

**UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT**

IMS HEALTH INCORPORATED, a	)	
Delaware corporation; VERISPAN, LLC,	)	
a Delaware limited liability company, and	)	Civil Action No. 1:07-cf-00188
SOURCE HEALTHCARE	)	
ANALYTICS, INC., a subsidiary of	)	<b>CONSOLIDATED WITH</b>
WOLTERS KLUWER, HEALTH INC.	)	1:07-cv-00220
	)	
Plaintiffs,	)	
	)	
v.	)	
WILLIAM H. SORRELL, as Attorney	)	
General of the State of Vermont,	)	
	)	
Defendant.	)	
	)	

**MEMORANDUM OF AMICUS CURIAE COALITION FOR  
HEALTHCARE COMMUNICATION IN SUPPORT OF  
PLAINTIFFS' PRAYER FOR PERMANENT INJUNCTION**

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## **STATEMENT OF INTEREST**

*Amicus* the Coalition for Healthcare Communication (“CHC”) comprises trade associations and their members who engage in medical education, publishing and marketing of prescription products and services, including drugs, devices, and biologics. Trade association members include the American Association of Advertising Agencies, the Association of Medical Media, and the Healthcare Communication and Marketing Association. These members make extensive use of prescriber data for a variety of marketing purposes that enable them to increase the effectiveness and efficiency of publishing, education and communication programs on behalf of the manufacturers of prescription products. The absence of these data would interfere substantially with the ability of member companies to meet their clients’ needs, educate prescribers, and improve patient care. Moreover, a ban on commercial use of these data would effectively eliminate their availability for the non-commercial research, public policy and safety uses that are supported by commercial revenues. Thus, the CHC has a considerable interest in the outcome of this case.

## **INTRODUCTION**

This case involves Vermont’s Prescription Confidentiality Law, 18 V.S.A. § 4631, a statute that restricts the use of prescriber-identifiable data. Prescriber-identifiable data is information that links a prescriber with the drugs he or she has

prescribed. Recognizing that the data have many uses, Vermont crafted the statute to allow the data to be used by some entities for several purposes, including prescriber oversight, medical research, and “patient care management.” *Id.* § 4631(e)(1). The statute, however, prohibits commercial marketing uses by manufactures of drugs. It says that the data cannot be sold, licensed, or exchanged for value “for marketing or promoting a prescription drug.” *Id.* § 4631(d). *Amicus* Coalition for Healthcare Communication (“CHC”) notes that marketing is the provision of information and that the information involved here is regulated by the Food and Drug Administration to insure, among other things, that it is not false and misleading. *Amicus* does not believe that Vermont can ban one class of speakers from the marketplace of ideas and information while at the same time allowing other speakers without violating the First Amendment.

Note, too, that while most of the discussion of this statute involves direct selling, called detailing, by drug manufacturers, the restrictions sweep broadly to all media and methods used by marketing companies that utilize these data. For example, prescriber data are used by publishers of medical journals to focus their content and their distribution. So, too, commercial market researchers use these data both to inform their research and to develop the communications designed to address the marketplace facts identified. Likewise, the art and science of educating health care professionals on the appropriate and safe uses of drugs largely involves

the identification of knowledge and practice gaps among prescribers, developing messages and methods to address those gaps, and then measuring the success of those educational endeavors by tracking clinical outcomes. Prescriber data is one very effective and potent tool to inform the crafting of these prescriber education messages. And, it is illogical and unconstitutional to systematically exclude prescriber data use by commercial educators, but allow such use by other educators.

Moreover, CHC is concerned that if this Vermont statute is not overturned, governments will resort to tactics used here to restrict the data and communication of other commercial speakers, thus much of the robust commercial communication that empowers informed decisions by professionals and consumers in America. Furthermore, several hastily drawn provisions adopted quickly after a similar state law was invalidated on First Amendment grounds only highlight the fatal flaws of the statute under the First Amendment. Allowing such empty and transparent attempts to save a clearly unconstitutional statute would send exactly the wrong signal to government entities across the United States. In fact, these provisions utterly fail to meet the heavy burdens of proof faced by governments intending to censor free speech.

The passage of this statute by Vermont was not mere exercise in abstract theory, it was intended to manipulate the market for drugs by limiting information

about them. It was an attempt to limit the efficiency and effectiveness of marketing information about branded drugs to health care professionals with the unproven hope that the state could then save money through broader use of generic drugs. Health care manufacturers have both a commercial interest and a social responsibility to inform doctors about their products so that patients can receive better care. Indeed, the clear aim of this law is to censor speech by drug companies about the safe and effective use of branded drugs precisely because that information may be used by doctors to treat their patients. The truth of this information is not at issue because the messages must conform with the approved labeling of the Food and Drug Administration for each of these drugs. Instead, the State of Vermont would censor these communications because of their effectiveness, because doctors might choose to utilize branded drug over lower cost generic drugs. Allowing Vermont to limit information to prescribers about new drugs undervalues the professional judgment of doctors, undermines the doctor-patient relationship, and interferes with individual patient care and the public health.

Under the First Amendment, individuals and professionals are allowed to inform and empower themselves amid a robust marketplace of ideas, unfettered by government intrusion and censorship. Governments cannot excluded commercial speakers from that marketplace without regard to the commercial speech

protections of the First Amendment. Upholding the Vermont provisions would give governments potent new power to control information dissemination and enforce ignorance, upsetting an underlying principle of our democracy and our economy.

The Vermont law is both a data and a speech restriction. If the First Amendment is to retain its power in this information age, it must continue to be used against governments that seek to restrict the data that supports modern information, public discussion and decision making. Modern enterprises—including medicine and politics—have grown to depend on information aggregation to best serve their clients and constituents. Restriction of data use here is nothing more than the modern equivalent of Luddite attempts to stop the progress of the industrial revolution by throwing sand in the gears of labor saving machinery.

Of course, protection of privacy and consumer data is serious business that warrants considered attention from careful legislators. Yet data protection must not be co-opted by state legislators who would censor speech to advance unrelated goals. The ostensible aim of the Vermont law is to reform Vermont's health care system, yet it attempts to justify its restrictions on speech with amorphous reference to privacy. Legitimate state ends are not served by laws which clumsily endeavor to safeguard information by suppressing speech. Should the court

sanction the Vermont law here, it will provide states a blueprint for how to approach their policy concerns—whether extant or engineered—through restrictions on speech justified by spurious reference to privacy protection and unsupported by the record required by the First Amendment.

### **SUMMARY OF ARGUMENT**

Despite attempts by the state of Vermont to characterize its Prescription Confidentiality Law as a protection of privacy, the law seeks to manipulate the market for health care in Vermont by suppressing speech that falls comfortably within the ambit of the First Amendment. The law, which purports to protect prescriber privacy, restricts the commercial dissemination of prescriber data for only marketing purposes. 18 V.S.A. § 4631(d), (e). The data must be protected, according to Vermont, only when its possessors wish to say things with it which the state legislators deem to be inappropriate. Such a restriction highlights the clear intention of the law’s progenitors, to suppress speech that they assert, without evidence, is harmful to the citizens of Vermont.

The data use regulated by the law is speech under the First Amendment, and requires protection as such. While less expressive perhaps than other forms of protected speech, factual data of public interest is protected as speech by the First Amendment. *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975); *see also Bartnicki v. Vopper*, 532 U.S. 514, 533–35 (2001). Vermont acknowledges the public interest

value of the data as it relates to patient care, medical oversight, and medical research. 18 V.S.A. § 4631(e) Vermont cannot in one breath say that the data is valuable, and in the next claim that it is not speech. This maneuvering evinces the underlying and thinly obscured purpose of the law, i.e., to manipulate the market for health care in Vermont by limiting speech. Such government efforts to control discourse constitute a gross violation of the First Amendment. The Constitution regards speech not as a toxin, as does Vermont, but as a cure, *see Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), and it will not tolerate states which attempt to restrict speech by calling it something else.

Mounting an alternative defense, Vermont seeks to insulate its selective data protection program by asserting that its actions are consistent with the First Amendment commercial speech doctrine. Under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980), however, it fails to establish a legitimate restriction of commercial speech.

The First Amendment exists to protect the free flow of information in the marketplace of ideas. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Commercial speech, so long as it is neither misleading nor unlawful, is entitled to constitutional protection. *Cent. Hudson*, 447 U.S. at 564. As the statute amounts to an unconstitutional restriction of commercial speech, it must be overturned.

First, Vermont is unable to point to a substantial state interest underpinning its restrictions of speech. *See id.* While the Constitution requires that a state point to a specific privacy interest implicated, *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1235 (10th Cir. 1999), Vermont makes reference only to a general privacy concern and asserts a heretofore unrecognized prescriber right of privacy. Playing on modern concerns about data proliferation is not enough to justify the restrictions on free speech which Vermont adopts. *Id.* at 1228, 1234–35. Vermont also fails to explain how the elimination of data use by commercial parties improves the public health, when Constitution would assume the opposite. The Constitution requires that all be allowed to speak, particularly on issues of public concern, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000), and harbors great hostility towards paternalistic legislation that underestimates the ability of individual citizens to make appropriate decisions, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996); *Va. Bd. of Pharmacy*, 425 U.S. 748, 769 (1976). Manipulating the marketplace of information is not a proper and substantial state interest, and Vermont cannot restrict protected speech in order to ensure that its voice rises above the rest.

Second, the Vermont law fails the *Central Hudson* test because the chosen means do not directly advance the stated ends. *See* 447 U.S. at 564. If Vermont wanted to revise its health care policies, it could have employed any number of

non-speech related legislative methods. *See IMS Health, Inc. v. Ayotte*, 490 F.Supp.2d 163, 182 (D.N.H. 2007), *appeal docketed*, No. 07-1945 (1st Cir. June 20, 2007). However, instead of directly addressing its perceived problem, it chose to target speech, violating the maxim that restrictions on speech “must be a last—not first—resort.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

Third, the Vermont law fails the *Central Hudson* test because it did not appropriately weigh lesser restrictions on speech. *See* 447 U.S. at 564. Vermont, by employing a disfavored opt-in provision, declined to even fully consider, much less adopt a less restrictive method of curtailing speech, *see Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1242 (10th Cir. 2004), thereby rendering its statute unconstitutional, *see United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 815 (2000). While an opt-out provision may not have saved the Vermont law, by not developing a record on such a less restrictive measure nor adopt it, the state doomed the statute.

## ARGUMENT

### I. THE DATA IN QUESTION IS SPEECH ENTITLED TO THE PROTECTIONS OF THE FIRST AMENDMENT BECAUSE IT IS FACTUAL IN NATURE AND CONCERNS MATTERS OF PUBLIC INTEREST.

As a threshold matter, Vermont maintains that it is free to curtail the activities of Plaintiffs without First Amendment scrutiny because Plaintiffs are not engaged in speech. (Defs.’ Mot. for Summ. J. on All First Amendment Counts

Directed at 18 V.S.A. § 4631 at 5–16.) Such an argument is unavailing. The First Amendment protects communicative activities of all types. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993). The Vermont legislature cannot sweep away the protections of the First Amendment by proclaiming that disfavored communications do not constitute speech; the First Amendment protects speech despite attempts to circumvent it.

The protections of the First Amendment are broad. They encompass not only to the spoken word, but also the freedom to associate, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), the freedom of expression, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), the freedom not to speak, *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), and the freedom to make commercial speech, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980), among other things. The protections of free speech also extend to “[p]urely factual matter of public interest.” *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (quoted in *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 762 (1976), and *Discovery Network, Inc.*, 507 U.S. at 421). Facts are speech, and are entitled to protection under the First Amendment as such. *Trans Union Corp. v. FTC*, 245 F.3d 809, 818 (D.C. Cir. 2001) (noting that even facts that are not of public concern merit constitutional protection). The data in question are factual in nature, and thus speech.

The data in question are also speech because they concern issues of public interest. “The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled,” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), and the Vermont law must be considered “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” *see id.* at 270; *see also Bartnicki v. Vopper*, 532 U.S. 514, 533–35 (2001) (discussing matters of public concern and citing numerous cases); Louis Brandeis & Samuel Warren, *The Right of Privacy*, 4 Harv. L. Rev. 193, 214 (1890) (“The right of privacy does not prohibit any publication of matter which is of public or general interest.”) (cited in *Bartnicki*, 532 U.S. at 534).

As the Vermont statute acknowledges, the data in question are of public concern. The new law protects certain rights of the Plaintiffs to make use of the speech, but only in a manner the legislature sees fit:

The prohibitions set forth . . . shall not apply to . . . the sale, license, exchange for value, or use of regulated records for the limited purposes of pharmacy reimbursement; prescription drug formulary compliance; patient care management; utilization review by a health care professional, the patient’s health insurer, or the agent of either; or health care research.

18 V.S.A. § 4631(e); *see also IMS Health Corp. v. Rowe*, 532 F.Supp.2d 153, 158 (D. Me. 2007) (“This data is not simply useful; it is valuable.”). These admissions evince that the state of Vermont considers the data in question to be of great public

concern, and any argument that the data in question is not speech must evaporate in their light. Furthermore, while CHC believes that Vermonters prefer doctors empowered with more information, not less, this Vermont law would limit the exposure of doctors to speech. Vermont cannot on one hand aver that the data in question are not speech, while on the other hand recognizing that the data are of great public concern.

The First Amendment further protects the right to gather information required to effectively speak on matters of public concern. *Bartnicki*, 532 U.S. at 535. Just as no state could prohibit a professor from gathering and using publicly available information, Vermont cannot prohibit pharmaceutical companies from gathering and using such information. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988) (“The First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for doing so.”). The data in question are of concern both to the public and to Plaintiffs.

Health care entities act in field of great competition, and Vermont’s manipulation of the marketplace flies in the face of the First Amendment right of commercial speakers to speak effectively and efficiently in that marketplace. Vermont seeks to choke off information from the marketplace by arguing that it is not speech. The First Amendment prohibits such a theory:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through

numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . [E]ven if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

*Va. Bd. of Pharmacy*, 425 U.S. at 765; *see also Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (“The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish” (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993))); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 568 (1980) (“[T]he suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment.”). As did the law ruled unconstitutional in *Virginia Board of Pharmacy*, Vermont’s law seeks to impact private economic decisions by restricting the free flow of important commercial information. But Vermont may not reduce the speech in this forum just because it hopes its citizens will make better decisions without it. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996); *Va. Bd. of Pharmacy*, 425 U.S. at 769–70.

In *IMS Health, Inc. v. Ayotte*, 490 F.Supp.2d 163 (D.N.H. 2007), *appeal docketed*, No. 07-1945 (1st Cir. June 20, 2007), New Hampshire unsuccessfully argued that its similar law did not impinge on speech:

[T]he challenged law restricts the transmission of truthful information concerning the prescribing practices of New Hampshire’s health care

providers. It is not exempt from First Amendment review merely because it targets factual information rather than viewpoints, beliefs, emotions, or other types of expression. . . . The law is [also] a speech restriction because it limits both the use and disclosure of prescriber-identifiable data for commercial purposes.

*Id.* at 175. The Vermont law has much in common with the New Hampshire law: it restricts the transmission of truthful information concerning prescribing practices, it targets factual information, and it limits the use and disclosure of such information. *See* 18 V.S.A. § 4631(d). So, too, the Vermont law must fail.

Vermont seeks refuge in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 538 U.S. 32 (1999), which it suggests can save its new law. (Defs.’ Mot. Summ. J. at 10–12.) It does nothing of the sort. In *United Reporting*, the Supreme Court rejected a First Amendment challenge to a California law prohibiting sale of government arrest records. 538 U.S. at 37. In doing so, however, the Court was quite explicit that its holding reached only government information—not free speech: “what we have before us is nothing more than a government denial of access to information in its possession.” *Id.* at 40; *see also id.* at 41 (Scalia, J., concurring) (“[T]he fact that [the law] is formally nothing but a restriction upon access to government information is determinative.”); *id.* at 42 (Ginsburg, J., concurring) (noting that the law “is properly analyzed as a restriction on access to government information, not as a restriction on free speech”); *id.* at 45 (Stevens, J., dissenting) (“I agree with the

majority that the [law] is really a restriction on access to government information rather than a direct restriction on protected speech.”). Several Justices even suggested that the government’s selective release of its own information might, under certain circumstances, constitute a First Amendment violation. *Id.* at 42 (Scalia, J., concurring); *id.* at 43–44 (Ginsburg, J., concurring) (noting that “limited disclosures that discriminate[] on the basis of viewpoint” are impermissible); *id.* at 46 (Stevens, J., dissenting) (arguing that viewpoint-based release of information would be “obviously unconstitutional discrimination”). If the government is capable of violating free speech by selectively releasing its own data, surely it violates free speech by regulating the manner in which third parties release theirs.

Because health care is an issue of great and growing importance, it becomes ever more critical to encourage speech, not to restrict it as Vermont would do here. The First Amendment is “transcendent,” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982), and it is “a matter of societal concern” that people “have a right to discuss publicly” issues of interest without fear of sanction, *Meyer v. Grant*, 486 U.S. 414, 421 (1988); *see also* 9 Writings of James Madison 103 (G. Hunt ed. 1910) (“Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”) (quoted in *Island Trees*, 457 U.S. at 867). Indeed, we are here dealing with the information that empowers

healthcare professionals to make decisions that sometimes mean the difference between life and death for patients.

Matters of health care are difficult questions, subject to vigorous debate. Yet Vermont answers these questions by limiting the debaters, in this case by limiting the participation of the companies with often the most recent and most important information about new drugs and new uses of drugs. As Justice Brandeis warned, the First Amendment does not tolerate such mischief: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (quoted in *Cent. Hudson*, 447 U.S. at 582 (Stevens, J., concurring)). The data in question relates to matters of tremendous public concern, and affects an industry buoyed by vigorous public debate. Vermont takes steps to silence the speech of those with whom it disagrees, by claiming that they do not add anything of substance. This is not its decision to make: “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.” *Va. Bd. of Pharmacy*, 425 U.S. at 770.

## **II. VERMONT'S RESTRICTIONS ON COMMERCIAL SPEECH VIOLATE THE FREE SPEECH PROTECTIONS OF THE FIRST AMENDMENT.**

*Central Hudson* establishes the basic framework for evaluating the constitutionality of a restriction on commercial speech in a four-part test: (1) the communication in question must be “neither misleading nor related to unlawful activity,” (2) the government must demonstrate “a substantial interest to be achieved by” the restrictions, (3) “the restriction must directly advance the state interest involved,” and (4) “if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980). Because the speech in question is truthful, nor has there been a suggestion otherwise, it is entitled to First Amendment protection under *Central Hudson*. Cf. *IMS Health, Inc. v. Ayotte*, 490 F.Supp.2d 163, 181 (D.N.H. 2007), *appeal docketed*, No. 07-1945 (1st Cir. June 20, 2007) (noting that New Hampshire “does not assert that the data is being used to propagate false or misleading marketing messages”). Furthermore, as this brief demonstrates, the Vermont law violates the First Amendment because the state did not meet its burdens for the final three prongs of the *Central Hudson* test.<sup>1</sup>

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<sup>1</sup> *Amicus* CHC does not foreclose the possibility that the speech in question is political speech, requiring that Vermont’s Prescription Confidentiality Law be analyzed under strict scrutiny. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

**A. Vermont Fails To Identify A Substantial State Interest That Can Justify Its Restrictions On Free Speech.**

The burden is on the state of Vermont to establish a “substantial interest” justifying its restrictions on speech. *Cent. Hudson*, 447 U.S. at 564; *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (“[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 816 (2000) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”). Yet Vermont’s arguments that its new law serves any state interest are without merit.

1. Vermont Fails to Show that its General Interest in Privacy is Substantial.

The Tenth Circuit notes that privacy is a substantial government interest “in the abstract.” *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1234 (10th Cir. 1999). It is, however, wary of states which use abstract privacy as a catch-all, without enunciating the specific rights to be protected. A state’s failure to “specify the particular notion of privacy and interest served” will doom a restriction on free speech: “the government cannot satisfy the second prong of the *Central Hudson*

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It offers here a commercial speech analysis, however, because prior courts to consider the question have proceeded as such. *See IMS Health, Inc. v. Ayotte*, 490 F.Supp.2d 163 (D.N.H. 2007), *appeal docketed*, No. 07-1945 (1st Cir. June 20, 2007); *IMS Health Corp. v. Rowe*, 532 F.Supp.2d 153 (D. Me. 2007).

test by merely asserting a broad interest in privacy.” *Id.* at 1234–35. Furthermore, in order to sufficiently protect the First Amendment from frivolous attack, courts must be especially vigilant when confronted by state privacy claims: “The breadth of the concept of privacy requires us to pay particular attention to attempts by the government to assert privacy as a substantial state interest.” *Id.* at 1234.

Paying particular attention to Vermont’s wispy assertions regarding privacy protection, one quickly realizes that the state fails to assert a defensible privacy claim. It does not seek to defend the privacy rights of consumers, as did the Federal Trade Commission in *Trans Union Corp. v. FTC*, 245 F.3d 809, 818 (D.C. Cir. 2001) (“[T]his interest—protecting the privacy of consumer credit information—is substantial.”). It does not seek to preserve the peaceful quiet of the home, as did the U.S. Postal Service in *Rowan v. U.S. Post Office Department*, 397 U.S. 728, 738 (1970) (“In effect, Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence.”), or insulate home dwellers from annoyance, as did the FTC in *Mainstream Marketing Services v. FTC*, 358 F.3d 1228, 1243 (10th Cir. 2004) (noting “unwanted intrusions into the privacy of consumers”). Instead Vermont asserts a heretofore unknown privacy interest of prescribers in prescriber-identifiable data. 18 V.S.A. § 4631 (“The Prescription Confidentiality Law”). And then it only protects this proffered right when it wishes to interfere with the

free speech rights of commercial speakers it prefers be censored, while ignoring such protection at all other relevant junctures.

Moreover, the information nominally protected by the Vermont law is “dissimilar to the traditional areas of privacy.” *IMS Health Corp. v. Rowe*, 532 F.Supp.2d 153, 158 (D. Me. 2007). These are data completely decoupled from patient information; *nothing in these data identifies who has gone to the doctor, for what reason, with what result*. Instead these data link prescribers with their prescribed medications. This information, as Vermont acknowledges, is valuable for many reasons: it helps properly manage patient care, properly review the practices and methods of doctors, and properly conduct medical research. 18 V.S.A. § 4631(e); *see also IMS Health v. Rowe*, 532 F.Supp.2d at 158 (“This data is not simply useful; it is valuable.”). For the state thereafter to assert that prescribers have a privacy interest in this information sufficient to justify significant incursions into free speech is spurious. *Cf. IMS Health v. Rowe*, 532 F.Supp.2d at 168 (“[T]hough enacted as a confidentiality law, the Law has no effective confidentiality provision.”); *IMS Health, Inc. v. Ayotte*, 490 F.Supp.2d 163, 179 (D.N.H. 2007), *appeal docketed*, No. 07-1945 (1st Cir. June 20, 2007) (“In short, what the Attorney General claims as a distinct interest in protecting prescriber privacy is nothing more than a restatement of her contentions that the law can be justified because it prevents pharmaceutical companies from using

prescriber-identifiable data in ways that undermine public health and increase health care costs.”).

We live in an “age of exploding information,” *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1228 (10th Cir. 1999), yet states cannot justify restrictions of free speech on a “general level of discomfort from knowing that people can readily access information about us,” *id.* at 1235; *see also IMS Health v. Rowe*, 532 F.Supp.2d at 162 (holding that “an uneasy sense” about diffusion of data cannot justify restrictions of speech). Courts must today defend the “rights bestowed by the United States Constitution . . . as vigilantly as in the days of handbills on public sidewalks.” *U.S. West*, 182 F.3d at 1228. As Vermont has done little more than assert an abstract concern about privacy, playing on general discomfort over the diffusion of information, it has failed to demonstrate a substantial state interest in privacy protection that can justify its intrusions into free speech.

2. Vermont Fails to Show that Commercial Restriction of the Data at Issue Has a Substantial Relation to the Public Health.

The state of Vermont fails to demonstrate how the speech implicated in this case threatens the public health. As the District of New Hampshire has noted, “[a]ny general claim that the public health is undermined when the effectiveness of detailing for brand-name drugs is increased depends upon the counterintuitive and unproven proposition that, on balance, brand-name drugs are more injurious to the public health than generic alternatives.” *IMS Health v. Ayotte*, 490 F.Supp.2d at

180. Any such argument must also assume that the costs associated with personal selling to health care professionals, known as detailing, outweigh the benefits. Any argument that detailing increases the costs of healthcare rests on the further unproven assumption that cheaper generic drugs are as effective as name-brand drugs. *Id.* Indeed, it fails to recognize that for a substantial number of individual patients, branded drugs are superior to generic alternatives. Curtailing the flow of information that empowers prescribers to recognize those instances undermines the health of those patients as well as the public health.

The Supreme Court has recognized the significant benefits associated with personalized, face-to-face commercial interaction. Such communications allow for “direct and spontaneous communication between buyer and seller.” *Edenfield v. Fane*, 507 U.S. 761, 766 (1993). Buyers benefit from increased information and improved markets, the opportunity “to meet and evaluate” the seller, a chance to “discuss and negotiate” the transaction, and to “explore in detail the way in which a particular product or service compares to its alternatives in the market.” *Id.* These benefits are particularly significant “with respect to nonstandard products.” *Id.* While Vermont promises witnesses who will testify to the purportedly negative impact of detailing, it fails to explain how these alleged externalities outweigh the benefits derived from the free flow of information. (Defs.’ Mot. for Summ. J. on All First Amendment Counts Directed at 18 V.S.A. § 4631 at 26–30.) When it

comes to restricting free speech, Vermont’s unproven and improvable assumptions fail. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 506–07 (1996) (“Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends.”).

“Our Constitution does not permit the official suppression of ideas,” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982), but this is precisely the effect of the Vermont law. It represents a state divination that the Vermont health markets will function better if certain information cannot be used by drug industry representatives who wish to use that information to inform those discussions with health professionals. The First Amendment explicitly rejects the power of government to create such barriers. It embraces instead Plaintiffs’ “right not only to advocate their cause but also to select what they believe to be the most effective means for doing so.” *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

The Vermont law is a bald example of paternalism: it singles out certain messages and messengers for suppression, *44 Liquormart*, 517 U.S. at 501; *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) (“[T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.”), and rests “solely on the offensive assumption that the public will respond

‘irrationally’ to the truth,” *44 Liquormart*, 517 U.S. at 503 (citation omitted); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976) (“[I]t is a protection based in large part on public ignorance.”). By determining that prescribers will do better without certain truthful information (that Vermont recognizes to be highly valuable in other contexts), the state wrests from medical professionals a judgment that is theirs to make. *See United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000) (“What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”); *Va. Bd. of Pharmacy*, 425 U.S. at 770 (“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.”). The Vermont law represents, in the words of Justice Blackmun, “a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.” *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 574–75 (1980) (Blackmun, J., concurring).

The law also fails to serve the public health because it violates the First Amendment rights of prescribers. Prescribers who wish to be contacted by pharmaceutical companies which make use of the data in question must manifest

their consent to take part in the “prescriber data-sharing program.” 18 V.S.A. § 4641(c)(1). By requiring prescribers to opt into desired speech, the law places an unnecessary and unconstitutional burden on the recipient’s speech. *See Va. Bd. of Pharmacy*, 425 U.S. at 756 (“[W]here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both.”). Vermont’s argument rests on the assumption that the public health is served by making it more difficult for doctors to receive desired information relating to patient care. Yet patients are not benefited when the state places roadblocks between relevant medical information and their doctors. As Vermont’s public health argument fails, so too must its Prescription Confidentiality Law.

**B. The Restrictions on Plaintiffs’ Speech Vermont has Adopted do Not Directly Advance the State’s Interests.**

*Central Hudson* further requires that restrictions on commercial speech be “in proportion” to the interests involved, and they must be “designed carefully to achieve the State’s goals.” 447 U.S. at 564. These factors are to be measured in part by how much the restrictions “directly advance the state interest involved.” *Id.* Courts must further take “special care” with “regulations that entirely suppress commercial speech in order to pursue a non-speech related policy,” because such restrictions on speech “could screen from public view the underlying governmental policy.” *Id.* at 566 n.9; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502–03 (1996) (“[B]ans that target truthful, nonmisleading commercial messages

rarely protect consumers from [commercial] harms. Instead, such bans often serve only to obscure an ‘underlying governmental policy’ that could be implemented without regulating speech.” (footnote and citation omitted)); *Va. Bd. of Pharmacy*, 425 U.S. at 780 n.8 (discussing the relationship between commercial information and political questions).

As the Vermont law seeks to advance non-speech related interests through restrictions on speech, it merits “special care” from the court. The statute does not protect prescribers from commercial harms, but rather seeks to use the prescribers to advance its ill-expressed health care policy. Vermont need not approach the issue this way. As described by the court in *IMS Health v. Ayotte*, a state can employ many direct methods to advance health care policy that do not impinge on free speech. If Vermont is concerned about any undue influence of the pharmaceutical companies, it can “adopt[] laws that limit such practices.” If it feels that pharmaceutical information is too pervasive, it has a multitude of options available to it, such as providing additional information, distributing best practice guidelines, and promoting continuing medical education programs. And if the state is concerned about drug costs, it has multiple options, including control over its own Medicaid program. *See IMS Health, Inc. v. Ayotte*, 490 F.Supp.2d 163, 182 (D.N.H. 2007), *appeal docketed*, No. 07-1945 (1st Cir. June 20, 2007). None

of these approaches limit speech, and all might well directly advance Vermont's health care policy.

Use of speech restrictions is strictly limited by the First Amendment. Restrictions on speech “must be a last—not first—resort.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). Yet here, the restrictions on speech are Vermont's first and primary means. Because these roundabout regulations impinge on free speech and fail to directly advance the state interest asserted, they fail the *Central Hudson* test and are unconstitutional.

**C. The Restrictions on Plaintiffs' Speech Vermont has Adopted are Not the Most Limited Restrictions Available.**

*Central Hudson* requires that restrictions on commercial speech be proportional to, and carefully designed to achieve, the state's goals. 447 U.S. at 564. The Court interprets these requirements to mean that, “if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.” *Id.*; *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 386 (1995) (explaining that a restriction on commercial speech must be “no more extensive than is necessary to serve [the stated] interest”). The burden falls to the state to demonstrate a “reasonable fit between its legitimate interests” and “the means chosen to serve those interests.” *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993); *see also Lowe v. SEC*, 472 U.S. 181, 234 (1985) (White, J., concurring) (“[E]ven where

mere ‘commercial speech’ is concerned, the First Amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate governmental interest.”). Restrictions must further be based on careful government calculations of “the costs and benefits associated with the burden on speech imposed by its prohibition.” *Greater New Orleans Broad. Ass’n., Inc., v. United States*, 527 U.S. 173, 188 (1999).

The Supreme Court has made clear that opt-out provisions can be a less restrictive way to permissibly restrict speech. *See Martin v. City of Struthers*, 319 U.S. 141, 147–48 (1943) (placing the onus on homeowners to make an “explicit command” to potential solicitors to “stay away”); *Reno v. ACLU*, 521 U.S. 844, 879 (1997) (Internet transmission of pornographic material to minors); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 815 (2000) (daytime broadcasting of pornography). As they do not “over-regulate protected speech,” opt-outs can also provide a much better fit between means and ends than do opt-ins. *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1242 (10th Cir. 2004) (on over-regulation of protected speech); *see also Playboy Entm’t*, 529 U.S. at 824 (“It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient.”)

The Vermont statute does not contain an opt-out clause, and there is no record that the state even considered such a clause before adopting the existing opt-

in restriction. The experience of the CHC is that opt-out provisions are much less restrictive than opt-in provisions. However, without any apparent record at the time of passage, Vermont imposed a much more restrictive opt-in regime. Thus, prescribers who wish to receive Plaintiffs' communications must take an affirmative action to manifest their consent. 18 V.S.A. § 4631(c)(1). At the same time, the record reflects little notice or adequate consideration of the fact that the American Medical Association already provides a mechanism for prescribers to opt-out.

Although it is not clear that the Vermont law would survive had the legislature adopted a state imposed opt-out provision, clearly this less restrictive means was available. The legislative record offers scant evidence that Vermont “adequately consider[ed this] obvious and substantially less restrictive alternative,” evincing a lack of narrow tailoring. *See U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1239 (10th Cir. 1999). Vermont puts forth no evidence that an opt-out program would be infeasible or ineffective, which also renders it unconstitutional. *See Playboy Entm't*, 529 U.S. at 815. Vermont further does not provide any evidence of the careful calculation of costs and benefits dictated by *Greater New Orleans*, 527 U.S. at 188. As Vermont offers no evidence that it considered an opt-out plan—which would have been a more limited restriction of commercial speech—the Vermont law represents an unconstitutional abridgment of the freedom of

speech. *See Cent. Hudson*, 447 U.S. at 564; *Rubin*, 514 U.S. at 386; *Lowe*, 472 U.S. at 234 (White, J., concurring).

*Amicus* CHC does not stipulate, however, that an opt-out would have sufficed. A law violates free speech, despite an opt-out provision, if it, “at its heart, . . . operates by making illegal the transfer of truthful commercial information for particular uses and disclosures.” *IMS Health Corp. v. Rowe*, 532 F.Supp.2d 153, 182 (D. Me. 2007). Vermont’s Prescription Confidentiality Law is one such law. It aims to keep from medical professionals truthful speech of public concern pertaining to patient care. No amount of tailoring can resuscitate such a restriction.

### **III. CONCLUSION**

For the foregoing reasons, the court should find Vermont’s Prescription Confidentiality Law, 18 V.S.A. § 4631, to be an unconstitutional restriction on Plaintiffs’ freedom of speech. *Amicus* Coalition for Healthcare Communication accordingly asks the court to grant Plaintiffs’ prayer for relief.