No. 10-779

In The Supreme Court of the United States

WILLIAM H. SORRELL,
Attorney General of Vermont, *et al.*,

Petitioners,

v.

IMS HEALTH INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF YALE RUDD CENTER FOR FOOD POLICY & OBESITY, PUBLIC HEALTH LAW & POLICY, BERKELEY MEDIA STUDIES GROUP, PUBLIC HEALTH LAW CENTER, CENTER FOR DIGITAL DEMOCRACY, AND CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

EDWARD STEINMAN
Counsel of Record
JENNIFER L. POMERANZ
RUDD CENTER FOR FOOD POLICY & OBESITY
YALE UNIVERSITY
309 Edwards Street
Box 208369
New Haven, CT 06520
(203) 432-8361
esteinman@scu.edu

SAMANTHA K. GRAFF
SETH E. MERMIN
PUBLIC HEALTH LAW & POLICY
2201 Broadway, Suite 502
Oakland, CA 94612
(510) 302-3377

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI CURIAE*[1]

This brief in support of petitioners is submitted by the **Yale University Rudd Center for Food Policy & Obesity** (Rudd Center) and other public health and consumer organizations. *Amici* file this brief to underscore the importance to public health of maintaining a distinction, for purposes of First Amendment review, between commercial and non-commercial speech. The interests of *amici curiae* in the case stem from extensive work on product warnings, claims and labeling; research and involvement in initiatives aimed at increasing the amount and openness of information available in the marketplace, and marketing to children in a wide variety of media.

The **Rudd Center** is a non-profit organization part of **Yale University**. Its mission is to improve the world's diet, prevent obesity, and reduce weight stigma by ensuring law and policy are based on rigorous science to support public health. The Center's work focuses on two aspects related to the First Amendment's protection for commercial speech. First, it produces rigorous studies exposing the poor nutrition-related beliefs and behaviors children develop as a result of the primarily unhealthy food marketing directed at them. Second, the Center works

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel made a monetary contribution to the preparation of the brief. The parties' letters consenting to the filing of all *amicus* briefs are on file with the Clerk.

extensively to ensure health and nutrition claims and disclosure requirements are accurate and not deceptive or misleading for food and beverage products and in restaurants. The Center supports the government's ability to require factual commercial disclosures so consumers have accurate information about products and services in the marketplace and simultaneously to regulate misleading, deceptive, and false commercial speech to protect the public.

Public Health Law & Policy (PHLP) is a national organization dedicated to developing practical solutions to public health problems. PHLP's project, the **National Policy & Legal Analysis Network to Prevent Childhood Obesity** (NPLAN), focuses on helping to achieve the Robert Wood Johnson Foundation's ambitious goal to reverse the childhood obesity epidemic by 2015. The obesity crisis cannot be solved without dramatic changes to the food marketing environment surrounding our nation's children. Therefore, NPLAN has a strong interest in maintaining government's ability to regulate products without invoking "speech" claims; to require factual disclosures when necessary to ensure that consumers have accurate information about the food they buy; and to safeguard the American public – and especially children – from false and misleading food advertising.

Berkeley Media Studies Group (BMSG), a program of the **Public Health Institute**, works with community groups, journalists, and public health professionals to use the power of the media to advance healthy public policy. To do this BMSG studies

how news, entertainment, and advertising present health and social issues. BMSG's recent studies of digital food marketing reveal an interrelated system of techniques that companies use to target and engage young people with food brands by following their every move through cyberspace. Through this research, we are keenly aware of the need to preserve the regulatory authority to respond to newly emerging, highly sophisticated digital marketing techniques that use neuromarketing, behavioral targeting, and other methods to capture personal data on children, youth, and adults. The Public Health Institute is a nonprofit organization that promotes evidence-based public health initiatives to improve the social determinants of health.

The **Public Health Law Center** is a public interest legal resource center dedicated to improving health through the power of law. Located at the **William Mitchell College of Law** in Saint Paul, Minnesota, the Center helps local, state, and national leaders improve health by strengthening public policies. The Center also serves as the National Coordinating Center of the new Public Health Law Network, which offers specialized legal assistance to health departments nationwide. In addition, the Center is home to the Tobacco Control Legal Consortium – America's legal network for tobacco control policy. The Center helps public officials and community leaders develop, implement and defend effective public health laws, including laws to require information disclosures necessary to protect health and

laws that impact the promotion of products harmful to health. The Center works to protect the public's authority to require factual commercial disclosures that provide consumers with the accurate, material information necessary to make informed decisions about their own health, as well as the government's authority to regulate deceptive and abusive business practices to protect consumers and the integrity of the marketplace.

Center for Digital Democracy is a leading U.S. digital privacy non-profit organization that educates the public about the role of consumer data collection used for interactive advertising, especially in the field of online health information and services. The Center supports the ability of government to protect the public, and especially children and adolescents in the digital health marketplace.

Campaign for a Commercial-Free Childhood, a program of **Third Sector New England**, counters the harmful effects of marketing to children through education, advocacy and research. The commercialization of childhood is the link between many of the most serious problems facing children today, including childhood obesity, eating disorders, youth violence, sexualization, family stress, underage alcohol and tobacco use, rampant materialism, and the erosion of children's creative play. Our interest in this case stems from our extensive work on marketing to children.

SUMMARY OF ARGUMENT

This case, involving compilations of information far from "the heart of what the First Amendment is meant to protect," *McConnell v. Federal Elections Comm.*, 540 U.S. 93, 248 (2003) (op. of Scalia, J.), presents the Court with an opportunity to buttress the constitutional protection of speech. As explained in detail in the separate brief of *amici* Public Citizen, *et al.,* the data miners' challenge to Vermont's Prescription Confidentiality Law, codified at Vt. Stat. Ann. tit. 18, § 4631, restricting the use of state-created prescriber databases, Vt. Bd. of Pharmacy Admin. Rules §§ 9.1, 9.24, 9.26 (2009), calls for reinforcement of the critical distinction between speech protected by the First Amendment and business practices that only incidentally involve language.

If this Court nevertheless determines (or is willing to assume) that the gathering and sale of doctors' prescription records constitutes commercial speech rather than basic business conduct, the Court can apply well-established precedent maintaining the longstanding and necessary distinction between the levels of scrutiny applied to regulation of core speech and commercial speech. The restriction or compulsion of core speech invokes the highest level of constitutional protection; the First and Fourteenth Amendments permit the government somewhat greater leeway with respect to commercial speech. Without this necessary distinction, the overall level of protection afforded core speech could diminish: " 'To require a parity of constitutional protection for commercial

and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.'" *Board of Trustees v. Fox*, 492 U.S. 469, 481 (1989) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

Equally troubling, such parity would elevate the degree of protection afforded commercial speech, thus undermining the constitutional values at stake in the current differential treatment. The primary reason for protecting commercial speech is to ensure the "free flow of commercial information" so that consumers can make "intelligent and well informed" decisions. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *see also* Robert Post, *Prescribing Records and the First Amendment – New Hampshire's Data-Mining Statute*, New Eng. J. Med. (Feb. 19, 2009) 360 (8): 745, 747 ("The correct constitutional inquiry . . . is whether the regulation of a data transmission channel is likely to impair the informed and intelligent creation of public opinion.")

According commercial speech the same degree of protection as core speech would contravene the rationale for protecting commercial speech in the first place: the "consumer's interest in the free flow of commercial information." *See Virginia Pharmacy Bd.*, 425 U.S. at 763. Factual disclosures essential to safety, health, and nutrition would sharply diminish because sellers could no longer be required to provide crucial factual information – despite the fact that it is

the listener rather than the speaker whose First Amendment rights have motivated protection for commercial speech since the doctrine's inception. *See id*. at 756-57; *see also Cincinnati v. Discovery Network*, 507 U.S. 410, 432 (1993) (Blackmun, J., concurring) (noting the "Court's emphasis on the First Amendment interests of the listener in the commercial speech context").

Further, consumers would be subject to an increase in false and deceptive advertising, to the detriment of a century of effort to combat precisely this scourge. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384 (1965) (outlining history of FTC jurisdiction over "deceptive" advertising); *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485, 489 (7th Cir. 1975) ("There is no constitutional right to disseminate false or misleading advertisements"); Comment, *Untrue Advertising*, 36 Yale L.J. 1155, 1156-57 (1927) (noting publication of "Printer's Ink" model statute in 1911).

Even purporting to limit the equivalence of treatment to restrictions on "truthful and non-misleading" commercial speech, *cf.* Br. for Plaintiffs-Appellants IMS Health Inc., *et al.* (2d Cir.) at 23-24; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1342 (2010) (Thomas, J., concurring in part), would leave consumers to contend with automatically dialed "robocalls" from retailers, unsolicited "junk faxes" and text messages, in-home commercial solicitations, and a host of other now-prohibited practices

ranging from the disruptive to the dangerous. In addition, the contention that there could be parity only with respect to speech restrictions rather than compelled speech, and only as to non-misleading speech as opposed to false or deceptive speech, is simply unrealistic. *See Milavetz*, 130 S. Ct. at 1343 ("We have refused in other contexts to attach any 'constitutional significance' to the difference between regulations that compel protected speech and regulations that restrict it. . . . I see no reason why that difference should acquire constitutional significance merely because the regulations at issue involve commercial speech.") The consequences of declaring even a supposedly limited parity of treatment would be harmful and, ultimately, severe.

There is, of course, an alternative to the havoc that decreeing parity would wreak on precedent and the insult it would work to common sense: maintaining the longstanding, logical distinction between the levels of protection afforded core speech, on the one hand, and commercial speech, on the other. Evaluated in this light, the Vermont data mining law – if it is determined to regulate speech at all – should be reviewed at most under the familiar and workable standard that over three decades has provided commercial speech the substantial, but different, level of protection that the First Amendment requires. *See Central Hudson Gas & Elec. Corp. v. Public Serv.*

Comm'n, 447 U.S. 557 (1980). Under that standard, the data mining law survives review.

ARGUMENT

I. Differential Treatment Of Core And Commercial Speech Is Essential To Maintain A Well-Informed Public And Safe And Efficient Marketplace.

Given that the "extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), restrictions on commercial speech – even non-misleading commercial speech, Br. for Plaintiffs-Appellants IMS Health Inc., *et al.* (2d Cir.) at 23-24 – should not be evaluated identically to restrictions on core speech. The argument for parity fails on at least three levels. First, a Procrustean insistence on equalizing the standard for reviewing restrictions on speech would either invite the "dilution . . . of the force of the [First] Amendment's guarantee" with respect to political, religious, and artistic speech that this Court has warned of since the inception of the commercial speech doctrine, *Ohralik*, 436 U.S. at 456, or alternatively, if not additionally, result in a resurgence of harmful practices as the government becomes hamstrung in its efforts to address ills that it previously eradicated or reduced. Second, if the

Court elevates commercial speech to the level of core speech for the purpose of analyzing speech *restrictions*, regulations *compelling* factual commercial speech disclosures will inevitably be drawn toward strict scrutiny as well. This would be not only illogical given the Court's recognition of the importance of transparency in commercial transactions, but also devastating to the disclosure-based regulatory environment on which the American consumers and businesses have come to depend. Finally, drawing a new bold line between truthful, non-misleading commercial speech and false or misleading commercial speech would be a futile exercise and would allow an infusion of deceptive commercial speech into the marketplace.

A. Commercial Disclosure Requirements Are Necessary To Protect And Inform The Public.

The commercial marketplace encompasses a wide spectrum of disclosure requirements that are necessary for transparency and efficiency. If these requirements were subject to strict scrutiny, many would be unlikely to survive review. That outcome would subvert the constitutional values that justify the commercial speech doctrine, and would undermine the entirety of the modern disclosure-based regulatory environment. This Court has recognized for more than a quarter century the information-promoting benefits of these requirements. *Zauderer*, 471 U.S. at

651. Indeed, just last Term the Court reaffirmed that the First Amendment calls for commercial disclosure requirements to be reviewed under the reasonable relationship standard set forth in *Zauderer* – thereby effectively requiring the continued distinction between core and commercial speech. *Milavetz*, 130 S. Ct. at 1339-40. The call for "parity" of protection for commercial and noncommercial speech therefore directly contradicts the principles underlying this Court's First Amendment jurisprudence.

The Court has consistently confirmed its preference for transparency in commercial transactions and consumer access to truthful commercial information in order to make informed decisions. *See, e.g., Virginia Pharmacy Bd.,* 425 U.S. at 765. As early as 1919, the Court found that "it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold." *Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 431 (1919); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (Stevens, J., concurring) ("In the commercial context . . . government . . . often requires affirmative disclosures that the speaker might not make voluntarily" (citing "15 U.S.C. § 1333 (requiring 'Surgeon General's Warning' labels on cigarettes); 21 U.S.C. § 343 (1988 ed. and Supp. V) (setting labeling requirements for food products); 21 U.S.C. § 352 (1988 ed. and Supp. V) (setting labeling requirements

for drug products); 15 U.S.C. § 77e (requiring registration statement before selling securities).")[2]

For good reason, this Court has found that commercial disclosure requirements need only be reasonably related to a valid government interest. *Zauderer,* 471 U.S. at 651. Since the application of First Amendment protection to commercial speech is based on the value to consumers of the information, a commercial actor's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.* (emphasis in original). Commercial disclosure requirements are based on the uncontroversial premise that it is difficult for consumers by themselves to verify the accuracy of

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[2] *See also National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) ("Innumerable federal and state regulatory programs require the disclosure of product and other commercial information. *See, e.g.,* 2 U.S.C. § 434 (reporting of federal election campaign contributions); 15 U.S.C. § 781 (securities disclosures); 15 U.S.C. § 1333 (tobacco labeling); 21 U.S.C. § 343(q)(1) (nutritional labeling); 33 U.S.C. § 1318 (reporting of pollutant concentrations in discharges to water); 42 U.S.C. § 11023 (reporting of releases of toxic substances); 21 C.F.R. § 202.1 (disclosures in prescription drug advertisements); 29 C.F.R. § 1910.1200 (posting notification of workplace hazards); Cal. Health & Safety Code § 25249.6 (Proposition 65); warning of potential exposure to certain hazardous substances); N.Y. Envtl. Conserv. Law § 33-0707 (disclosure of pesticide formulas). To hold that the Vermont statute is insufficiently related to the state's interest in reducing mercury pollution would expose these long-established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required.").

commercial messages. *Central Hudson*, 447 U.S. at 563-64 n.6. A seller is in the best position to know about the products and services he peddles; his "access to the truth about his product and its price substantially eliminates any danger that government regulation . . . will chill accurate and nondeceptive commercial expression." *Virginia Pharmacy Bd.,* 425 U.S. at 777-78 (Stewart, J., concurring).

As a result, the United States regulatory landscape is replete with commercial disclosure requirements that protect consumers from economic and physical injury by conveying truthful information about available products and services. Under the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., companies must report key financial data to investors "to remove impediments to and perfect the mechanisms of a national market system for securities." *Id*. § 78b. The Food Allergen Labeling and Consumer Protection Act of 2004, 21 U.S.C. § 343(w), compels disclosure of the presence of the eight food allergens that cause ninety percent of all life-threatening food allergies. The Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 343, ensures that consumers have information about the ingredients of their food and beverages and are not confused or deceived about the health benefits of what they consume. Under the Federal Hazardous Substances Act of 1960, 15 U.S.C. §§ 1261-78, labels must divulge whether a product is toxic, corrosive, flammable or combustible, among other hazards that may cause substantial personal injury or illness, including

reasonably foreseeable ingestion by children. The Surgeon General's Warning cautions potential smokers about the dire health consequences of tobacco use. 15 U.S.C. § 1333 (1965). Federal law also ensures that lead-based paint hazards are revealed before the sale or lease of residential housing built prior to 1978, 42 U.S.C. § 4852d (1992), and that alcohol content is listed on beverage packaging and labels, 27 U.S.C. § 205(e) (1935).[3] All of these disclosure laws promote fair dealing, better informed decision-making, and efficient commercial markets. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 27-28 (2000). But if parity of treatment were imposed, the viability of all such required commercial disclosure requirements would be called into question.

Unlike factual disclosures in the commercial realm, core factual speech generally cannot be compelled. The First Amendment recognizes a "constitutional equivalence of compelled speech and compelled

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[3] States similarly require disclosures on products and services to protect and inform consumers. *See, e.g.*, Tex. Prop. Code § 221.031 (1987) (requiring advertisements for timeshare interests to disclose the purpose of the solicitation, how the recipients' information will be used, and the marketers' affiliations); Minn. Stat. § 325G.42 (1987) (mandating that credit card applications disclose rates, fees, and conditions, among other information); Fla. Stat. § 849.0935 (1988) (providing that brochures, advertisements, notices, tickets, and entry forms used by charities for a "drawing by chance" must disclose the rules, the source of funds, and information about the organization).

silence in the context of fully protected expression." *Riley v. National Federation of the Blind, Inc.,* 487 U.S. 781, 796-97 (1988). This Court has observed that in the political, religious and artistic realm "freedom of speech" necessarily comprises "the decision of both what to say and what *not* to say." *Id.* (emphasis in original). In the context of core speech, that freedom encompasses factual disclosures as well as opinions. "[E]ither form of compulsion burdens protected speech." *Id.* at 797-98. Government-mandated factual disclosures of political or religious information are, with certain minimal exceptions, subject to strict scrutiny. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (distributors of campaign literature cannot be compelled to disclose their identity); *Buckley v. American Constitutional Law Foundation, Inc*., 525 U.S. 182 (1999) (petition gatherers cannot be made to wear ID badges); *Talley v. California*, 362 U.S. 60 (1960) (handbill distributors cannot be required to print the name of person who prepared, distributed or sponsored leaflets).

If compelled commercial disclosure requirements were subject to strict scrutiny, the likely result would be the disappearance of crucial sources of factual information in the marketplace – leaving the public vulnerable to dangers and abuses that government currently has the authority to address. Entire regulatory infrastructures could fail if commercial speakers succeed in insisting that existing mandatory disclosure requirements violate their (enhanced) First Amendment right not to speak, interfere with their

"ability to communicate [their] own message," and "take[ ] up space that could be devoted to other material." *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 64 (2006).

Disclosure requirements are essential to the transparency and efficiency of the American economy. Subjecting them to the highest scrutiny would disrupt a well-functioning regulatory system and repudiate precedent. This would necessarily result in less speech, not more – an inversion of the oft-cited First Amendment maxim. *See, e.g.*, *Citizens United v. Federal Elections Comm.*, 130 S. Ct. 876, 911 (2010) ("it is our law and our tradition that more speech, not less, is the governing rule").

B. The Proper Functioning Of The Marketplace Depends On Government's Ability To Regulate False, Deceptive, And Misleading Speech.

Ensuring that the "stream of commercial information flow cleanly as well as freely" is the essence of the commercial speech doctrine. *Virginia Pharmacy Bd.*, 425 U.S. at 772. This Court has therefore repeatedly held that the First Amendment leaves room for the government to deal effectively with deceptive and misleading commercial speech. *Id*. at 771; *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 68-69, n.31 (1976); *see also Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) ("Advertising that is false,

deceptive, or misleading of course is subject to restraint").

After all, the "benefits from commercial speech derive from confidence in its accuracy and reliability," *Bates*, 433 U.S. at 383, and government limitations on deceptive and misleading commercial speech are essential and consistent with this Court's emphasis on the interests of listeners in the marketplace. *See Cincinnati v. Discovery Network*, 507 U.S. 410, 432 (1993) (Blackmun, J., concurring). Commercial speakers have no legitimate expressive interest in conveying misrepresentations, and "the consequences of false commercial speech can be particularly severe." *Rubin v. Coors Brewing*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring) ("Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised. . . . The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech.").

In the realm of core expression, however, deceptive and misleading speakers are protected. The freedom of political and religious speakers to be able to state beliefs, ideas, and their version of the facts without government control is the underpinning of First Amendment protection for speech. *Citizens United*, 130 S. Ct. at 892. For core speech, the First

Amendment guards against government interference in this realm for the benefit of both the listener and the speaker. *Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting) ("the First Amendment protects . . . the freedom to hear as well as the freedom to speak. . . . The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the 'means indispensable to the discovery and spread of political truth.' "). Strict protection is warranted to "maximize the speaker's freedom of participation within public discourse," Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. at 40, so she can get her opinions "accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) ("erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

Collapsing the distinction between commercial and fully protected speech would impair the government's efforts to deal effectively with false or misleading commercial speech. The current doctrine is nuanced enough to permit courts to assess restrictions on three separate forms of misleading commercial speech: inherently misleading, actually misleading, and potentially misleading. *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S.

91, 99-101 (1990) (plurality opinion); *In re R.M.J.,* 455 U.S. 191, 203 (1982). The first two types receive no First Amendment protection, per the first, threshold prong of the *Central Hudson* test, which excludes such speech from the ambit of the First Amendment. 447 U.S. at 564. However, restrictions on *potentially* misleading speech – that is, speech that "also may be presented in a way that is not deceptive" – must withstand scrutiny under the full *Central Hudson* test. *In re R.M.J.,* 455 U.S. at 203.

Lower courts have relied on this jurisprudence to uphold restrictions on deceptive and misleading advertising practices.[4] Moreover, the commercial

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[4] *See, e.g.*, *Joe Conte Toyota v. Louisiana Motor Vehicle Commission*, 24 F.3d 754, 757 (5th Cir. 1994) (finding the term "invoice" to be inherently misleading in automobile advertisements); *Adams Ford Belton, Inc. v. Missouri Motor Vehicle Comm'n*, 949 S.W.2d 199 (Mo. Ct. App. 1997) (same); *see also Barry v. Arrow Pontiac, Inc.,* 494 A.2d 804 (N.J. 1985) (finding terms "dealer invoice," "cost," "inventory," and "invoice" misleading in automobile advertisements); *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1101 (9th Cir. 2004) (finding physician's use of the term "board certified" to be inherently misleading because he did not meet the statutory requirements for using the term); *N.C. State Bar v. Culbertson*, 627 S.E.2d 644 (N.C. Ct. App. 2006) (finding an advertisement stating that an attorney was "published" in the Federal Law Reports to be inherently misleading); *cf. Piazza's Seafood World v. Odom*, 448 F.3d 744, 752-53 (5th Cir. 2006) (affirming district court's application of *Central Hudson* to strike down speech restriction, finding the term "Cajun" only potentially misleading because, although the average consumer might be confused, misled, or deceived, plaintiff's customer base were seafood wholesalers and presumably sophisticated buyers); *Snell v. Engineered Systems & Designs*,

(Continued on following page)

speech doctrine undergirds federal regulatory authority to protect consumers from a broad swath of false marketing claims, including those that have lured vulnerable cancer patients into purchasing an herbal "cure," *In re Daniel Chapter One*, FTC Docket No. 9329 (Aug. 5, 2009), 2009 WL 2584873, conned consumers into spending millions of dollars on ineffectual diet and human growth hormone products, *FTC v. Global Web Promotions*, No. 04C 3022 (N.D. Ill. June 16, 2005), *available at* http://www.ftc.gov/os/caselist/0423086/0423086.shtm, and professed that a sugary cereal is "clinically shown to improve kids' attentiveness" and "helps support your child's immunity," *In re Kellogg Co.*, FTC Docket No. C-4262 (June 2, 2010), 2010 WL 2332719.[5]

If parity were accepted, it would apply to deceptive and misleading speech as well. The result of dispensing with flexibility and nuance in favor of superficial simplicity and uniformity in this area would be the upending of necessary comprehensive

669 A.2d 13, 21 (Del. 1995) (finding commercial speech not actually misleading because the survey presented was outdated, from a different geographic location, and lacking the language being contested).

[5] Of course, relevant consumer protection laws apply to topics that range far beyond health. *See, e.g.*, 15 U.S.C. § 78n(a) and SEC Rule 14a-9, 17 C.F.R. § 240.14a-9 (prohibiting false and misleading statements in proxy soliciting materials; *FTC v. Stuffingforcash.com Corp.*, No. 02C 5022 (N.D. Ill. July 2, 2003), *available at* http://www.ftc.gov/os/caselist/p024408.html (barring an advertising scam involving a fraudulent envelope-stuffing work-at-home scheme).

and predictable regulatory controls. Charlatans would be afforded the "breathing space," *New York Times v. Sullivan*, 376 U.S. at 272, now reserved for political, religious or artistic speakers. The marketplace would be flooded with false, deceptive and misleading commercial speech. Alternatively, or additionally, and no less harmfully, parity could remove, through "dilution," *Board of Trustees v. Fox*, 492 U.S. at 481, the necessary buffer provided to false statements in public debate. The resulting landscape would be far more distorted and less workable that what exists today. The task of line-drawing in this instance would be significantly more demanding and complicated than distinguishing commercial from core speech. And whether a given piece of commercial speech was found to be "actually misleading," as opposed to merely "potentially misleading," would mean the difference between no First Amendment safeguard at all and the fullest measure of constitutional protection. A move toward "parity" purportedly justified by uniformity and predictability would end up resulting in greater disparity and inconsistency.

C. Parity Would Result In A Resurgence Of Harmful Commercial Practices.

The idea that it is possible to establish parity only for non-misleading commercial speech represents a precarious illusion. Even if this were possible, the new regime would not solve the dilemmas it is touted to redress, and would create or exacerbate problems that are currently under control.

First, there is an inherent contradiction between claiming that parity is necessary because it is not "possible to draw a coherent distinction between commercial and noncommercial speech," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring), and simultaneously acknowledging that one "ha[s] no quarrel with the principle that advertisements that are false or misleading, or that propose an illegal transaction, may be proscribed." *Milavetz*, 130 S. Ct. at 1343 n.1 (2010) (Thomas, J., concurring). If false commercial speech may be restricted, but false ideological speech may not, then the same fraught line "between commercial and noncommercial speech" will still need to be drawn – only with higher stakes since the difference would be between complete protection and none at all.

Second, there are tangible negative consequences to imposing equivalence even for non-misleading commercial speech. To choose but one concrete example: under a parity regime, the United States would be unable to restrict commercial "robocalls," the once-incessant telephone solicitations made by automatic dialers with prerecorded or digital voice messages, which are currently prohibited by the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1). *Compare Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996) (applying *Central Hudson* test and upholding federal prohibition on automatically dialed commercial calls) *with Moser v. Frohnmayer*, 845 P.2d 1284 (Or. 1993) (applying strict scrutiny under Oregon constitution and striking down state ban on similar calls). Other forms

of governmental limits on intrusive and cost-imposing communications that have been upheld under the *Central Hudson* test could, similarly, fail to withstand scrutiny under a regime that afforded parity of protection to ideological and commercial speech. *See, e.g., Missouri ex rel. Nixon v. American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003) (unsolicited "junk faxes"); *Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004) (national "Do Not Call" telephone registry). And from the perspective of a vulnerable or elderly consumer, there is a fine line between telemarketing and telemarketing fraud. *See United States v. Smith*, 133 F.3d 737 (10th Cir. 1997); Senior Citizens Against Marketing Scams Act of 1994, 18 U.S.C. §§ 2325-2327 (1994).[6]

Nothing in the First Amendment, and nothing in this case, requires this Court to open the door to

[6] The impact would not, of course, be limited to telecommunications. *Compare Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009) (upholding prohibition of only commercial offsite billboards under *Central Hudson*) *with West Coast Media, LLC v. City of Gladstone*, 84 P.3d 213 (Or. Ct. App. 2004) (striking down similar law under the state constitution's parity standard); *see also Anderson v. Treadwell*, 294 F.3d 453, 464 (2d Cir. 2002) (upholding under *Central Hudson* a restriction on in-home real estate solicitations); *Chambers v. Stengel*, 256 F.3d 397 (6th Cir. 2001) (approving under *Central Hudson* a prohibition on attorney solicitation of victims in the immediate aftermath of accidents). Subjected to strict scrutiny under a parity standard, it is by no means clear that these restrictions could stand; if they did not, the abusive practices that they have thus far constrained would proliferate.

increased abuse – not to mention fraud. However inelegant the current standard may be, it has proved itself, after over three decades, a familiar and practical measure.

II. The *Central Hudson* Test Remains A Workable Standard That Provides Significant Protection For Commercial Speech.

Although the *Central Hudson* test has its flaws and its detractors,[7] the measure remains a pragmatic and usable standard that, in practice, has provided considerable protection to commercial speech. Indeed, no decision of this Court for more than 15 years has upheld a government limitation on commercial speech under the *Central Hudson* standard. *See Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) (striking down commercial speech restriction); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (same); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999) (same); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (same); *but see Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding restriction).

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[7] *See Lorillard v. Reilly*, 533 U.S. at 554 (2001) ("Petitioners urge us to reject the *Central Hudson* analysis and apply strict scrutiny. They are not the first litigants to do so. *See, e.g., Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 184 (1999). Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. . . .").

A. There Is Neither Need Nor Justification For A Higher Standard.

Given the already considerable protection afforded commercial speech, and in light of the doctrinal and practical problems detailed above that adopting the same level of protection accorded core speech would entail, there is little justification for the adoption of strict scrutiny or any other higher standard. There remains "'no need to break new ground.'" *Lorillard Tobacco Co.*, 533 U.S. at 554 (quoting *Greater New Orleans*, 527 U.S. at 184 (1999)).

This is, of course, the conclusion endorsed by both the majority and the dissenting opinions below. *See IMS Health Inc. v. Sorrell*, 2010 U.S. App. LEXIS 24053, *28-*48 (2d Cir. 2010) (applying *Central Hudson* test); *id*. at *73 (Livingston, J., dissenting) (determining that Act regulates conduct, but that if it regulated speech *Central Hudson* would apply). The disparate interpretations of the Act by the majority and dissent hinge largely on whether an awkwardly worded phrase in the legislative findings – "The marketplace for ideas on medicine safety and effectiveness is frequently one-sided. . . ." – changes the purpose of the Act from one that regulates conduct to one that regulates speech. The fact that the two opinions came to different conclusions is a matter of interpretation of the statute's scope and purpose. There is no dispute about which test to apply if the law is found to regulate commercial speech – the *Central Hudson* standard. For good reason, no judge in the

court of appeals adopted respondents' arguments for applying strict scrutiny.

Finally, this case would be a poor choice to use as a vehicle to remake the commercial speech doctrine even if this Court were so inclined. Wholly absent here are the core interests underlying the protection of commercial speech in the first instance, and the provision of consumer information to the public, *Virginia Pharmacy Bd.*, 425 U.S. at 763. The databases at issue are not available to the public or to the doctors who are most affected by their sale. Vt. Bd. of Pharmacy Admin. Rules §§ 9.1, 9.24, 9.26 (2009). Indeed, whereas the great majority of this Court's commercial speech cases have involved advertising to consumers, *see, e.g.*, *Thompson*, 535 U.S. 357 (2002) (advertisement of compounded drugs); *Lorillard Tobacco Co.*, 533 U.S. 525 (2001) (tobacco billboards and in-store advertisements); *Central Hudson*, 477 U.S. 557 (1980) (advertising by electrical utility), marketing to the public has no role in this case. *See* Br. for Plaintiffs-Appellants IMS Health Inc., *et al.* (2d Cir.) at 24 ("plaintiffs distribute information" to "subscribers."). Further, the state's interests implicate novel prescriber and patient privacy issues not present in prior commercial speech jurisprudence. Br. for Petitioners at 46-47. This case would be an outlier, if considered a speech case at all, *see* Br. of *Amici* Public Citizen *et al.*, and thus reexamining the commercial speech doctrine under such circumstances would simply "make bad law." *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401 (1904)

(Holmes, J., dissenting) ("because of some accident of immediate overwhelming interest . . . makes what previously was clear seem doubtful, and before which even well settled principles of law will bend").

B. The Vermont Law Withstands Scrutiny Under *Central Hudson*.

If the Court finds the Vermont law to be a regulation of speech, the remaining steps are straightforward. The appropriate standard in this case devoid of consumer advertising may be one that is less robust than *Central Hudson*. For the reasons aptly set forth in Judge Livingston's opinion in the court of appeals, *IMS Health Inc. v. Sorrell*, 2010 U.S. App. LEXIS 24053, at *73-*95; *see also* Br. for Petitioners at 41-59; however, the data mining law readily withstands review under the *Central Hudson* test.

CONCLUSION

The judgment of the court of appeals should be reversed, and the Vermont law upheld.

Respectfully submitted,

EDWARD STEINMAN
Counsel of Record
JENNIFER L. POMERANZ
RUDD CENTER FOR FOOD
POLICY & OBESITY
YALE UNIVERSITY
309 Edwards Street
Box 208369
New Haven, CT 06520
(203) 432-8361
esteinman@scu.edu

Counsel for Amici Curiae