No. 10-779

IN THE
Supreme Court of the United States

WILLIAM 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 United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATION OF NATIONAL ADVERTISERS, INC., AMERICAN ADVERTISING FEDERATION, AND AMERICAN ASSOCIATION OF ADVERTISING AGENCIES IN SUPPORT OF RESPONDENTS

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Amici Curiae, the Association of National Advertisers, Inc., the American Advertising Federation, and the American Association of Advertising Agencies (the "Advertising Associations"), respectfully request that this Court affirm the decision below in *IMS Health Inc. v. Sorrell*, 630 F.3d 263 (2d Cir. 2010).[1]

INTEREST OF *AMICI CURIAE*

The Association of National Advertisers, Inc. ("ANA") leads the marketing community by providing insights, collaboration and advocacy to its membership, which includes nearly 400 companies with 9,000 brands that collectively contribute to our economy by spending over $250 billion annually in marketing communications and advertising in the United States. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs, and advance, promote and protect advertisers and marketers. The ANA also serves its members by advocating clear and coherent legal standards governing advertising.

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[1] All parties have consented to the filing of *amicus curiae* briefs, in support of either party or of neither party, in the docket for this case. Pursuant to Rule 37.6, *amici* here represent 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 to preparation or submission of this brief.

The American Advertising Federation ("AAF"), headquartered in Washington, D.C., is the trade association that represents 50,000 professionals in the advertising industry. AAF's 130 corporate members are advertisers, agencies and media companies that comprise the nation's leading brands and corporations.

The American Association of Advertising Agencies ("AAAA"), founded in 1917, is the national trade association representing the advertising business in the United States. AAAA's nearly 450 members represent virtually all the large multi-national advertising agencies, as well as hundreds of small and mid-sized agencies, which together maintain 13,000 offices throughout the country. Its membership produces approximately 75 percent of total advertising volume placed by agencies nationwide.

The core mission of each of the Advertising Associations includes safeguarding marketers' First Amendment rights. The decision below in *IMS Health Inc. v. Sorrell* recognized as unconstitutional and invalidated under the commercial speech doctrine Vermont's Prescription Confidentiality Law, 18 V.S.A. § 4631 ("PCL"), insofar as it restricts "detailing" by pharmaceutical representatives to promote specific prescription drugs. The Second Circuit held the PCL restricts commercial speech in violation of the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), because it does not directly advance the interests that Vermont asserts, and it is not narrowly tailored. 630 F.3d 267, 271-82.

Amici Advertising Associations write to urge this Court to affirm the Second Circuit's well-reasoned application of important First Amendment principles. Further, this case places in issue more than just proper use of the *Central Hudson* test for commercial speech. Affirming the decision would necessarily reject an unduly narrow understanding of what constitutes expression protected by the First Amendment. Conversely, reversing the decision below would undermine constitutional protection for the use of truthful information for both marketing and for non-commercial purposes. This would cripple constitutional protections on which the Advertising Associations' members depend.

INTRODUCTION AND BACKGROUND

1. Vermont's PCL acts as a direct restriction on speech. It bans the sale, license, or exchange for value of prescriber-identifiable ("PI") data to market or promote prescription drugs, and bars pharmaceutical manufacturers from using PI data for such marketing and promotion, unless the prescriber consents, *i.e.*, "opts in," to such use. *IMS Health v. Sorrell*, 630 F.3d at 266-67, 269 (quoting 18 V.S.A. § 4631(a) & (d)). Marketing is broadly defined as "advertising, promotion, or any activity… intended" to "influence sales or the market share of a prescription drug," to "influence or evaluate [ ] prescribing behavior," or "to promote a prescription drug, market prescription drugs to patients, or evaluate the effectiveness of…detailing." 18 V.S.A. § 4631(b)(5). Pharmaceutical manufacturers are not the only entities that purchase PI data from Respondents, although they, along with other

marketers, are the only purchasers prohibited from using it in marketing efforts. *IMS Health v. Sorrell*, 630 F.3d at 267.

Petitioners ask this Court to hold that the PCL's restrictions on data mining and pharmaceutical "detailing" do not implicate First Amendment rights. They seek this ruling despite the fact that the "detailing" targeted by Vermont's law involves visits by pharmaceutical representatives to physicians to provide information about specific drugs, including their use, side effects, and risks. Pharmaceutical manufacturers use PI data to identify audiences for their marketing efforts, to focus their marketing to individual prescribers, and to direct scientific and safety messages to physicians. *Id.* at 267. The data also is used to track disease progression, aid law enforcement, implement risk mitigation, and conduct clinical trials and post-marketing surveillance required by the Food and Drug Administration. *Id.* Each of these uses involves protected speech.

The Vermont legislature's findings to support the PCL state that "[t]he marketplace for ideas on medicine safety and effectiveness is frequently one-sided," and legislators were concerned that doctors may rely on "incomplete and biased information." 2007 Vt. Acts & Resolves No. 80, §§ 1(3)-(4), 1(6). The legislature feared the FDA lacks legal ability to ensure pharmaceutical marketing is "fair and balanced," and it thus sought to address an asserted "massive imbalance in [the] information" doctors receive. *Id.* The resulting law is "the state's attempt to correct what it sees as an unbalanced marketplace of ideas." *IMS Health v. Sorrell*, 630 F.3d at 270.

2. The Second Circuit found the PCL regulates speech in violation of commercial speech rights under *Central Hudson*'s four-part inquiry for determining the constitutionality of restrictions on commercial speech: (1) whether the speech at issue is truthful and non-misleading; (2) whether the government's interest is substantial; (3) whether the law advances that interest in a direct and material way; and (4) whether it restricts speech no more than necessary to achieve the asserted state purpose. *Id.* at 267, 271-82 (citing 447 U.S. at 562-63, 566).

The court below held the law was "clearly aimed at influencing the supply of information, a core First Amendment concern." *Id.* at 272. It disagreed that the statute regulates non-commercial speech, but held that its restrictions failed *Central Hudson*'s third and fourth prongs. The Second Circuit also held that Vermont failed to show its interests could not be as well served in less speech-restrictive ways. *Id.* at 279-82.

3. The decision diverged sharply from two First Circuit cases that upheld similar laws in New Hampshire and Maine. *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009); *IMS Health Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010), *petition for cert. filed* (U.S. Jan. 28, 2011) (No. 10-984). In those cases, the First Circuit held the statutes regulated only conduct, not speech, and that even if speech were affected, the laws satisfied *Central Hudson*.

Ayotte held that a New Hampshire law that restricted the use of truthful, non-misleading information for marketing did not impose

restrictions on protected speech but rather only on information that had become a "commodity." 550 F.3d at 45, 51-54. In *Mills*, the First Circuit upheld a similar Maine statute by largely following the analysis in *Ayotte*. 616 F.3d at 19. *Mills* also applied *Central Hudson* to uphold Maine's law insofar as it allows doctors to opt out of detailing, based on physicians' asserted interests to be "let alone." *Id.* at 21-22.

SUMMARY OF ARGUMENT

The Second Circuit correctly held a ban on use of PI data in advertising, promotion, or any activity used to influence sales or market share regulates speech and violates the First Amendment. *IMS Health v. Sorrell*, 630 F.3d at 271-73. Marketing and other business communications cannot be restricted as mere "conduct" or as a "commodity," as Vermont urges. Starting with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, this Court has recognized the importance of a "free flow of commercial information," 425 U.S. 748, 764 (1976), leading to the settled rule that dissemination of factual matter for commercial needs is constitutionally protected.

The First Amendment safeguards the entire communication process, including the gathering of data used to create a commercial or non-commercial message. Vermont thus may not ban the use of data without satisfying constitutional requirements. Although Vermont characterized PI data as "non-public," it is not analogous to information obtained in discovery in litigation as in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), or government data

like arrest records under *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999). Rather, the PCL directly restricts use of information collected by pharmacies in the normal course of business. Nor can "privacy" interests prop up the PCL, as PI data is patient-anonymized and there is no authority for protecting *doctor* identities vis-à-vis prescribing practices – nor should physicians be shielded from all outside evaluation of their prescribing practices.

The Second Circuit also correctly held Vermont's PCL failed to satisfy *Central Hudson*. Although this was the sole basis for the decision and should be affirmed, this Court also should clarify that commercial speech must be defined narrowly as speech that does no more than propose a commercial transaction. The PCL uses the term "marketing" far too broadly to encompass expression that pertains to the economic interests of speakers and their audiences. On its face, the PCL restricts non-consensual use of PI data that relates in any way to a commercial interest, including surveys that can be used to help doctors and patients but that might also make marketing "more effective." This goes well beyond "commercial speech" as this Court has defined it.

To the extent the PCL is scrutinized as a restriction on commercial speech, the Second Circuit held correctly that the law violates First Amendment principles. It is not supported by a significant government interest. The asserted privacy interests in *prescriber* information have no basis in precedent. Although promoting public health and reducing

prescription costs may be significant interests in the abstract, the PCL's self-stated goal is to influence discourse. This can never be a valid purpose under jurisprudence that leaves it to speakers and their audiences to assess the value of commercial speech. This Court has made clear that the government cannot regulate the dissemination of truthful commercial speech to prevent recipients from making what the State thinks are "bad decisions." *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 94, 96 (1977).

Finally, the PCL is not narrowly tailored. Vermont has provided no evidence the law will directly and materially advance any of the asserted interests, particularly given the roundabout way the statute works. *IMS Health v. Sorrell*, 630 F.3d at 278. Speech regulations that target non-speech-related conduct are inherently suspect, and there is no doubt here that Vermont "put [its] thumb on the scales of the marketplace of ideas in order to influence conduct." *Id.* at 277. The law is more extensive than is necessary because it seeks to regulate new and allegedly insufficiently tested brand-name drugs yet applies to all such drugs regardless of their effectiveness or if a generic alternative exists. The State's asserted interests could be served more directly by policies that do not restrict speech, such as regulating doctors directly, or engaging in counter-speech.

ARGUMENT

The Second Circuit correctly held Vermont's PCL unconstitutionally restricts protected speech. The State tries to avoid this conclusion by characterizing

PI data as nothing more than a by-product of government regulation that can somehow be placed "off limits." But there is no question Vermont's law directly restricts constitutionally protected speech and that the PCL cannot survive even intermediate scrutiny under *Central Hudson*.

I. THE VERMONT LAW DIRECTLY RESTRICTS CONSTITUTIONALLY PROTECTED SPEECH

A. The Expressive Activity and Information at Issue Cannot Be Characterized as "Conduct" or "Commodities"

The Second Circuit correctly held the PCL's prohibition on using PI data for "advertising, promotion, or any activity that is intended to be used or is used to influence sales or the market share of a prescription drug" regulates speech, not conduct. *IMS Health v. Sorrell*, 630 F.3d at 271-73. Petitioners' argument that "[t]he commercial use of nonpublic information is better described as commercial conduct than commercial speech" is incorrect. Pet'r Br. 26. Likewise, the First Circuit erred in *Ayotte* and *Mills* by characterizing information used for marketing purposes as nothing more than a "commodity."

A long line of decisions rejects the idea that business-related communications and marketing decisions can be regulated as pure conduct or as a commodity. Indeed, this Court first articulated protection for commercial speech in direct response to prior rulings that had denied First Amendment

immunity for such expression. *Virginia State Bd. of Pharmacy*, 425 U.S. at 763. *See also Bigelow v. Virginia*, 421 U.S. 809, 818-20 (1975).

This Court has recognized that society "may have a strong interest in the free flow of commercial information." *Virginia State Bd. of Pharmacy*, 425 U.S. at 764. Observations like this – and the legal doctrine that emerged from them – did not limit First Amendment protection only to advertising that related in some way to a "public" issue. Constitutional protection for commercial speech is predicated on the value of the "dissemination of information as to who is producing and selling what product, for what reason, and at what price" in order to facilitate "numerous private economic decisions." *Id.* at 765. "To this end, the free flow of commercial information is indispensable." *Id.*

Accordingly, various courts have held that the distribution of purely factual information for a commercial purpose is constitutionally protected. *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1513 (10th Cir. 1994); *NCTA v. FCC*, 555 F.3d 996, 1000 (D.C. Cir. 2009). The Second Circuit below thus confirmed that "[e]ven dry information, devoid of advocacy, political relevance, or artistic expression," merits First Amendment protection. *IMS Health v. Sorrell*, 630 F.3d at 271-72 (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446-47 (2d Cir. 2001)). *See Virginia State Bd. of Pharmacy*, 425 U.S. at 761-70.

In heralding the development of the commercial speech doctrine, *Virginia State Board of Pharmacy*

reversed the Court's prior refusal to extend constitutional immunities to "commercial conduct." For example, nascent First Amendment jurisprudence had denied constitutional protection to cinema and allowed states to ban films, reasoning that "[t]he exhibition of moving pictures is a business, pure and simple, originated and conducted for profit." *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230, 244 (1915). Among other things, the Court observed that, while opinion is free, "*conduct alone* is amenable to the law." *Id.* at 243 (emphasis added). It likewise upheld a state law that banned the use of images of the American flag "as an advertisement on a bottle of beer." *Halter v. Nebraska*, 205 U.S. 34, 42 (1907). Similarly, in *Valentine v. Chrestensen*, 316 U.S. 52, 53 (1942), the Court upheld a provision of the New York Sanitary Code that prohibited the act of "distribut[ing] in the streets … commercial and business advertising matter." *See id.* at 54 (prohibiting "such activity" is a matter of legislative judgment that does not violate the Constitution).

The "simplistic approach" of *Chrestensen* and other prior commercial speech cases has been thoroughly repudiated by this Court,[2] and a separate

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[2] *Virginia State Bd. of Pharmacy*, 425 U.S. at 759 ("[T]he notion of unprotected 'commercial speech' [has] all but passed from the scene."). *See Bigelow*, 421 U.S. at 818-21 (the Court's cases since *Chrestensen* "clearly demonstrate as untenable" the notion that all advertising is unprotected). For a precursor to these decisions, *see Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) ("That books, newspapers, and magazines

test was fashioned for "speech which does 'no more than propose a commercial transaction.'" *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). These cases led to the development of *Central Hudson*'s four-part inquiry for determining the constitutionality of restrictions on commercial speech. 447 U.S. at 562-63, 566.

Vermont cannot short-circuit constitutional protection by restricting the information necessary for effective communication then claiming that PI data is not, by itself, "expressive." Calling the information used to engage in protected speech a "commodity" does not place it beyond First Amendment protection. This Court's opinions provide no support for such constitutional sleight of hand. *See*, *e.g.*, *Smith v. California*, 361 U.S. 147, 152 (1959) (rejecting an analogy between regulating speech and regulating food); *NAACP v. Button*, 371 U.S. 415, 429 (1963) ("[A] State cannot foreclose the exercise of constitutional rights by mere labels.").

This Court has affirmed repeatedly that the government cannot adopt laws suppressing expression that "operate at different points in the speech process." *Citizens United v. FEC*, 130 S. Ct. 876, 896 (2010). Thus, it has held the First Amendment protects the materials necessary for

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are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.").

printing, *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (striking down tax on newsprint and ink); newsgathering activities, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (First Amendment requires right of access to criminal trials); and circulation of publications, including the physical placement of newsboxes. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988). *See Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("Liberty of circulating is as essential to th[e] freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.") (citation omitted). It has also held that the First Amendment protects campaign expenditures and contributions, since government-imposed limits necessarily reduce the quantity of expression in political campaigns by restricting the number of issues discussed, the depth of their exploration, and the size of the audience. *Randall v. Sorrell*, 548 U.S. 230, 246 (2006).

This clear line of authority applies notwithstanding the fact that the information restricted by the Vermont PCL has a commercial purpose. As this Court pointed out in *Bigelow*, 421 U.S. at 818, "[o]ur cases … clearly establish that speech is not stripped of First Amendment protection merely because it appears in [commercial] form." It explained further that First Amendment protections for commercial speech extend to the entire communication process, which includes the communication, its source and its recipients. *Virginia State Bd. of Pharmacy*, 425 U.S. at 756-57. *Cf. Grosjean v. American Press Co.*, 297 U.S. 233,

240, 244-45 (1936) (invalidating tax imposed on any person or corporation "engaged in the business of selling … advertising or for advertisements, whether printed or published"). To hold otherwise would return First Amendment jurisprudence to the era in which films could be banned because "[t]he exhibition of moving pictures is a business, pure and simple, originated and conducted for profit," *Mutual Film Corp.*, 236 U.S. at 244, and commercial handbills could be outlawed because "distribut[ing]… commercial and business advertising matter" could result in litter. *Chrestensen*, 316 U.S. at 53-54.

The value of advertising depends on the ability to get the message to the right audience, and this Court has held that a restriction on targeted marketing efforts necessarily implicates the First Amendment. *E.g.*, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). As the Tenth Circuit noted in striking down a ban on the use of customer data to make targeted solicitations, "a restriction on speech tailored to a particular audience, 'targeted speech,' cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, 'broadcast speech.'" *U.S. West*, 182 F.3d at 1232. Accordingly, the Second Circuit was correct to find that the PCL restricts protected expression.

B. The Assertion of "Privacy" Interests Does Not Alter the Extent to Which Vermont's Law Directly Restricts Speech

Petitioners erroneously argue that the State may ban the use of "nonpublic" information for commercial purposes without implicating the First

Amendment. Pet'r Br. 23-30. They argue that Vermont's restriction on the nonconsensual use of such data is justified because it protects "privacy." But this Court's prior decisions fall far short of Vermont's aspirations for them, and the Second Circuit correctly decided the State's asserted interest in protecting privacy was "speculative." *IMS Health v. Sorrell*, 630 F.3d at 276. Indeed, this Court's decisions provide no precedent for such an expansive definition of "privacy" as a counterweight to free speech.

PI information is not analogous to information obtained in discovery in civil litigation as in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), *see* Pet'r Br. 28-29, nor is information obtained through discovery categorically unprotected. Contrary to Vermont's argument that restrictions on using such information do not implicate First Amendment rights at all, *id.* 26-27, this Court made clear in *Seattle Times* that orders designed to limit the dissemination of information obtained through discovery "are subject to scrutiny under the First Amendment."[3] Moreover, unlike the blanket prohibition in this case, protective orders like the one at issue in *Seattle Times* are tailored to meet particular needs case-by-case, and do not restrict the use of information once obtained from another source.

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[3] *Seattle Times*, 467 U.S. at 37 (Brennan, J., concurring). The Court held that the protective order at issue was subject to intermediate scrutiny, similar to what is required under *Central Hudson*. *Id.* at 32.

Thus, this Court noted that a party could disseminate the identical information so long as it was gained through independent means. *Seattle Times*, 467 U.S. at 34. By contrast, Vermont's PCL not only prohibits both the sale or transfer of PI data without consent, but also bans any *use of the information* for marketing purposes "unless the prescriber consents as provided in subsection (c) of this section." 18 V.S.A. § 4631(d).

Likewise, the PI data at issue here is not comparable to government information, such as arrest records. As a consequence, *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999), simply does not apply. Pet'r Br. 29-30. That case addressed only the question of "access to government information" and did not resolve the "entirely different question" of the First Amendment problem that would be presented by allowing access for one purpose (*e.g.*, the press) but denying it to others "who wish to use the information for certain speech purposes." *United Reporting*, 528 U.S. at 42 (Scalia, J., concurring). The Court made clear that *United Reporting* was not "a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." *Id.* at 40.

Unlike the restriction in *United Reporting*, Vermont's PCL directly restricts the use of information that pharmacies collect in the normal course of business. For each prescription filled, a record is kept that includes the patient's name, the prescriber's name and address, the name, dosage and quantity of the drug, and the date the prescription is

filled. Retail pharmacies or third parties remove patient information before selling the remaining prescription data to Respondents, or others who make that information available for various purposes, including advertising and marketing.

Petitioners are correct that various state and federal laws limit access to health information generally, and that *patient*-identifiable information is specifically protected. Pet'r Br. 31, 36-38. But they leap from that premise to the conclusion that the government can ban the use of otherwise anonymous prescription information for marketing or promotion purposes unless the physician consents.[4] This is quite a stretch. The fact that information is highly regulated when used for certain purposes does not give the government carte blanche to ban speech that otherwise is protected by the First Amendment. *Citizens United*, 130 S. Ct. at 897-98.

Petitioners' argument that sharing aggregate data that includes *prescribers'* identities raises the same privacy concerns as disclosing information about patients and individual treatment decisions is

[4] Certain *amici* argue that such uses create the risk that patient-identifiable data will be disclosed. If that is the concern, the solution is to adopt more effective protections for patient information, not to ban speech based on information that includes none. Moreover, to the extent there is a genuine concern that patient information might be revealed, Vermont's solution, which permits use of such data with the physician's consent, seems poorly tailored to address the problem.

without support. *E.g.*, Pet'r Br. 31. Indeed, this Court rejected just such a premise in *Whalen v. Roe*, 429 U.S. 589 (1977). It found that no right to privacy was violated when the state required a centralized computer file on prescriptions for certain drugs for which there was both a legal and illegal market. So long as patients' names were not disclosed, the requirement violated no privacy interest, and this conclusion was not altered by the possibility of "inadequate protection against unwarranted disclosures." *Id.* at 601-02.

Vermont's asserted interest is not about medical privacy for patients at all, but is instead premised on protecting physicians from "imbalanced" or "biased" information that purportedly is presented by drug detailers. This asserted interest distorts the meaning of "personal privacy." *Cf. FCC v. AT&T*, 131 S. Ct. 1177 (2011). More importantly, no law that restricts speech is necessary to serve this interest, once it is properly understood. As the Second Circuit pointed out, "[p]hysicians in Vermont can always choose to decline to be visited by detailers, even without [the PCL]." *IMS Health v. Sorrell*, 630 F.3d at 278.

II. THE VERMONT LAW VIOLATES THE FIRST AMENDMENT

Vermont's "secondary" argument, that the PCL permissibly regulates commercial speech, Pet'r Br. 43-23, fares no better than its attempt to claim the restrictions do not affect speech at all. The Second Circuit correctly held that – at the very least – Vermont's PCL failed to satisfy the *Central Hudson* test. However, it must be emphasized that the

speech regulated by the law's definitions extend beyond just commercial speech.

A. The Law Restricts Both Commercial and Non-Commercial Speech

This case underscores the pressing need to clarify that the proper application of the commercial speech doctrine requires defining commercial speech narrowly.[5] This Court has recognized that a coherent definition is critical to determining the level of First Amendment protection that applies in any particular case. However, crafting a uniform definition of commercial speech has been a considerable challenge. The Court has described "the test for identifying commercial speech," as speech that does no more than propose a commercial transaction, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (quoting *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989)), but also has referred more generally to "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561.

Although the decision below was based entirely on the commercial speech doctrine and should be

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[5] Some *amici* argue that the Court should eliminate entirely the distinction between commercial and non-commercial speech. While there is merit to these arguments, to the extent the Court retains the commercial speech doctrine, it must be strictly defined to prevent the dilution of constitutional protection for broader categories of speech.

affirmed, this Court also should make clear that what constitutes "commercial speech" is far narrower than the PCL's definition of "marketing." The definition sets forth various uses of information beyond just proposing a sale, including any activity intended to influence sales *or* market share, any evaluation of "the prescribing behavior of an individual health care professional," or any assessment of "the effectiveness of a professional pharmaceutical detailing sales force." 18 V.S.A. § 4631(b)(5).

Such uses of PI data may relate to a speaker's economic interests, but they do not all propose commercial transactions. The Second Circuit observed that PI data has many commercial and non-commercial uses, such as researching how prescription medications are used, identifying harmful consequences of certain drugs, and warning doctors who have prescribed certain medications of safety concerns that arise after FDA approval. *IMS Health v. Sorrell*, 630 F.3d at 273. But the PCL's definition of "marketing" is so broad that it restricts a wide swath of uses for such data that are not strictly commercial.

Thus, the Court should make clear that some of the information restricted by the Vermont law is used for commercial speech but much is not. This means the law is subject to strict scrutiny in a number of its applications and to the commercial speech doctrine in others. But the Vermont statute is invalid regardless whether *Central Hudson* or the test governing restrictions on non-commercial speech applies.

B. Vermont's Restrictions on Commercial Speech Do Not Satisfy *Central Hudson*

The PCL violates various principles underlying the commercial speech doctrine. Even when the government seeks to further interests that it can show are significant, "regulating speech must be a last – not first – resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). Under this well-developed body of law, the PCL's restrictions on detailing are unconstitutional. The State has failed to show the law is intended to address significant government interests other than abstract aspirational goals, that it will serve any such interest in a direct and material way, and that the statute's restrictions on speech are no greater than necessary. *Central Hudson*, 447 U.S. at 565-66.

1. Vermont Fails to Articulate a Significant Government Interest

None of the purported governmental interests satisfy the first prong of *Central Hudson*. Vermont's asserted goal of protecting "medical privacy" lacks any substance. The law was not intended to serve patients' privacy interests, nor does it do so since the data regulated by the law is already patient-anonymized.[6] The privacy interest of "prescribers" is speculative at best, as the Second Circuit below and

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[6] *See IMS Health v. Sorrell*, 630 F.3d at 267 ("[D]ata sold by … appellants is stripped of patient information, to protect patient privacy.").

the district courts in related cases rightly recognized.[7]

That leaves Vermont's asserted interests in promoting public health and in reducing medical costs. *See* Pet'r Br. 49-54; *IMS Health v. Sorrell*, 630 F.3d at 275. Although both these interests may be significant in the abstract, the specific purpose the legislature espoused was to influence the marketplace of ideas with regard to medical decision-making. *Supra,* p.4. That is not a legitimate governmental purpose.

This Court's commercial speech jurisprudence rests on the presumption "that the speaker and the audience, not the Government, should … assess the value of accurate and nonmisleading information about lawful conduct." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 195 (1999). The Court repeatedly has rejected the idea that the government can prevent the dissemination of truthful commercial information to keep those who hear it from "making bad decisions" with it. *Western States*, 535 U.S. at 374. *See also Linmark Assocs.,*

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[7] *Id.* at 276; *IMS Health Corp. v. Rowe*, 532 F. Supp. 2d 153, 170-72 (D. Me. 2008), *rev'd*, 616 F.3d 7 (1st Cir. 2010); *IMS Health Inc. v. Ayotte*, 490 F. Supp. 2d 163, 178-80 (D.N.H. 2007), *rev'd*, 550 F.3d 42 (1st Cir. 2008). Even in *IMS Health v. Mills*, in which the court accepted protection of doctor privacy as a significant government interest, it did not do so based on the interest Petitioners articulate here. Rather, it relied on a doctor's supposed "right" to avoid unwelcome advertisements and solicitations. *See* 616 F.3d at 21-22.

Inc. v. Township of Willingboro, 431 U.S. 85, 94, 96 (1977); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 (1996).

Here, Vermont is concerned primarily with the "volume" and precision of speech communicated by detailers. The State thus set out to referee the "conversation" so the discourse hews more closely to what the State prefers. It does so despite its acknowledgment that the regulated speech is neither unfair, misleading, nor marked by imbalance in access to information. *IMS Health v. Sorrell*, 630 F.3d at 275. This alone is constitutionally infirm.

The problem is exacerbated to the extent the State seeks to shape the conversation by squelching expression by certain speakers rather than amplifying the voices of those it views as disadvantaged, or arming them with additional information. Such an approach can never be allowed to serve as a significant government interest under *Central Hudson*. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes." *Virginia State Bd. of Pharmacy*, 425 U.S. at 770. *See also Citizens United*, 130 S. Ct. at 898-99.

2. Vermont's Law Does Not Materially Serve its Asserted Interest

Even if Vermont had articulated significant interests, the PCL does not directly and materially advance them. Because the law restricts commercial speech, the State bears the burden of

showing it directly and materially serves its interests. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). This Court has stressed that satisfying this aspect of *Central Hudson*'s test is "critical" in that it requires invalidating commercial speech restrictions that "provide[ ] only ineffective or remote support" for the State's interest. *Greater New Orleans*, 527 U.S. at 188.

The Second Circuit correctly held there is no evidence Vermont's law would advance interests in public health or reducing medical costs, especially given the roundabout way it sets about its goal. *See IMS Health v. Sorrell*, 630 F.3d at 278. It assumes that choking off PI data will reduce the effectiveness of pharmaceutical marketing, which in turn will reduce the sale of more expensive brand-name prescriptions for some unspecified percentage of the population. The asserted connection to the State's proffered interest is tenuous at best.[8]

This is hardly the direct and material advancement of a legislative interest that the State must prove. Vermont is seeking to inhibit particular conduct – the way doctors prescribe drugs – but chose to restrict speech rather than directly regulate the behavior in question. The State claims its law

[8] In addition, the PCL does not ban detailing – it only restricts detailing that uses PI data without physicians' consent. Thus, the very harms the State believes detailing causes are permitted under the law, so long as there is physician buy-in.

advances its interests in part because "the influence of marketing caused doctors to prescribe [ ] drug[s] inappropriately." Pet'r Br. 50. Putting aside this characterization of doctors as passive dupes rather than trained professionals who try to choose the most medically appropriate drugs for their patients, the State's assumptions about their credulousness cannot be used to open the door to speech regulation.

This Court scrutinizes with special care speech regulations designed to alter non-speech-related conduct. *See Central Hudson*, 447 U.S. at 566 n.9; *44 Liquormart*, 517 U.S. at 503. Vermont claims it did not seek to address its concerns by "suppressing truthful information about prescription drugs," but that is precisely what it has done.[9] The legislature's stated intent was to affect the marketplace of ideas, which the Constitution does not permit. *See supra,* p.4. The First Amendment requires courts to assume that information "is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication

[9] Pet'r Br. 54. Petitioners decry certain aspects of detailing that pertain to its effectiveness, how that efficacy is measured, and use of those metrics to hone messaging. Pet'r Br. 51. They also cite conduct such as "allegations of improper marketing practices," and "industry ghostwriting of journal articles." *Id.* 53. However, Vermont's PCL is not designed to target speech that is misleading, deceptive or untruthful. *IMS Health v. Sorrell*, 630 F.3d at 275. Thus, these concerns fail to show how the law directly and materially advances any relevant interest.

rather than to close them." *Virginia State Bd. of Pharmacy*, 425 U.S. at 770.

Our constitutional framework presupposes "that the speaker and the audience, not the Government, should … assess the value of accurate and nonmisleading information." *Greater New Orleans*, 527 U.S. at 195. Accordingly, the Second Circuit correctly held that "Vermont here aims to do exactly that which has been so highly disfavored – namely, put [its] thumb on the scales of the marketplace of ideas in order to influence conduct." *IMS Health v. Sorrell*, 630 F.3d at 277.

3. Vermont's Law Restricts More Speech Than Necessary

The PCL is also "more extensive than is necessary" to serve any of the State's interests. *Western States*, 535 U.S. at 374 (quoting *Central Hudson*, 447 U.S. at 566). Under this test, the existence of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech" is certainly relevant "in determining whether the 'fit' between the ends and means is reasonable." *Discovery Network*, 507 U.S. at 417 n.13. This Court stressed in *Western States* that "if the Government could achieve its interests in a manner that does not restrict speech … [it] must do so." 535 U.S. at 371. Application of this rule does not require that less restrictive alternatives are in fact available or would work – it is sufficient if non-speech-related means "might be possible." *Id.* at 372.

Here, the restrictions of the Vermont law are not tailored to the asserted problems. The speech

prohibition applies to all brand-name prescription drugs regardless if there is a generic alternative or whether a particular drug is effective. As the Second Circuit found, this creates a "poor fit with the state's goal to regulate new and allegedly insufficiently tested brand-name drugs." *IMS Health v. Sorrell*, 630 F.3d at 279. Accordingly, banning transmission or use of PI data for marketing for all prescription drugs, regardless whether the drug presents problems or has a generic alternative, regulates commercial speech far beyond what is needed to achieve the State's asserted interest. *Id.* at 280.

Vermont's asserted interests also could be served more directly by policies that do not restrict speech. The Second Circuit suggested the State could adopt regulations that do not involve speech at all, such as regulating physicians' prescription practices. *IMS Health v. Sorrell*, 630 F.3d at 280. And if the State feels it must truly insert itself into discourse relating to doctors' prescribing practices out of some sense of "market imbalance," *see supra,* p.4, it could undertake counter-speech to ensure physicians receive the full picture Vermont believes they are missing. *See*, *e.g.*, *Linmark*, 431 U.S. at 97. As the decision below notes, the State has a newly-funded program of just this type that has yet to be evaluated. *IMS Health v. Sorrell*, 630 F.3d at 280.

In this regard, it is worth noting that Vermont's asserted interest in reducing health care costs, Pet'r Br. 49, is something that can be more effectively pursued through competition, rather than regulating speech. For competition to function properly, information should flow freely to allow market

participants to make well-informed choices. *Virginia State Bd. of Pharmacy*, 425 U.S. at 765. *Cf. 44 Liquormart*, 517 U.S. at 505. Here, Vermont chooses to impede communication by detailers, which can include information on specific drugs, including their use, costs, side effects, and risks. *IMS Health v. Sorrell*, 630 F.3d at 267. Not only does this reflect impermissible intent and interest, *see supra,* pp.7-8; *Linmark*, 431 U.S. at 96-97, the extent to which the State restricts speech in this regard is especially pernicious; it prevents the market from functioning properly to bring about the effects Vermont wishes to achieve, *i.e.*, lower prices and better prescribing decisions. This is not just unsound policy, it underscores the very reasons this Court developed the commercial speech doctrine in the first place.

CONCLUSION

Consistent, coherent First Amendment protection of truthful commercial speech is essential to a robust economy, and in particular to *Amici* Advertising Associations and their members, who rely upon the protections of the First Amendment every day in conducting their businesses nationwide. For the foregoing reasons, *Amici* Advertising Associations respectfully request that the Court affirm the decision of the Second Circuit.

Respectfully submitted,

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