

Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 10–779

WILLIAM H. SORRELL, ATTORNEY GENERAL OF
VERMONT, ET AL., PETITIONERS *v.*
IMS HEALTH INC. ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June 23, 2011]

JUSTICE KENNEDY delivered the opinion of the Court.

Vermont law restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors. Vt. Stat. Ann., Tit. 18, §4631 (Supp. 2010). Subject to certain exceptions, the information may not be sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers. Vermont argues that its prohibitions safeguard medical privacy and diminish the likelihood that marketing will lead to prescription decisions not in the best interests of patients or the State. It can be assumed that these interests are significant. Speech in aid of pharmaceutical marketing, however, is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont’s statute must be subjected to heightened judicial scrutiny. The law cannot satisfy that standard.

I
A

Pharmaceutical manufacturers promote their drugs to

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doctors through a process called “detailing.” This often involves a scheduled visit to a doctor’s office to persuade the doctor to prescribe a particular pharmaceutical. Detailers bring drug samples as well as medical studies that explain the “details” and potential advantages of various prescription drugs. Interested physicians listen, ask questions, and receive followup data. Salespersons can be more effective when they know the background and purchasing preferences of their clientele, and pharmaceutical salespersons are no exception. Knowledge of a physician’s prescription practices—called “prescriber-identifying information”—enables a detailer better to ascertain which doctors are likely to be interested in a particular drug and how best to present a particular sales message. Detailing is an expensive undertaking, so pharmaceutical companies most often use it to promote high-profit brand-name drugs protected by patent. Once a brand-name drug’s patent expires, less expensive bioequivalent generic alternatives are manufactured and sold.

Pharmacies, as a matter of business routine and federal law, receive prescriber-identifying information when processing prescriptions. See 21 U. S. C. §353(b); see also Vt. Bd. of Pharmacy Admin. Rule 9.1 (2009); Rule 9.2. Many pharmacies sell this information to “data miners,” firms that analyze prescriber-identifying information and produce reports on prescriber behavior. Data miners lease these reports to pharmaceutical manufacturers subject to nondisclosure agreements. Detailers, who represent the manufacturers, then use the reports to refine their marketing tactics and increase sales.

In 2007, Vermont enacted the Prescription Confidentiality Law. The measure is also referred to as Act 80. It has several components. The central provision of the present case is §4631(d).

“A health insurer, a self-insured employer, an elec-

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tronic transmission intermediary, a pharmacy, or other similar entity shall not sell, license, or exchange for value regulated records containing prescriber-identifiable information, nor permit the use of regulated records containing prescriber-identifiable information for marketing or promoting a prescription drug, unless the prescriber consents Pharmaceutical manufacturers and pharmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents”

The quoted provision has three component parts. The provision begins by prohibiting pharmacies, health insurers, and similar entities from selling prescriber-identifying information, absent the prescriber’s consent. The parties here dispute whether this clause applies to all sales or only to sales for marketing. The provision then goes on to prohibit pharmacies, health insurers, and similar entities from allowing prescriber-identifying information to be used for marketing, unless the prescriber consents. This prohibition in effect bars pharmacies from disclosing the information for marketing purposes. Finally, the provision’s second sentence bars pharmaceutical manufacturers and pharmaceutical marketers from using prescriber-identifying information for marketing, again absent the prescriber’s consent. The Vermont attorney general may pursue civil remedies against violators. §4631(f).

Separate statutory provisions elaborate the scope of the prohibitions set out in §4631(d). “Marketing” is defined to include “advertising, promotion, or any activity” that is “used to influence sales or the market share of a prescription drug.” §4631(b)(5). Section 4631(c)(1) further provides that Vermont’s Department of Health must allow “a prescriber to give consent for his or her identifying information to be used for the purposes” identified in §4631(d).

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Finally, the Act’s prohibitions on sale, disclosure, and use are subject to a list of exceptions. For example, prescriber-identifying information may be disseminated or used for “health care research”; to enforce “compliance” with health insurance formularies, or preferred drug lists; for “care management educational communications provided to” patients on such matters as “treatment options”; for law enforcement operations; and for purposes “otherwise provided by law.” §4631(e).

Act 80 also authorized funds for an “evidence-based prescription drug education program” designed to provide doctors and others with “information and education on the therapeutic and cost-effective utilization of prescription drugs.” §4622(a)(1). An express aim of the program is to advise prescribers “about commonly used brand-name drugs for which the patent has expired” or will soon expire. §4622(a)(2). Similar efforts to promote the use of generic pharmaceuticals are sometimes referred to as “counter-detailing.” App. 211; see also *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 91 (CA1 2008) (Lipez, J., concurring and dissenting). The counterdetailer’s recommended substitute may be an older, less expensive drug and not a bioequivalent of the brand-name drug the physician might otherwise prescribe. Like the pharmaceutical manufacturers whose efforts they hope to resist, counterdetailers in some States use prescriber-identifying information to increase their effectiveness. States themselves may supply the prescriber-identifying information used in these programs. See App. 313; *id.*, at 375 (“[W]e use the data given to us by the State of Pennsylvania . . . to figure out which physicians to talk to”); see also *id.*, at 427–429 (Director of the Office of Vermont Health Access explaining that the office collects prescriber-identifying information but “does not at this point in time have a counter-detailing or detailing effort”). As first enacted, Act 80 also required detailers to provide information about alternative

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treatment options. The Vermont Legislature, however, later repealed that provision. 2008 Vt. Laws No. 89, §3.

Act 80 was accompanied by legislative findings. Vt. Acts No. 80, §1. Vermont found, for example, that the “goals of marketing programs are often in conflict with the goals of the state” and that 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.” §§1(3), (4). Detailing, in the legislature’s view, caused doctors to make decisions based on “incomplete and biased information.” §1(4). Because they “are unable to take the time to research the quickly changing pharmaceutical market,” Vermont doctors “rely on information provided by pharmaceutical representatives.” §1(13). The legislature further found that detailing increases the cost of health care and health insurance, §1(15); encourages hasty and excessive reliance on brand-name drugs, before the profession has observed their effectiveness as compared with older and less expensive generic alternatives, §1(7); and fosters disruptive and repeated marketing visits tantamount to harassment, §§1(27)–(28). The legislative findings further noted that use of prescriber-identifying information “increase[s] the effect of detailing programs” by allowing detailers to target their visits to particular doctors. §§1(23)–(26). Use of prescriber-identifying data also helps detailers shape their messages by “tailoring” their “presentations to individual prescriber styles, preferences, and attitudes.” §1(25).

B

The present case involves two consolidated suits. One was brought by three Vermont data miners, the other by an association of pharmaceutical manufacturers that produce brand-name drugs. These entities are the respondents here. Contending that §4631(d) violates their

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First Amendment rights as incorporated by the Fourteenth Amendment, the respondents sought declaratory and injunctive relief against the petitioners, the Attorney General and other officials of the State of Vermont.

After a bench trial, the United States District Court for the District of Vermont denied relief. 631 F. Supp. 2d 434 (2009). The District Court found that “[p]harmaceutical manufacturers are essentially the only paying customers of the data vendor industry” and that, because detailing unpatented generic drugs is not “cost-effective,” pharmaceutical sales representatives “detail only branded drugs.” *Id.*, at 451, 442. As the District Court further concluded, “the Legislature’s determination that [prescriber-identifying] data is an effective marketing tool that enables detailers to increase sales of new drugs is supported in the record.” *Id.*, at 451. The United States Court of Appeals for the Second Circuit reversed and remanded. It held that §4631(d) violates the First Amendment by burdening the speech of pharmaceutical marketers and data miners without an adequate justification. 630 F. 3d 263. Judge Livingston dissented.

The decision of the Second Circuit is in conflict with decisions of the United States Court of Appeals for the First Circuit concerning similar legislation enacted by Maine and New Hampshire. See *IMS Health Inc. v. Mills*, 616 F. 3d 7 (CA1 2010) (Maine); *Ayotte, supra* (New Hampshire). Recognizing a division of authority regarding the constitutionality of state statutes, this Court granted certiorari. 562 U. S. __ (2011).

II

The beginning point is the text of §4631(d). In the proceedings below, Vermont stated that the first sentence of §4631(d) prohibits pharmacies and other regulated entities from selling or disseminating prescriber-identifying information for marketing. The information,

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in other words, could be sold or given away for purposes other than marketing. The District Court and the Court of Appeals accepted the State's reading. See 630 F.3d, at 276. At oral argument in this Court, however, the State for the first time advanced an alternative reading of §4631(d)—namely, that pharmacies, health insurers, and similar entities may not sell prescriber-identifying information for any purpose, subject to the statutory exceptions set out at §4631(e). See Tr. of Oral Arg. 19–20. It might be argued that the State's newfound interpretation comes too late in the day. See *Sprietsma v. Mercury Marine*, 537 U. S. 51, 56, n. 4 (2002) (waiver); *New Hampshire v. Maine*, 532 U. S. 742, 749 (2001) (judicial estoppel). The respondents, the District Court, and the Court of Appeals were entitled to rely on the State's plausible interpretation of the law it is charged with enforcing. For the State to change its position is particularly troubling in a First Amendment case, where plaintiffs have a special interest in obtaining a prompt adjudication of their rights, despite potential ambiguities of state law. See *Houston v. Hill*, 482 U. S. 451, 467–468, and n. 17 (1987); *Zwickler v. Koota*, 389 U. S. 241, 252 (1967).

In any event, §4631(d) cannot be sustained even under the interpretation the State now adopts. As a consequence this Court can assume that the opening clause of §4631(d) prohibits pharmacies, health insurers, and similar entities from selling prescriber-identifying information, subject to the statutory exceptions set out at §4631(e). Under that reading, pharmacies may sell the information to private or academic researchers, see §4631(e)(1), but not, for example, to pharmaceutical marketers. There is no dispute as to the remainder of §4631(d). It prohibits pharmacies, health insurers, and similar entities from disclosing or otherwise allowing prescriber-identifying information to be used for marketing. And it bars pharmaceutical manufacturers and detailers from using the information for

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marketing. The questions now are whether §4631(d) must be tested by heightened judicial scrutiny and, if so, whether the State can justify the law.

A

1

On its face, Vermont’s law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. The provision first forbids sale subject to exceptions based in large part on the content of a purchaser’s speech. For example, those who wish to engage in certain “educational communications,” §4631(e)(4), may purchase the information. The measure then bars any disclosure when recipient speakers will use the information for marketing. Finally, the provision’s second sentence prohibits pharmaceutical manufacturers from using the information for marketing. The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers. As a result of these content- and speaker-based rules, detailers cannot obtain prescriber-identifying information, even though the information may be purchased or acquired by other speakers with diverse purposes and viewpoints. Detailers are likewise barred from using the information for marketing, even though the information may be used by a wide range of other speakers. For example, it appears that Vermont could supply academic organizations with prescriber-identifying information to use in countering the messages of brand-name pharmaceutical manufacturers and in promoting the prescription of generic drugs. But §4631(d) leaves detailers no means of purchasing, acquiring, or using prescriber-identifying information. The law on its face burdens disfavored speech by disfavored speakers.

Any doubt that §4631(d) imposes an aimed, content-

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based burden on detailers is dispelled by the record and by formal legislative findings. As the District Court noted, “[p]harmaceutical manufacturers are essentially the only paying customers of the data vendor industry”; and the almost invariable rule is that detailing by pharmaceutical manufacturers is in support of brand-name drugs. 631 F. Supp. 2d, at 451. Vermont’s law thus has the effect of preventing detailers—and only detailers—from communicating with physicians in an effective and informative manner. Cf. *Edenfield v. Fane*, 507 U. S. 761, 766 (1993) (explaining the “considerable value” of in-person solicitation). Formal legislative findings accompanying §4631(d) confirm that the law’s express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs. Just as the “inevitable effect of a statute on its face may render it unconstitutional,” a statute’s stated purposes may also be considered. *United States v. O’Brien*, 391 U. S. 367, 384 (1968). Here, the Vermont Legislature explained that detailers, in particular those who promote brand-name drugs, convey messages that “are often in conflict with the goals of the state.” 2007 Vt. No. 80, §1(3). The legislature designed §4631(d) to target those speakers and their messages for disfavored treatment. “In its practical operation,” Vermont’s law “goes even beyond mere content discrimination, to actual viewpoint discrimination.” *R. A. V. v. St. Paul*, 505 U. S. 377, 391 (1992). Given the legislature’s expressed statement of purpose, it is apparent that §4631(d) imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint.

Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted. See *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 418 (1993) (applying heightened scrutiny to “a categorical prohibition on the use of newsracks to disseminate commercial messages”); *id.*, at

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429 (“[T]he very basis for the regulation is the difference in content between ordinary newspapers and commercial speech” in the form of “commercial handbills Thus, by any commonsense understanding of the term, the ban in this case is ‘content based’” (some internal quotation marks omitted)); see also *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 658 (1994) (explaining that strict scrutiny applies to regulations reflecting “aversion” to what “disfavored speakers” have to say). The Court has recognized that the “distinction between laws burdening and laws banning speech is but a matter of degree” and that the “Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.” *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 812 (2000). Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content. See *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115 (1991) (content-based financial burden); *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U. S. 575 (1983) (speaker-based financial burden).

The First Amendment requires heightened scrutiny whenever the government creates “a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989); see also *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986) (explaining that “‘content-neutral’ speech regulations” are “those that are *justified* without reference to the content of the regulated speech” (internal quotation marks omitted)). A government bent on frustrating an impending demonstration might pass a law demanding two years’ notice before the issuance of parade permits. Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional. *Ibid.* Commercial speech is no excep-

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tion. See *Discovery Network, supra*, at 429–430 (commercial speech restriction lacking a “neutral justification” was not content neutral). A “consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.” *Bates v. State Bar of Ariz.*, 433 U. S. 350, 364 (1977). That reality has great relevance in the fields of medicine and public health, where information can save lives.

2

The State argues that heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation. It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove “‘White Applicants Only’” signs, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 62 (2006); why “an ordinance against outdoor fires” might forbid “burning a flag,” *R. A. V., supra*, at 385; and why antitrust laws can prohibit “agreements in restraint of trade,” *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 502 (1949).

But §4631(d) imposes more than an incidental burden on protected expression. Both on its face and in its practical operation, Vermont’s law imposes a burden based on the content of speech and the identity of the speaker. See *supra*, at 8–11. While the burdened speech results from an economic motive, so too does a great deal of vital expression. See *Bigelow v. Virginia*, 421 U. S. 809, 818 (1975); *New York Times Co. v. Sullivan*, 376 U. S. 254, 266 (1964); see also *United States v. United Foods, Inc.*, 533 U. S. 405, 410–411 (2001) (applying “First Amendment scrutiny” where speech effects were not incidental and

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noting that “those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups”). Vermont’s law does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers. The Constitution “does not enact Mr. Herbert Spencer’s Social Statics.” *Lochner v. New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting). It does enact the First Amendment.

Vermont further argues that §4631(d) regulates not speech but simply access to information. Prescriber-identifying information was generated in compliance with a legal mandate, the State argues, and so could be considered a kind of governmental information. This argument finds some support in *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U. S. 32 (1999), where the Court held that a plaintiff could not raise a facial challenge to a content-based restriction on access to government-held information. Because no private party faced a threat of legal punishment, the Court characterized the law at issue as “nothing more than a governmental denial of access to information in its possession.” *Id.*, at 40. Under those circumstances the special reasons for permitting First Amendment plaintiffs to invoke the rights of others did not apply. *Id.*, at 38–39. Having found that the plaintiff could not raise a facial challenge, the Court remanded for consideration of an as-applied challenge. *Id.*, at 41. *United Reporting* is thus a case about the availability of facial challenges. The Court did not rule on the merits of any First Amendment claim.

United Reporting is distinguishable in at least two respects. First, Vermont has imposed a restriction on access to information in private hands. This confronts the Court with a point reserved, and a situation not addressed, in *United Reporting*. Here, unlike in *United*

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Reporting, we do have “a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses.” *Id.*, at 40. The difference is significant. An individual’s right to speak is implicated when information he or she possesses is subjected to “restraints on the way in which the information might be used” or disseminated. *Seattle Times Co. v. Rhinehart*, 467 U. S. 20, 32 (1984); see also *Bartnicki v. Vopper*, 532 U. S. 514, 527 (2001); *Florida Star v. B. J. F.*, 491 U. S. 524 (1989); *New York Times Co. v. United States*, 403 U. S. 713 (1971) (*per curiam*). In *Seattle Times*, this Court applied heightened judicial scrutiny before sustaining a trial court order prohibiting a newspaper’s disclosure of information it learned through coercive discovery. It is true that the respondents here, unlike the newspaper in *Seattle Times*, do not themselves possess information whose disclosure has been curtailed. That information, however, is in the hands of pharmacies and other private entities. There is no question that the “threat of prosecution . . . hangs over their heads.” *United Reporting*, 528 U. S., at 41. For that reason *United Reporting* does not bar respondents’ facial challenge.

United Reporting is distinguishable for a second and even more important reason. The plaintiff in *United Reporting* had neither “attempt[ed] to qualify” for access to the government’s information nor presented an as-applied claim in this Court. *Id.*, at 40. As a result, the Court assumed that the plaintiff had not suffered a personal First Amendment injury and could prevail only by invoking the rights of others through a facial challenge. Here, by contrast, the respondents claim—with good reason—that §4631(d) burdens their own speech. That argument finds support in the separate writings in *United Reporting*, which were joined by eight Justices. All of those writings recognized that restrictions on the disclosure of government-held information can facilitate or burden the

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expression of potential recipients and so transgress the First Amendment. See *id.*, at 42 (SCALIA, J., concurring) (suggesting that “a restriction upon access that *allows* access to the press . . . but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech”); *id.*, at 43 (GINSBURG, J., concurring) (noting that “the provision of [government] information is a kind of subsidy to people who wish to speak” about certain subjects, “and once a State decides to make such a benefit available to the public, there are no doubt limits to its freedom to decide how that benefit will be distributed”); *id.*, at 46 (Stevens, J., dissenting) (concluding that, “because the State’s discrimination is based on its desire to prevent the information from being used for constitutionally protected purposes, [i]t must assume the burden of justifying its conduct”). Vermont’s law imposes a content- and speaker-based burden on respondents’ own speech. That consideration provides a separate basis for distinguishing *United Reporting* and requires heightened judicial scrutiny.

The State also contends that heightened judicial scrutiny is unwarranted in this case because sales, transfer, and use of prescriber-identifying information are conduct, not speech. Consistent with that submission, the United States Court of Appeals for the First Circuit has characterized prescriber-identifying information as a mere “commodity” with no greater entitlement to First Amendment protection than “beef jerky.” *Ayotte*, 550 F. 3d, at 52–53. In contrast the courts below concluded that a prohibition on the sale of prescriber-identifying information is a content-based rule akin to a ban on the sale of cookbooks, laboratory results, or train schedules. See 630 F. 3d, at 271–272 (“The First Amendment protects even dry information, devoid of advocacy, political relevance, or artistic expression” (internal quotation marks and alteration omitted)); 631 F. Supp. 2d, at 445 (“A restriction on

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disclosure is a regulation of speech, and the ‘sale’ of [information] is simply disclosure for profit”).

This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. See, e.g., *Bartnicki*, *supra*, at 527 (“[I]f the acts of ‘disclosing’ and ‘publishing’ information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct” (some internal quotation marks omitted)); *Rubin v. Coors Brewing Co.*, 514 U. S. 476, 481 (1995) (“information on beer labels” is speech); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U. S. 749, 759 (1985) (plurality opinion) (credit report is “speech”). Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.

The State asks for an exception to the rule that information is speech, but there is no need to consider that request in this case. The State has imposed content- and speaker-based restrictions on the availability and use of prescriber-identifying information. So long as they do not engage in marketing, many speakers can obtain and use the information. But detailers cannot. Vermont’s statute could be compared with a law prohibiting trade magazines from purchasing or using ink. Cf. *Minneapolis Star*, 460 U. S. 575. Like that hypothetical law, §4631(d) imposes a speaker- and content-based burden on protected expression, and that circumstance is sufficient to justify application of heightened scrutiny. As a consequence, this case can be resolved even assuming, as the State argues, that prescriber-identifying information is a mere commodity.

B

In the ordinary case it is all but dispositive to conclude

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that a law is content-based and, in practice, viewpoint-discriminatory. See *R. A. V.*, 505 U. S., at 382 (“Content-based regulations are presumptively invalid”); *id.*, at 391–392. The State argues that a different analysis applies here because, assuming §4631(d) burdens speech at all, it at most burdens only commercial speech. As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied. See, e.g., *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U. S. 173, 184 (1999). For the same reason there is no need to determine whether all speech hampered by §4631(d) is commercial, as our cases have used that term. Cf. *Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U. S. 469, 474 (1989) (discussing whether “pure speech and commercial speech” were inextricably intertwined, so that “the entirety must . . . be classified as noncommercial”).

Under a commercial speech inquiry, it is the State’s burden to justify its content-based law as consistent with the First Amendment. *Thompson v. Western States Medical Center*, 535 U. S. 357, 373 (2002). To sustain the targeted, content-based burden §4631(d) imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. See *Fox, supra*, at 480–481; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 557, 566 (1980). There must be a “fit between the legislature’s ends and the means chosen to accomplish those ends.” *Fox, supra*, at 480 (internal quotation marks omitted). As in other contexts, these standards ensure not only that the State’s interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message. See *Turner Broadcasting*, 512 U. S., at 662–663.

The State’s asserted justifications for §4631(d) come

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under two general headings. First, the State contends that its law is necessary to protect medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship. Second, the State argues that §4631(d) is integral to the achievement of policy objectives—namely, improved public health and reduced healthcare costs. Neither justification withstands scrutiny.

1

Vermont argues that its physicians have a “reasonable expectation” that their prescriber-identifying information “will not be used for purposes other than . . . filling and processing” prescriptions. See 2007 Vt. Laws No. 80, §1(29). It may be assumed that, for many reasons, physicians have an interest in keeping their prescription decisions confidential. But §4631(d) is not drawn to serve that interest. Under Vermont’s law, pharmacies may share prescriber-identifying information with anyone for any reason save one: They must not allow the information to be used for marketing. Exceptions further allow pharmacies to sell prescriber-identifying information for certain purposes, including “health care research.” §4631(e). And the measure permits insurers, researchers, journalists, the State itself, and others to use the information. See §4631(d); cf. App. 370–372; *id.*, at 211. All but conceding that §4631(d) does not in itself advance confidentiality interests, the State suggests that other laws might impose separate bars on the disclosure of prescriber-identifying information. See Vt. Bd. of Pharmacy Admin. Rule 20.1. But the potential effectiveness of other measures cannot justify the distinctive set of prohibitions and sanctions imposed by §4631(d).

Perhaps the State could have addressed physician confidentiality through “a more coherent policy.” *Greater New Orleans Broadcasting*, *supra*, at 195; see also *Discovery*

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Network, 507 U. S., at 428. For instance, the State might have advanced its asserted privacy interest by allowing the information's sale or disclosure in only a few narrow and well-justified circumstances. See, e.g., Health Insurance Portability and Accountability Act of 1996, 42 U. S. C. §1320d-2; 45 CFR pts. 160 and 164 (2010). A statute of that type would present quite a different case than the one presented here. But the State did not enact a statute with that purpose or design. Instead, Vermont made prescriber-identifying information available to an almost limitless audience. The explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers. Given the information's widespread availability and many permissible uses, the State's asserted interest in physician confidentiality does not justify the burden that §4631(d) places on protected expression.

The State points out that it allows doctors to forgo the advantages of §4631(d) by consenting to the sale, disclosure, and use of their prescriber-identifying information. See §4631(c)(1). It is true that private decisionmaking can avoid governmental partiality and thus insulate privacy measures from First Amendment challenge. See *Rowan v. Post Office Dept.*, 397 U. S. 728 (1970); cf. *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60, 72 (1983). But that principle is inapposite here. Vermont has given its doctors a contrived choice: Either consent, which will allow your prescriber-identifying information to be disseminated and used without constraint; or, withhold consent, which will allow your information to be used by those speakers whose message the State supports. Section 4631(d) may offer a limited degree of privacy, but only on terms favorable to the speech the State prefers. Cf. *Rowan*, *supra*, at 734, 737, 739, n. 6 (sustaining a law that allowed private parties to make “unfettered,” “unlimited,” and “unreviewable” choices regarding their own privacy). This is not to say

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that all privacy measures must avoid content-based rules. Here, however, the State has conditioned privacy on acceptance of a content-based rule that is not drawn to serve the State's asserted interest. To obtain the limited privacy allowed by §4631(d), Vermont physicians are forced to acquiesce in the State's goal of burdening disfavored speech by disfavored speakers.

Respondents suggest that a further defect of §4631(d) lies in its presumption of applicability absent a physician's election to the contrary. Vermont's law might burden less speech if it came into operation only after an individual choice, but a revision to that effect would not necessarily save §4631(d). Even reliance on a prior election would not suffice, for instance, if available categories of coverage by design favored speakers of one political persuasion over another. Rules that burden protected expression may not be sustained when the options provided by the State are too narrow to advance legitimate interests or too broad to protect speech. As already explained, §4631(d) permits extensive use of prescriber-identifying information and so does not advance the State's asserted interest in physician confidentiality. The limited range of available privacy options instead reflects the State's impermissible purpose to burden disfavored speech. Vermont's argument accordingly fails, even if the availability and scope of private election might be relevant in other contexts, as when the statute's design is unrelated to any purpose to advance a preferred message.

The State also contends that §4631(d) protects doctors from "harassing sales behaviors." 2007 Vt. Laws No. 80, §1(28). "Some doctors in Vermont are experiencing an undesired increase in the aggressiveness of pharmaceutical sales representatives," the Vermont Legislature found, "and a few have reported that they felt coerced and harassed." §1(20). It is doubtful that concern for "a few" physicians who may have "felt coerced and harassed" by

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pharmaceutical marketers can sustain a broad content-based rule like §4631(d). Many are those who must endure speech they do not like, but that is a necessary cost of freedom. See *Erznoznik v. Jacksonville*, 422 U. S. 205, 210–211 (1975); *Cohen v. California*, 403 U. S. 15, 21 (1971). In any event the State offers no explanation why remedies other than content-based rules would be inadequate. See *44 Liquormart, Inc. v. Rhode Island*, 517 U. S. 484, 503 (1996) (opinion of Stevens, J.). Physicians can, and often do, simply decline to meet with detailers, including detailers who use prescriber-identifying information. See, e.g., App. 180, 333–334. Doctors who wish to forgo detailing altogether are free to give “No Solicitation” or “No Detailing” instructions to their office managers or to receptionists at their places of work. Personal privacy even in one’s own home receives “ample protection” from the “resident’s unquestioned right to refuse to engage in conversation with unwelcome visitors.” *Watchtower Bible & Tract Soc. of N. Y., Inc. v. Village of Stratton*, 536 U. S. 150, 168 (2002); see also *Bolger, supra*, at 72. A physician’s office is no more private and is entitled to no greater protection.

Vermont argues that detailers’ use of prescriber-identifying information undermines the doctor-patient relationship by allowing detailers to influence treatment decisions. According to the State, “unwanted pressure occurs” when doctors learn that their prescription decisions are being “monitored” by detailers. 2007 Vt. Laws No. 80, §1(27). Some physicians accuse detailers of “spying” or of engaging in “underhanded” conduct in order to “subvert” prescription decisions. App. 336, 380, 407–408; see also *id.*, at 326–328. And Vermont claims that detailing makes people “anxious” about whether doctors have their patients’ best interests at heart. *Id.*, at 327. But the State does not explain why detailers’ use of prescriber-identifying information is more likely to prompt these

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objections than many other uses permitted by §4631(d). In any event, this asserted interest is contrary to basic First Amendment principles. Speech remains protected even when it may “stir people to action,” “move them to tears,” or “inflict great pain.” *Snyder v. Phelps*, 562 U. S. ___, ___ (2011) (slip op., at 15). The more benign and, many would say, beneficial speech of pharmaceutical marketing is also entitled to the protection of the First Amendment. If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it. *Brandenburg v. Ohio*, 395 U. S. 444, 447 (1969) (*per curiam*).

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The State contends that §4631(d) advances important public policy goals by lowering the costs of medical services and promoting public health. If prescriber-identifying information were available for use by detailers, the State contends, then detailing would be effective in promoting brand-name drugs that are more expensive and less safe than generic alternatives. This logic is set out at length in the legislative findings accompanying §4631(d). Yet at oral argument here, the State declined to acknowledge that §4631(d)’s objective purpose and practical effect were to inhibit detailing and alter doctors’ prescription decisions. See Tr. of Oral Arg. 5–6. The State’s reluctance to embrace its own legislature’s rationale reflects the vulnerability of its position.

While Vermont’s stated policy goals may be proper, §4631(d) does not advance them in a permissible way. As the Court of Appeals noted, the “state’s own explanation of how” §4631(d) “advances its interests cannot be said to be direct.” 630 F. 3d, at 277. The State seeks to achieve its policy objectives through the indirect means of restraining

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certain speech by certain speakers—that is, by diminishing detailers’ ability to influence prescription decisions. Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the “fear that people would make bad decisions if given truthful information” cannot justify content-based burdens on speech. *Thompson*, 535 U. S., at 374; see also *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 769–770 (1976). “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.” 44 *Liquormart, supra*, at 503 (opinion of Stevens, J.); see also *Linmark Associates, Inc. v. Willingboro*, 431 U. S. 85, 97 (1977). These precepts apply with full force when the audience, in this case prescribing physicians, consists of “sophisticated and experienced” consumers. *Edenfield*, 507 U. S., at 775.

As Vermont’s legislative findings acknowledge, the premise of §4631(d) is that the force of speech can justify the government’s attempts to stifle it. Indeed the State defends the law by insisting that “pharmaceutical marketing has a strong influence on doctors’ prescribing practices.” Brief for Petitioners 49–50. This reasoning is incompatible with the First Amendment. In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime. Likewise the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.

The defect in Vermont’s law is made clear by the fact that many listeners find detailing instructive. Indeed the record demonstrates that some Vermont doctors view

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targeted detailing based on prescriber-identifying information as “very helpful” because it allows detailers to shape their messages to each doctor’s practice. App. 274; see also *id.*, at 181, 218, 271–272. Even the United States, which appeared here in support of Vermont, took care to dispute the State’s “unwarranted view that the dangers of [n]ew drugs outweigh their benefits to patients.” Brief for United States as *Amicus Curiae* 24, n. 4. There are divergent views regarding detailing and the prescription of brand-name drugs. Under the Constitution, resolution of that debate must result from free and uninhibited speech. As one Vermont physician put it: “We have a saying in medicine, information is power. And the more you know, or anyone knows, the better decisions can be made.” App. 279. There are similar sayings in law, including that “information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.” *Virginia Bd.*, 425 U. S., at 770. The choice “between the dangers of suppressing information, and the dangers of its misuse if it is freely available” is one that “the First Amendment makes for us.” *Ibid.*

Vermont may be displeased that detailers who use prescriber-identifying information are effective in promoting brand-name drugs. The State can express that view through its own speech. See *Linmark*, 431 U. S., at 97; cf. §4622(a)(1) (establishing a prescription drug educational program). But a State’s failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction. “The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not

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the government, assess the value of the information presented.” *Edenfield, supra*, at 767.

It is true that content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech. Indeed the government’s legitimate interest in protecting consumers from “commercial harms” explains “why commercial speech can be subject to greater governmental regulation than noncommercial speech.” *Discovery Network*, 507 U. S., at 426; see also *44 Liquormart*, 517 U. S., 502 (opinion of Stevens, J.). The Court has noted, for example, that “a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there.” *R. A. V.*, 505 U. S., at 388–389 (citing *Virginia Bd.*, *supra*, at 771–772). Here, however, Vermont has not shown that its law has a neutral justification.

The State nowhere contends that detailing is false or misleading within the meaning of this Court’s First Amendment precedents. See *Thompson*, 535 U. S., at 373. Nor does the State argue that the provision challenged here will prevent false or misleading speech. Cf. *post*, at 10–11 (BREYER, J., dissenting) (collecting regulations that the government might defend on this ground). The State’s interest in burdening the speech of detailers instead turns on nothing more than a difference of opinion. See *Bolger*, 463 U. S., at 69; *Thompson, supra*, at 376.

* * *

The capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure. In considering how to protect those interests, however, the State cannot engage in content-based discrimination to advance its own side of a debate.

If Vermont’s statute provided that prescriber-identifying

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information could not be sold or disclosed except in narrow circumstances then the State might have a stronger position. Here, however, the State gives possessors of the information broad discretion and wide latitude in disclosing the information, while at the same time restricting the information's use by some speakers and for some purposes, even while the State itself can use the information to counter the speech it seeks to suppress. Privacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers.

When it enacted §4631(d), the Vermont Legislature found that 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.” 2007 Vt. Laws No. 80, §1(4). “The goals of marketing programs,” the legislature said, “are often in conflict with the goals of the state.” §1(3). The text of §4631(d), associated legislative findings, and the record developed in the District Court establish that Vermont enacted its law for this end. The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.

The judgment of the Court of Appeals is affirmed.

It is so ordered.