No. 10-779

In The Supreme Court of the United States

WILLIAM H. SORRELL,
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 AMICUS CURIAE TECHFREEDOM IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Contents

Page

Contents

Page

Contents

Page

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Cited Authorities

Page

Cited Authorities

Page

Cited Authorities

Page

STATUTES

RULES

INTEREST OF AMICUS CURIAE TECHFREEDOM

TechFreedom[1] is a non-profit,[2] non-partisan public policy think tank based in Washington, D.C. Our work on a wide range of information technology policy issues rests on a belief that technology enhances freedom and freedom enhances technology.

Although TechFreedom launched earlier this year, our staff has long been involved in debates over both free speech and privacy. We believe the freedom to collect, process, disseminate, and use data is essential, not just for the marketplace for goods and services and for innovation in that marketplace, but also for the noncommercial "marketplace" of ideas, research, philanthropic causes, and politics. Thus, we believe restrictions on the flow of information, whether to protect privacy or achieve some other state interest, must be reconciled with the speech interests burdened by regulation. TechFreedom President Berin Szoka previously directed the Center for Internet Freedom at The Progress & Freedom Foundation, which joined an *amicus* brief asking the Second Circuit to strike down Vermont's law as an unconstitutional restriction on noncommercial, as well as commercial, speech. The parties of record have issued and filed blanket consents to all *amici* briefs in this Court.

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[1] Pursuant to Supreme Court Rule 37.6, TechFreedom states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than TechFreedom and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

[2] TechFreedom is currently seeking 501(c)(3) tax-exempt status.

STATEMENT

TechFreedom adopts the Statement in the Brief for Respondent Pharmaceutical Research and Manufacturers of America ("PhRMA"). PhRMA Br. at 2-19.

SUMMARY OF ARGUMENT

The Vermont law (the "Statute") violates the First Amendment because it furthers no legitimate purpose and serves only the impermissible, paternalistic goal of suppressing speech which the state opposes. Additionally, the law burdens noncommercial speech in at least two ways. First, the law unquestionably restricts the collection, processing, and dissemination of data about prescription patterns from pharmacies, by data miners, and to pharmaceutical company users of that data. The speech prohibited plainly does more than merely propose a commercial transaction. Second, cutting off such data reduces or eliminates a wide variety of noncommercial forms of protected expression that depend on the data, including commentary and research, for both its factual basis and its financial viability. Because prescriber-identifiable data is noncommercial speech, and inextricably intertwined with it, the Court should apply strict scrutiny.

The Statute unquestionably fails that standard because it does not advance any compelling state interest and is not narrowly tailored to serve one. The law is so radically underinclusive and overinclusive that it does not advance any purported interest in privacy, cost-control, or public health.

Protecting consumer privacy may be a compelling state interest, but none is served here. Even if it were, there are other less restrictive, more narrowly tailored means to protect it.

By addressing the noncommercial speech interests in this case, the Court can offer a principled basis under the First Amendment by which legislators can enact meaningful privacy protections that protect such interests while respecting free speech.

Assuming that some uses of prescriber-identifiable data were regarded as commercial speech, the Statute cannot survive intermediate scrutiny. Vermont's justifications for the law are so unpersuasive, and its tailoring so inadequate, as to belie any suggestion that the Statute directly advances privacy, cost-control, or public health interests. The Statute clearly constitutes constitutionally impermissible paternalism. Because Vermont does not trust doctors to make decisions it favors about dispensing branded and generic drugs, it has acted unconstitutionally to restrict the flow of truthful information they receive. Even under intermediate scrutiny, such a paternalistic, content-based, discriminatory approach to the "regulation" of protected speech violates the First Amendment.

The Statute cannot be justified as a reasonable restriction on access to government information. Prescriber-identifiable data simply is not held by the government. While the state may regulate the collection of data by private pharmacies, the reality is that pharmacies already have such data to conduct their business. This regulation does

not also empower Vermont to silence pharmaceutical companies that would willingly disseminate such truthful information in order for the state to exercise paternalistic control over prescription decisions that it disfavors. Were it otherwise, the dissemination of vast amounts of privately held, and publicly disseminated, information might become subject to governmental secrecy. Accordingly, the Court should strike down the Statute.

ARGUMENT

I. THE STATUTE VIOLATES THE FIRST AMENDMENT RIGHT TO DISSEMINATE NONCOMMERCIAL EXPRESSION

A. Prescriber-Identifiable Data Is Not Commercial Speech

1. The Data Does Not Propose A Commercial Transaction

The core definition of "commercial speech" is expression that "does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)); *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 97 (2d Cir. 1998) ("The 'core notion' of commercial speech includes 'speech which does no more than propose a commercial transaction.'") (citation omitted). Although *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980), defined commercial speech in broader terms as "expression related solely

to the economic interests of the speaker and its audience," the Court subsequently noted in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993), that it had not employed this broader definition in recent commercial speech cases. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (speech that would "propose a commercial transaction … is the test for identifying commercial speech") (citations omitted).

Contrary to Vermont's position (*see* Pet'rs Br. at 22-33, 41-42), the expression at issue cannot be reduced to speech "proposing a commercial transaction." The data is comprised of prescriptions for drugs written by physicians for particular patients and filled by pharmacies. Obviously, communication using such factual data entails medical treatments and diagnoses and encompasses numerous healthcare issues, which go beyond "proposed commercial transactions." And there can be no question that the First Amendment protects the dissemination of "fact," and sources of factual information such as the compilation of data. *Va. State Bd. of Pharmacy*, 425 U.S. at 762, 765; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 498 (1995) (First Amendment protects dissemination of fact of alcohol content of beer); *Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (publication of fact of rape victim's name protected by the First Amendment). Thus, the prescriber information cannot be categorized as commercial speech.

2. The Data Communicates Important Information Relevant To Medical Research, Healthcare, Education, And Sound Prescription Practices, Sweeping Far Beyond "Economic Interests"

In fact, prescriber-identifiable data has wide-ranging uses that extend far beyond even "economic interests." Apart from marketing drugs to physicians ("detailing"), pharmaceutical companies use the data to communicate targeted scientific and safety information to appropriate physicians, to track disease progression, and to conduct clinical trials. *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 267 (2d Cir. 2010); PhRMA Br. at 11. Pharmaceutical companies also disseminate the data to aid law enforcement and to conduct FDA-required post-marketing surveillance programs of drugs' adverse effects. *Sorrell,* 630 F.3d at 267.

The data is purchased and used by entities other than pharmaceutical manufacturers. Federal government entities like the FDA, CDC, and DEA use it "to monitor usage of controlled substances and to identify prescribers who need time-sensitive safety information." *Id.* at 268. Vermont itself utilizes the data for law enforcement purposes, in managing Medicaid and state-funded healthcare programs, and to encourage use of generics. *Id.*; PhRMA Br. at 12-13. In addition to encouraging the use of cheaper generic drugs, insurance companies also require the data to process claims for benefits and manage formulary compliance. *Sorrell*, 630 F.3d at 268; PhRMA Br. at 12-13. Finally, the data is used by researchers for a variety of purposes, including identifying "overuse of a pharmaceutical in specific

populations," developing new drugs, and identifying clinical trial participants. *Sorrell*, 630 F.3d at 268.

These facts make plain that the data at issue does more than propose a mere "commerce transaction," or relate "solely to economic interests."

3. Even If Some Uses Of The Data Were Deemed Commercial Speech, They Are So Intertwined Both Conceptually And Practically With Noncommercial Speech And Uses That The Data Must Be Afforded Full First Amendment Protection

Even if some uses of prescriber-identifiable data could be regarded as a proposal for a commercial transaction, it is so inextricably intertwined with noncommercial speech, both economically and conceptually, that only a statute narrowly tailored to serve a compelling state interest may constitutionally restrict it. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795-96 (1988); *Village of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967 (1984). In each of these cases, the state attempted to regulate or restrict, as an economic regulation of commercial speech, that portion of a charitable group's fundraising solicitations which covered the fees charged for the solicitation. This Court in each case applied strict scrutiny because the charities' noncommercial, non-economic speech interests were intertwined with expression related to the fees for solicitation costs.

In *Schaumberg*, the village claimed that charitable solicitations were just like any business proposition and therefore must be considered commercial speech. The ordinance required that 75% of all funds collected be used for charitable purposes unrelated to administrative and fundraising costs. This Court rejected that argument and held that charitable solicitations "involve a variety of speech interests … that are within the protection of the First Amendment" and therefore have not been dealt with as "purely commercial speech." *Schaumberg*, 444 U.S. at 632. The Statute failed strict scrutiny because it was not narrowly tailored to serve the state's interest in preventing fraud.

Similarly, in *Munson*, this Court applied *Schaumberg* to invalidate a state law that regulated the relationship between professional fundraisers and charities by prohibiting contracts between them in which the fundraiser retained more than 25% of the amount raised. 467 U.S. at 949-51. The *Riley* court followed *Schaumberg* and *Munson* by applying strict scrutiny to strike down a Statute that defined reasonable solicitation fees for charitable organizations. 487 U.S. at 787-89. In all three cases, the states argued that the statutory restrictions amounted to nothing more than economic regulations applying only to the commercial speech associated with charitable fundraising. In each instance, this Court held that charitable fundraising is so intertwined with the charities' other noncommercial speech that the commercial aspects of the speech could not be separated out and subjected to lesser scrutiny.

Yet, that is exactly what Vermont would ask this Court to do – notwithstanding the heavy presumption against validating such discriminatory content-based restrictions. Even if some part of "detailing" were deemed commercial speech, many other noncommercial speech interests are inextricably intertwined with it and the underlying data.

The commercial and noncommercial expression burdened by Vermont's Statute cannot be separated for two fundamental reasons firmly established in the record. First, conceptually, "detailing" and prescriber-identifiable data embody expression regarding the proper treatment of illness, injury, and disease, not just a proposal to buy a branded drug. They include good reasons why the branded drug is more appropriate to prescribe under the specific circumstance, salient discussions of quality control for available prescription drugs, optimized treatments, and the comparative advantages and criteria for the respective use of both branded drugs and generics. "Detailing" is also brigaded with many important healthcare research and law enforcement uses. *See supra* Part I.A.1.; *Sorrell*, 630 F.3d at 268; *cf.* IMS Br. at 16-20.

Second, the record also establishes that "detailing" is the only data use that is economically viable on its own and in fact pays for and economically enables all other incontestably noncommercial uses – in just the same way solicitation fees and fundraisers are economically inseparable from, and a precondition to, all of the charities' noncommercial speech and projects. *See* J.A. 136-38; *see also Sorrell*, 630 F.3d at 267 ("data

mining companies … sell [the data] … primarily to pharmaceutical manufactures" and "spending on detailing has increased exponentially along with the rise of data mining"); PhRMA Cert. Resp. Br. at 6 ("manufacturers are the primary purchasers of prescriber-identifiable data"); *see also IMS Health Inc. v. Mills,* 616 F.3d 7, 16 (1st Cir. 2010) ("most of their reports and databases are destined – and designed for – pharmaceutical manufacturers to instruct detailers where to focus their efforts ….").

Because the Vermont Statute inevitably burdens noncommercial expression, it must be deemed noncommercial speech and subjected to strict scrutiny.

B. The Vermont Statute Violates The First Amendment Because It Serves No Compelling State Interest And Is Not Narrowly Tailored

Vermont's law is a content-based restraint on noncommercial expression. As such, it passes the strict scrutiny required by the First Amendment if, and only if, it is narrowly tailored to serve a compelling state interest. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n,* 447 U.S. 530, 540 (1980); *Cornelius v. NAACP Legal Def. Fund & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). Indeed, because it is content-based, the teaching of this Court has long established that the law must be regarded as presumptively invalid. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 98-99 (1972). The Vermont Statute fails because it is anything but "narrowly tailored" and, rather than any "compelling purpose," it serves only the illegitimate interest of

impermissible state paternalism imposing viewpoint discrimination.

1. The Vermont Statute Serves Only The Improper Purpose Of Attempting To Paternalistically Control Prescription Decisions By Restricting The Flow Of Truthful Information To Physicians Solely Because The State Does Not Trust Them To Make The Judgments It Favors

Vermont's Statute seeks to restrict the flow of truthful information from willing speakers based on a paternalistic concern that, if this information is available to pharmaceutical companies for detailing, physicians would not be able to make the "rational" decision favored by the state; namely, to prescribe generic drugs rather than the sometimes more expensive branded drugs marketed by pharmaceutical companies. This impermissible paternalism is reflected in the Statute's legislative findings. 2007 Vt. Acts & Resolves No. 80 ("Act 80"), § 1 (Pet. App. 134a-140a).

These findings indicate a strongly-held belief by the state that: (1) the messages conveyed in marketing efforts by pharmaceutical manufacturers are disfavored compared to messages conveyed by other speakers; (2) without this legislation, pharmaceutical manufacturers (with their financial incentive and resources) are too effective in conveying their messages, creating an imbalance in the "marketplace of ideas"; and (3) government intervention is necessary and appropriate to protect doctors from this imbalance. *See, e.g.*, Act 80, § 1(4) ("The marketplace for ideas on medicine safety and

effectiveness is frequently one-sided in that brand-name companies invest in expensive pharmaceutical marketing campaigns to doctors."); *id.* § 1(17)-(18) (blaming this perceived problem on the amount of money pharmaceutical companies spend on their communications with physicians); *id.* § 1(2), (6), (13)-(15), (19), (22)-(27), (30) (concluding that pharmaceutical manufacturers are too effective in persuading doctors to prescribe costly drugs); *id.* § 1(4), (13), (19) (concluding that manufacturers' speech inhibited Vermont physicians from exercising their independent medical judgment); *see also* PhRMA Br. at 13-16, 33-34 (further discussing findings supporting the Statute); *id.* at 34-37 (discussing legislative record).

As exhaustively addressed elsewhere, the notion that the message of pharmaceutical manufacturers is somehow of less merit than Vermont's position is both factually and constitutionally suspect (*see, e.g.*, PhRMA Br. at 20-21, 28-39; IMS Br. at 16-20; 30-32; 47-62), as is the idea that pharmaceutical manufacturers possess an unfair advantage in conveying their messages (*see, e.g.*, PhRMA Br. at 37-39; IMS Br. at 47-56). Equally insupportable is the premise that the state may restrict pharmaceutical manufacturers' truthful and non-misleading speech in favor of competing speech, based on fears that doctors will otherwise make unreasonable treatment decisions for their patients. This Court has roundly condemned paternalistic legislation – that restricts truthful information for fear of the effect "upon … its recipients" – as contrary to the fundamental philosophy embodied in the First Amendment. *See Va. State Bd. of Pharmacy*, 425 U.S. at 773; *see also First Nat'l Bank*

of Boston v. Bellotti, 435 U.S. 765, 785, 791-92 (1978); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977).

In *Virginia State Board of Pharmacy*, the Court held that a state may not choose to silence a willing speaker simply because it fears the listener's reaction:

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance.

425 U.S. at 770 (citation omitted). In *Linmark Associates*, this Court struck down a content-based restriction on "for sale" signs because it was improperly based on the assumption that the public would not act rationally or properly if it knew which houses might be sold to minorities. 431 U.S. at 96-97. In *Bellotti*, the Court found the public must be deemed capable of evaluating corporate advertising on political issues. 435 U.S. at 792 n.31.

Further, several Justices have expressed serious concerns regarding "bans against truthful, non-misleading commercial speech" because they "usually rest on the offensive assumption that the public will respond 'irrationally' to the truth."

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996) (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.); *accord Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 576-77 (2001) (Thomas, J., concurring in part and concurring in judgment). It is for this reason that "a state legislature does not have broad discretion to suppress truthful, nonmisleading information for paternalistic purposes." *44 Liquormart*, 517 U.S. at 510 (opinion of Stevens, J., joined by Kennedy, Thomas, and Ginsburg, JJ.); *accord id.* at 517 (Scalia, J., concurring in part, concurring in judgment) ("I … share Justice Stevens' aversion toward paternalistic government policies that prevent men and women from hearing facts that might not be good for them.").

The paternalism underlying Vermont's Statute is even more troubling because the listeners, purportedly in need of the state's protection, are skilled and educated medical professionals. *Cf. Edenfield v. Fane*, 507 U.S. 761, 775 (1993) (invalidating state restriction on speech by accountants whose audience consisted of "sophisticated and experienced business executives" who are "less susceptible to manipulation"). It is irrational for the state to conclude that doctors are not equipped to make decisions in the best interests of their patients or that they would somehow be better-equipped to make good decisions if they possessed less information. Furthermore, doctors are not helpless to avoid unwanted communications from pharmaceutical marketers. Indeed, they are in full control of their interactions with marketing representatives. They decide whether to meet, where, when, with whom, for how long, and under what conditions. *See, e.g.*, J.A. 203, 220, 364, 465-66.

In a strikingly analogous situation, this Court, in *Thompson v. Western States Medical Center*, rejected the idea that compound-drug advertising "would put people who do not need such drugs at risk by causing them to convince their doctors to prescribe the drug anyway." 535 U.S. 357, 374 (2002). According to the Court, such a paternalistic rationale rests first "on the questionable assumption that doctors would prescribe unnecessary medication," and second, on "a fear that people would make bad decisions if given truthful information about [the] drugs." *Id.* The Court "rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." *Id.*

This same reasoning applies in other contexts. *See, e.g.*, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 194-95 (1999) (invalidating statutes which barred advertising of casino gambling, because the law "sacrifice[d] an intolerable amount of truthful speech about lawful conduct," and violated the "presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct."); *Edenfield*, 507 U.S. at 767 ("the speaker and the audience, not the government, [should] assess the value of the information presented"); *44 Liquormart*, 517 U.S. at 503 (opinion of Stevens, J.) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.").

Moreover, this Court's jurisprudence compels the government, in circumstances such as this, to "open the channels of communication," as a first resort, before restricting the flow of truthful, non-misleading communications. *See Va. State. Bd. of Pharmacy*, 425 U.S. at 770; *Thompson*, 535 U.S. at 373 ("If the First Amendment means anything, it means that regulating speech must be the last – not the first – resort.").

2. Even If The Statute Rendered Records Of Privately Owned Pharmacies State Property, It Would Violate The First Amendment Due To Its Paternalistic Purpose Of Suppressing Truthful Speech The State Opposes

Vermont proceeds on the mistaken assumption that, if its regulation of prescriber-identifying data collected and held by private pharmacies made them akin to government-controlled or owned property, the Statute would raise no First Amendment issue. A long line of precedent in this Court flatly contradicts this argument. *United States v. Kokinda,* 497 U.S. 720, 730 (1990); *Cornelius*, 473 U.S. at 800; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Lehmann v. City of Shaker Heights*, 418 U.S. 298, 304 (1974).

The Court explained this basic rule of First Amendment jurisprudence in *Kokinda*:

> Thus, the regulation at issue must be analyzed under the standards set forth for nonpublic fora: It must be

> reasonable and "*not an effort to suppress expression merely because public officials oppose the speaker's view.*" *Perry, supra,* 460 U.S., at 46, 103 S.Ct., at 955. Indeed, "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral.*" *Cornelius, supra,* 473 U.S. at 806, 105 S.Ct., at 3451.

497 U.S. at 730 (emphasis added).

As amply demonstrated in Respondent PhRMA's Brief (Br. at 23-39), Vermont seeks to restrict "detailing" speech by pharmaceutical companies solely because it is opposed to their point of view. Even if state regulation transformed this intertwined complex of putative commercial and undeniably noncommercial speech into government controlled information, its dissemination could be subjected to regulatory viewpoint discrimination only if the Statute survives strict scrutiny. It does not.

3. The Statute Is So Radically Overinclusive And Underinclusive That It Is Not Narrowly Tailored To Serve Any Compelling State Interest Even If Its Impermissible Purpose Is Disregarded

The Vermont Statute violates the First Amendment because it is, paradoxically, both overinclusive and underinclusive. Applying strict scrutiny, Vermont must show that the Statute

advances a compelling state interest and is narrowly tailored to serve that interest. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). In this case, the Statute must fall because its tailoring is decidedly inadequate. *See Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987) (First Amendment violated where challenged provision was "both overinclusive and underinclusive"); *Bellotti*, 435 U.S. at 794-95 (same).

The Vermont Legislature aims to curb detailing in the name of privacy and cost control, *see* Vt. Stat. Ann. tit. 18, § 4631(a), but its effort is at once feeble and clumsy. "When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly[.]" *Fla. Star*, 491 U.S. at 540. Vermont has not done so here: this Statute is so underinclusive as to belie any suggestion that protecting privacy is its aim.[3] *See*

[3] As an initial matter, privacy interests cannot be served by Vermont's Statute because there is nothing private about the prescriber data at issue. Vermont likens the information to a person's "bank account number," *see* Pet'rs Br. at 14, but that is hyperbole. Prescriber data contains no personal information about the prescriber, the patient, or the doctor-patient relationship. IMS Br. at 33-34. Instead, the data reveals only facts about a particular doctor's prescribing tendencies "aggregated across numerous patients and time periods." PhRMA Br. at 46. In fact, prescriber data reflects merely a commonplace event – a doctor's decision to prescribe drug A instead of drug B to patient Y, whose identity is unknown. IMS Br. at 42. Such information is no more private than, for example, statistics on a litigator's chosen case strategies aggregated across time. While, clearly, a lawyer's

Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002) ("the [challenged provision] is so woefully underinclusive as to render belief in [the state's] purpose a challenge to the credulous").

Exceptions riddle this Statute. It does not require encryption or de-identification of patient or prescriber data[4] (which would conceivably be a constitutionally permissible less-restrictive means of satisfying a valid compelling state interest), and the Statute expressly permits the sale, disclosure, and use of prescriber histories to researchers, law enforcement authorities, other pharmacies, insurers, and utilization review professionals, among others. Vt. Stat. Ann. tit. 18, § 4631(e). Indeed, while it targets the sale and use of prescriber data in connection with a pharmaceutical company's marketing efforts, the Statute in fact permits the disclosure to any other party, and the use of such data for any other purpose whatsoever, regardless of whether the doctor (never mind the patient) has consented. *See Sorrell*, 630 F.3d at 275 ("the statute

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mental impressions are subject to work-product protection, no one would seriously contend that there is anything private about data revealing the regularity with which a lawyer files a motion to dismiss in lieu of an answer. Prescriber data – which is nothing more than anonymized statistics about the prescription drugs that doctors prefer for their patients – should be regarded no differently.

[4] It is no answer to say that the Vermont Statute must be read *in pari materia* with other federal and state laws, such as HIPAA, that may require encryption or redaction. The point is that no privacy protections are contained in ***this*** Statute, and it is reasonable to think that they would have been if the Legislature was truly concerned with patient or doctor privacy, rather than suppressing speech it disfavors.

does not ban any use of the data other than for marketing purposes, including widespread publication to the general public"). Significantly, the Statute does nothing to prevent pharmacies from widely distributing prescriber data to whomever they please. Pharmacies are thus left free to publish any and all of their prescriber data online or in the newspaper.

Just as strikingly, nothing in the Statute prevents other parties from purchasing, acquiring, and using prescriber data. Nor does it prevent them from contacting doctors based on their prescriber histories. In fact, news outlets and consumer advocacy groups are free to print doctors' prescriber histories in their publications and to contact doctors based on their particular prescribing patterns. *See id.* at 275-76 ("There is nothing in the statute that would prevent the use of such data for journalistic reports about physicians."). As Respondent PhRMA points out, "nothing in the law purports to prohibit [even] outright harassment of doctors" based on this data. PhRMA Br. at 41. "Th[is] underinclusion is substantial, not inconsequential." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993).

Moreover, the Statute does not directly regulate detailing at all. *See Sorrell*, 630 F.3d at 278 ("[Statute] does not ban detailing, even when that detailing is seen as harassment by an individual physician"). Instead, the Statute restrains a pharmaceutical manufacturer's ability to acquire and use prescriber data for detailing. *Cf. Mills*, 616 F.3d at 36-37 (Lipez, J., concurring) ("Given the wide, permissible dissemination of the prescribing

information, and the continued allowance of targeted one-on-one detailing, prescriber privacy does not appear to be meaningfully advanced by this [Maine] statute."). Thus, the Statute has not ended detailing by pharmaceutical companies; it has merely caused detailing to be less efficient and more expensive. As the Court of Appeals explained below:

> The statute does not directly restrict the prescribing practices of doctors, and it does not even directly restrict the marketing practices of detailers. Rather, it restricts the information available to detailers so that their marketing practices will be less effective and less likely to influence the prescribing practices of physicians.

Sorrell, 630 F.3d at 277. Because the Statute makes detailing less informed and efficient, pharmaceutical companies will be forced to step up their marketing efforts in all areas, including detailing, in order to compensate. IMS Br. at 61. Accordingly, the Statute may very well have no effect other than to tie up more of doctors' time with detailing and to increase the marketing costs of pharmaceutical companies – both of which may well, contrary to Vermont's stated intent, increase healthcare costs.

While it undermines the efficiency of pharmaceutical companies' detailing efforts, the Statute leaves other parties – those with views Vermont favors – free to use prescriber data for drug marketing. Nothing in the Statute prohibits academic counter-detailers from obtaining and using prescriber data to educate doctors about, and steer

them toward, generic medications. IMS Br. at 35; PhRMA Br. at 43-44. Even insurers are permitted to use prescriber data for detailing purposes. *Id.* at 44. Thus, Vermont's asserted goal of protecting doctors' privacy and shielding them from "commercial influences" is illusory. *Id.* "The [S]tatute does not protect a 'right to be let alone'; it merely protects prescribers who consent to interactions with detailers from exposure to one type of message." *Mills*, 616 F.3d at 37 (Lipez, J., concurring) While "[t]he prescribers may have particular distaste for sales pitches based on their own prescribing histories," such "discomfort – whether or not properly labeled an issue of 'privacy' – seems inadequate to justify a content-based restriction on truthful speech of public concern." *Id.*; *see also R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 391 (1992) (speech may not be restricted based on "disapproval of the ideas expressed").

The Statute's vast underinclusiveness belies any suggestion that Vermont was really concerned about privacy or cost control. The State's true purpose appears to be nothing more than to impermissibly single out and silence certain disfavored speech by pharmaceutical companies from which it believes doctors should be shielded. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994) (underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech"); *Fla. Star*, 491 U.S. at 540-41 ("the facial underinclusiveness of [the law] raises serious doubts about whether [the state] is, in fact, serving, with this statute, the significant interests which appellee invokes" and "[w]ithout more careful and inclusive precautions against alternative forms of

dissemination, we cannot conclude that [the state's] selective ban on publication … satisfactorily accomplishes its stated purpose"); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 396 (1984) (under and overinclusiveness of regulation provides ineffective support for, and undermines, plausibility of asserted governmental interests); *see also Fla. Star*, 491 U.S. at 541-42 (1989) (Scalia, J., concurring) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") (citation omitted); *Playboy Entm't Group*, 529 U.S. at 812 ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles."). Accordingly, the Statute must be struck for underinclusiveness.

Paradoxically, this Statute also sweeps much too broadly in its attempt to protect the State's purported interests. As to overinclusiveness, "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The Statute fails this test because it does not differentiate between detailing that may lead to higher healthcare costs and detailing that clearly will not. If prescribers are persuaded by pharmaceutical detailers to switch from a less expensive generic drug to a more expensive brand name drug, then healthcare costs may rise – or so the state's argument goes. But the Statute's restrictions on the use of prescriber data affect not just this sort of detailing; they equally impact detailing that involves the introduction of a new

branded drug for which there is no generic, detailing of branded drugs in circumstances where generics would be unwise or ineffective, and the marketing of one generic drug over another or one brand name drug over another – regardless of the cost or efficacy of the particular drug. As the Court of Appeals explained,

> The statute prohibits the transmission or use of [prescriber] data for marketing purposes for all prescription drugs regardless of any problem with the drug or whether there is a generic alternative. The statute bans speech beyond what the state's evidence purportedly addresses. It seeks to discourage detailing about new brand-name prescription drugs which may not be efficacious or which may not be more effective than generic alternatives. However, it does that by precluding the use of [prescriber] data for the marketing of any brand-name prescription, no matter how efficacious and no matter how beneficial those drugs may be compared to generic alternatives. Even if the Court defers to the legislature's determinations, those determinations cannot support banning speech in circumstances that the state's evidence does not address.

Sorrell, 630 F.3d at 280. Indeed, Vermont's own expert has admitted that the law applies "even when the data would not lead to lower health care costs," such as where "a brand name drug has no generic

equivalent" and "is not the most expensive treatment." IMS Br. at 58-59 (State's expert). Such a "blunderbuss approach," *see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 337 (1995), does not satisfy the First Amendment's narrow tailoring requirement. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252-53 (2002) ("speech ban is not narrowly drawn" where "this restriction goes well beyond that [governmental] interest by restricting [additional] speech").

Finally, overinclusiveness is a problem because while the Statute fails to stop the practice of detailing, it kills the primary market for prescriber data and thereby disincentivizes its collection and reduces or eliminates its availability for other beneficial uses (apart from detailing). *See supra* Part I.A.3. Indeed, the Statute not only fails in its central aim, but also sweeps so broadly as to severely hamper socially beneficial research endeavors and noncommercial forms of expression that depend upon the ready availability of prescriber data. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone." *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 70 (1981) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). This Statute is the opposite of precise.

In sum, "this [Statute] is not narrowly drawn to respond to" the Vermont Legislature's concerns about pharmaceutical detailing, "and it is not clear that a more selective approach would fail to address those unique problems if any there are. The [State] has not established that its interests could not be met by restrictions that are less intrusive on

protected forms of expression." *Schad*, 452 U.S. at 71; *see also Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980) ("[The government] may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."). Because the Statute is not even remotely well-tailored, it cannot survive strict scrutiny.

II. THE STATUTE WOULD VIOLATE THE FIRST AMENDMENT EVEN UNDER INTERMEDIATE SCRUTINY

Even if, despite the Statute's burdens on noncommercial speech, the Court were to apply intermediate scrutiny as set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564 (1980), the Statute fares no better. In order to satisfy the First Amendment under *Central Hudson*, the Statute must "directly advance" Vermont's asserted interests in privacy, cost-control and/or patient health, and there must be "a reasonable fit between the means and ends of the regulatory scheme." *See Lorillard Tobacco*, 533 U.S. at 561. This Statute does not advance Vermont's purported interest in privacy, cost-control, or patient health even in the most roundabout way, let alone directly. Also, as addressed herein, the Statute fails to "reasonably fit" its purpose.

A. The Vermont Statute Fails To Directly Advance A Substantial State Interest

Vermont's asserted interests in privacy, public health, and cost containment cannot justify the

Statute's significant restrictions on speech rights. The state's putative interests are speculative at best, and if the Statute advances those interests at all, it does so indirectly and ineffectively. *See, e.g.*, PhRMA Br. at 49-55; IMS Br. at 47-62.

TechFreedom is particularly concerned by Vermont's assertion that the Statute directly advances the State's interest in protecting the "privacy" of doctors' prescriber-histories. As the Court of Appeals found, the State's privacy interest is "too speculative," *see Sorrell*, 630 F.3d at 276, because there is nothing private about the data at issue. Further, the "privacy" of prescriber-identifiable information is not advanced in any meaningful way because the Statute does not prohibit broad dissemination of such information and only prohibits one use of the information by one type of speaker. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190, 193-94 (1999) ("Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.").

Given such gaping holes in the regulatory regime, the Statute does not "directly advance" Vermont's asserted privacy interest under *Central Hudson*. *See id.* ("The [statutory] regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) ("these exemptions and inconsistencies bring into question the purpose of the [restriction]," and "[t]here is little chance that [the regulation] can directly and

materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects"); *see also Fla. Star*, 491 U.S. at 535 ("[I]t is a limited set of cases indeed where, despite the accessibility to the public of certain information, a meaningful public interest is served by restricting its further release by other entities."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425-26 (1993) (ban on news racks containing "commercial handbills," which did not apply to news racks containing "newspapers," violated First Amendment under *Central Hudson*).

B. The Statute Is Not Sufficiently Tailored To Serve Any Substantial State Interest

The Statute does not satisfy *Central Hudson*'s tailoring prong because it is vastly overinclusive. The Statute prohibits pharmaceutical companies from using prescriber data for detailing in the name of cost control and drug safety, but fails to differentiate between drugs that are the best in their class, for which no generic equivalent is available, and that are not more expensive than the alternatives. Moreover, Vermont attempts no showing that any particular drugs it deems too expensive or too risky are actually the subjects of the majority – or any portion – of pharmaceutical detailing. As Respondent IMS Health points out, "[i]t is impossible to know only because Vermont has no idea which drugs it is actually targeting." IMS Br. at 59. The Statute is also overinclusive because it undermines the primary market for prescriber data, to the detriment of medical research and other beneficial, noncommercial uses for which the data is necessary. Such sweeping imprecision does not

satisfy *Central Hudson*'s tailoring requirement. *See, e.g.*, *Lorillard Tobacco*, 533 U.S. at 562 (*Central Hudson* test not satisfied where "[t]he breadth and scope of the regulations," which were vastly overinclusive, "d[id] not demonstrate a careful calculation of the speech interests involved").

The Statute is also not sufficiently tailored because "[Vermont's] interest could be served as well by a more limited restriction on commercial speech." *Central Hudson*, 447 U.S. at 564. There are many other less-restrictive avenues by which Vermont could pursue its aims as well. For example, the state could wait to see the effect of its new academic counter-detailing program; it could mandate the primary use of generic drugs for patients receiving Medicare Part D funds; or it could require additional prescriber education intended to stress the importance of prescription costs to doctors. *Sorrell*, 630 F.3d at 280; PhRMA Br. at 54. These options are in addition to the other programs already in place in Vermont, including, for example, the state's generic substitution law, which requires pharmacists to dispense a generic drug whenever available unless the prescriber expressly instructs otherwise; and the Vermont law which requires doctors to be alerted to the expiration of brand name drug patents so that they may be informed of impending generic alternatives. *Id.* In light of these facts, Vermont's chosen approach utterly fails *Central Hudson*'s "reasonable fit" requirement. *See Lorillard Tobacco*, 533 U.S. at 566 ("the Attorney General has failed to show that the outdoor advertising regulations for smokeless tobacco and cigars are not more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use").

III. THE STATUTE MAY NOT BE JUSTIFIED AS A REASONABLE RESTRICTION ON ACCESS TO GOVERNMENT-HELD INFORMATION

A. Prescriber-Identifiable Information Is Not Held By The Government

Vermont attempts to avoid First Amendment inquiry by falsely analogizing to restrictions on "access" to government-held or government-compelled information. Vermont's position is premised on the unsupportable contention that pharmacies have access to prescriber-identifiable information solely because of state regulation requiring its collection. *See* Pet'rs Br. at 23-24. The flaw in Vermont's access theory, however, is that prescriber-identifiable information is not held by the government, and would be collected and maintained as the most basic of pharmacy business records even in the absence of state regulatory requirements. *See, e.g.*, *Mills*, 616 F.3d at 15 (noting that pharmacies collect data primarily for insurance reimbursement purposes).

1. The Access Cases Relied Upon By Vermont Are Limited To Controversies Involving Control Over The Dissemination Of Government-Held Information

The cases relied on by Vermont are limited to controversies over the dissemination of government-held or government-compelled information and do not support the Statute's restriction on the free flow of prescriber-identifiable information. *Los Angeles Police Department v. United Reporting Publishing Corp.* involved a California statute that placed

conditions on public access to arrestees' addresses, which were held and collected by state and local law enforcement agencies. 528 U.S. 32, 34 (1999). Because the California statute in question resulted in "nothing more than governmental denial of access to information in its possession," the state's decision to withhold dissemination of arrestee information did not run afoul of the First Amendment. *Id.* at 40. The circumstances underlying the *United Reporting* decision are in direct contrast to the situation here. Prescriber-identifiable information is not collected by Vermont and is not in Vermont's possession; rather, it is collected and held by private pharmacies in the course of their day-to-day business. *United Reporting* made clear that that it is "not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." *Id.* The Statute, however, does precisely that: by barring the sale or use of prescriber-identifiable information for marketing or promotional purposes without prescriber consent, Vermont is prohibiting a pharmacy from conveying information it already possesses in connection with its ordinary business operations.

Seattle Times Co. v. Rhinehart also does not support the suppression of the free exchange of information that the Statute imposes. 467 U.S. 20 (1984). *Seattle Times* considered whether parties to civil litigation have a First Amendment right to disseminate information obtained solely pursuant to a court order during the pretrial discovery process. *Id.* at 22, 32. The Court held that the First Amendment was not offended by protective orders entered on a case-by-case basis by trial courts upon a showing of "good cause" that justified restrictions on

the information's use, *id.* at 37, explaining that "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit." *Id.* at 32.

The "unique character of the discovery process" was a significant factor in the Court's decision, *id.* at 36, and the Court pointedly distinguished situations where, as here, information was obtained outside of the judicial system:

> In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context.

Id. at 34. The information at issue in *Seattle Times* did not belong to the party seeking to disseminate it, and only came into that party's possession as a result of court-ordered discovery. By contrast, a pharmacy's prescription records are not held by virtue of a court order, and such records are collected and retained in the ordinary course of a pharmacy's business.[5]

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[5] Vermont also cites to *National Aeronautics & Space Administration v. Nelson*, 131 S. Ct. 746 (2011), and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), both of which are similarly inapposite. *Nelson* considered privacy issues surrounding the government's elicitation and collection of information regarding treatment or counseling for illicit-drug use in connection with its performance of employment background checks for federal contract employees. 131 S. Ct. at 751-52, 758, 762. Prescriber-identifiable information, however, is collected by and from

2. The Regulation Of Pharmacies Does Not Render Them State Actors

Vermont's pharmacy record-keeping requirements do not warrant application of this Court's precedent involving access to government-held information. Vermont relies on the dissenting opinion of Circuit Judge Livingston (Pet'rs Br. at 22), who concluded "that the information is only 'in the hands' of pharmacies because the state had directed them to collect it." *Sorrell*, 630 F.3d at 283, 285 (Livingston, J., dissenting). The Vermont Board of Pharmacy's Administrative Rules, on which the dissent's conclusion rested, require that pharmacies make "a reasonable effort" to retain a "patient information system" for three years. Vt. Bd. Pharmacy Admin. R. 9.23, 9.24 (2009).[6]

It is simply inconceivable that, in the absence of state administrative rules requiring retention of individual patient prescription histories in a

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private persons or entities in connection with private business transactions. *Florida Star* likewise concerned information "entrusted to" and in the "custody" of the government. 491 U.S. at 534. Although Vermont cites to dicta in the opinion intimating that "the government may under some circumstances forbid" the "nonconsensual acquisition" of "sensitive information rest[ing] in private hands," *id.* at 534, *Florida Star* actually held that punishing a newspaper for publishing a rape victim's name violates the First Amendment. *See id.* at 541. The information published was truthful and lawfully obtained from a government-issued police report. *See id.* at 537, 541. Accordingly, *Florida Star* does not support restricting the dissemination of privately held prescription records here.

[6] The Rules are available at http://vtprofessionals.org/opr1/pharmacists/rules.asp (visited Mar. 24, 2011).

particular form and for a certain length of time, pharmacies would not have access to, collect, and retain basic information related to their own primary business of dispensing doctor-prescribed medications. Pharmacies privately collect and hold information regarding the prescriptions they fill in the course of an ordinary business transaction for a variety of reasons other than government regulation, including seeking reimbursement, selecting products to stock, contacting the prescriber to verify or address problems with a prescription, and managing patient care.

In any event, this Court has held, in the context of the Fourteenth Amendment, that extensive state regulation of a business or industry does not render private businesses state actors. In *Jackson v. Metropolitan Edison Co.*, for example, the Court considered a Fourteenth Amendment challenge to actions taken by a privately owned and operated utility company and explained:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so.

419 U.S. 345, 350 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1965)). In the same vein, extensive government regulation does not transform privately collected and maintained pharmacy records into government records, and thus Vermont's argument fails.

B. The Fact That A State Regulates The Information A Pharmacy Would In Any Event Collect And Maintain Regarding Its Operations Does Not Empower The Government To Silence This "Willing Corporate Speaker" Regarding That Truthful Information In Order To Exercise Paternalistic Control Over Physician Decisions That The State Disfavors

That Vermont regulates the information a pharmacy would in any event collect and retain does not forestall First Amendment inquiry into the Statute, and does not empower the state to suppress the free flow of truthful prescriber-identifiable information. Pharmacies and other collectors of prescriber-identifiable information are willing corporate speakers.[7] Where there is a willing speaker, the First Amendment affords protection "to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy*, 425 U.S. at 756. The right to access government-held information is not at issue in this case. Rather, Respondents claim a right to receive the speech of willing speakers. "[T]his Court has referred to a First Amendment right to receive information and ideas, and that freedom of speech necessarily protects the right to receive." *Id.* at 757 (internal quotation marks omitted); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (noting a First Amendment right to listen and to receive

[7] This Court has afforded First Amendment protection to corporate speakers in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and more recently in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

information and ideas); *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) (contrasting the issue of access to government-held information with the "right to *receive* ideas and information").

1. If Vermont's Access Theory Is Accepted, The Dissemination Of Vast Amounts Of Information From Private Sources May Be Subject To Governmental Control

Vermont's access theory has far-reaching implications. State and federal governments regulate and impose record-keeping requirements on countless industries. For instance, Vermont alone has established numerous administrative rules mandating that state-licensed professionals adopt certain record-retention practices.[8] If accepted by this Court, Vermont's access theory would result in a sweeping expansion of what constitutes government-held and government-compelled information, subjecting vast amounts of privately held and collected business information to governmental control. Adopting such a theory risks effectively eliminating First Amendment rights as to any speech that the state disfavors that relies upon factual sources of information over which the state has opted to impose record-related regulations.

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[8] *E.g.*, Vt. Bd. of Pub. Accountancy R. 10.8, available at http://vtprofessionals.org/opr1/accountants (visited Mar. 26, 2011); Vt. Bd. of Real Estate Appraisers R. 3.9, available at http://vtprofessionals.org/opr1/real_estate_appraisers (visited Mar. 26, 2011).

2. Paternalistically Discriminatory State Control Over Access To Truthful Information Held By, And Relating To, Private Persons And Corporations Violates The First Amendment

As discussed in Parts I.B. and II.A. *supra*, this Court's established First Amendment precedent renders unconstitutional a Statute that paternalistically restricts the flow of truthful information collected and held by private corporations or persons. *See, e.g.*, *Linmark Assocs.*, 431 U.S. at 96-97 (rejecting state attempts to restrict the free flow of data based on fear that recipients will make "decisions inimical to what" the state views as their best interest); *Va. State Bd. of Pharmacy*, 425 U.S. at 769-70 (explaining that the alternative to the "highly paternalistic approach" is "to assume that this 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 rather than to close them").

Vermont's heavy reliance on *United Reporting* is thus flawed for another reason. Justices Scalia and Thomas made it clear in their concurrence that a selective restriction on access that applies only to certain people "who wish to use the information for certain speech purposes, is in reality a restriction on speech rather than upon access to government information," 528 U.S. at 41-42; Justices Ginsburg, O'Connor, Souter, and Breyer all agreed, *id.* at 42-43; and, in dissent, Justices Stevens and Kennedy concurred that restricting access to information based upon viewpoint discrimination would be

invalid, *id.* at 44-45. *United Reporting* thus provides Vermont no support.

CONCLUSION

For the foregoing reasons, the court below should be affirmed.

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