable expectation that the information in that prescription, including their own identity and that of the patient, will not be used for purposes other than the filling and processing of the payment for that prescription." Pet. App. 139-40a. Doctors expressed strong support for the law for this reason. Testimony by doctors in the legislature called the practice "demeaning," and an "invasion of the physician's privacy." JA 404-05, 419-20. Doctors told the legislature that they considered their prescription histories to be as sensitive as their bank account numbers and viewed drug companies' acquisition of this data to be equivalent to "spying." JA 407-08, 412. The Vermont Medical Society called the practice "an intrusion into the way physicians practice medicine" and expressed concern for "confidentiality and privacy" in the doctor-patient relationship. JA 376-78. Vermont's law is also supported by similar evidence on which New Hampshire and Maine relied in developing their similar prescription-information laws. *See Mills*, 616 F.3d at 20 (concluding that Maine had shown that its law directly advanced a real and substantial privacy interest).

Based on the available evidence, the dissent below concluded that, "[w]ithout question, the law restricts the flow of otherwise private information about doctors' prescribing habits and the care they provide to their patients," and that "neither appellants nor the majority advances any serious argument that the state does not have a legitimate and substantial interest in medical privacy." Pet. App. 59-60a. At the very least, Vermont has established that restricting a practice that doctors consider to be an offensive intrusion into the doctor-patient relationship is not irrational. Because its law does not restrict speech, Vermont is not required to show anything more.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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