

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WILLIAM H. SORRELL, ATTORNEY :

4 GENERAL OF VERMONT, ET AL., :

5 Petitioners : No. 10-779

6 v. :

7 IMS HEALTH INC., ET AL. :

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9 Washington, D.C.

10 Tuesday, April 26, 2011

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:06 a.m.

15 APPEARANCES:

16 BRIDGET C. ASAY, ESQ., Assistant Attorney General,
17 Montpelier, Vermont; on behalf of Petitioners.

18 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
19 Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting Petitioners.

22 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf
23 of Respondents.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning -- this morning in Case
5 10-779, William Sorrell, Attorney General of Vermont, v.
6 IMS Health Incorporated.

7 Ms. Asay.

8 ORAL ARGUMENT OF BRIDGET C. ASAY

9 ON BEHALF OF THE PETITIONERS

10 MS. ASAY: Mr. Chief Justice, and may it
11 please the Court:

12 Under State and Federal law, doctors write
13 prescriptions for their patients to allow them access to
14 drugs that the government deems too dangerous for
15 unrestricted sale. Vermont's law allow doctors to
16 decide whether this information that they're compelled
17 to provide to pharmacies may be used in marketing that
18 is directed at them.

19 Drug companies would certainly like to have
20 this information for marketing, but they have no First
21 Amendment right to demand it, just as they have no right
22 to demand access to the doctor's tax returns, his
23 patient files, or to their competitors' business
24 records.

25 Vermont's law does not regulate the content

1 of the marketing pitches and the advertising that drug
2 companies provide about their products or their
3 competitors' products. It regulates access to this
4 information that's created in a highly regulated regime
5 of prescription drugs and in the context of the
6 doctor-patient relationship.

7 CHIEF JUSTICE ROBERTS: The purpose -- the
8 purpose is to prevent sales representatives from
9 contacting particular physicians, right?

10 MS. ASAY: I disagree, Your Honor. The
11 purpose of the statute is to let doctors decide whether
12 sales representatives will have access to this inside
13 information about what they have been prescribing to
14 their patients. And what -- what the record shows is
15 that what drug companies do is track and monitor doctors
16 very closely to watch when they switch drugs, to watch
17 the trends by which they -- doctors prescribe, by
18 gender, by age. And all that information is used to
19 target and to direct the marketing projects --

20 JUSTICE SCALIA: But they could use it for
21 other purposes, right?

22 MS. ASAY: The pharmaceutical manufacturers?

23 JUSTICE SCALIA: Right.

24 MS. ASAY: Under this statute they may use
25 it for some limited purposes for clinical trials.

1 JUSTICE SCALIA: So what the Chief Justice
2 suggested is right, that the purpose is to stop them
3 from using it in order to market their drugs?

4 MS. ASAY: The purpose is to allow doctors
5 to decide whether the --

6 JUSTICE SCALIA: That's right.

7 MS. ASAY: -- the information should be
8 available.

9 JUSTICE SCALIA: Well, that's right, but
10 that -- that is an impediment to their using it for the
11 marketing of drugs. You're -- you're placing that
12 impediment on it. Isn't that the obvious purpose of it?
13 I mean, it doesn't necessarily make it bad, but -- but
14 let's not quibble over what the purpose is.

15 MS. ASAY: As with any information that
16 the -- that might inform a marketing campaign, not
17 having the information may be -- make their marketing
18 less effective or make it different.

19 JUSTICE SCALIA: That's the purpose. That's
20 the purpose of it, to prevent them from using this
21 information to market their drugs.

22 MS. ASAY: Again, Your Honor, the purpose is
23 to allow doctors to make the decision, and doctors may
24 want to allow its use or not allow its use. But the
25 law --

1 JUSTICE SCALIA: But it's only for that use
2 that you interpose the requirement that the doctor
3 consent. For all other uses you don't require the
4 doctor's consent, right?

5 MS. ASAY: The only -- the consent
6 requirement in this statute goes to the use for
7 marketing and also to the sale by the pharmacy, and that
8 sale may be for other purposes as well, so there --

9 JUSTICE GINSBURG: Ms. Asay, are any of the
10 other purposes, like for insurance purposes, cases where
11 the pharmacist is paid for giving out the prescriber
12 information? Here what they call data miners are paying
13 the pharmacists to get this information. In the case of
14 other, others who have access, do any of them also pay
15 the pharmacists?

16 MS. ASAY: Your Honor, there's two sort of
17 answers to that. The first is that, with respect to
18 pharmacies, the record shows here that the only place
19 that the pharmacies disseminate their information is to
20 the data vendors, and that is a commercial sale, and it
21 is primarily intended for the marketing purpose.
22 Insurers do have information about doctors' prescribing
23 practices and patient information. They have that
24 internally from their own claims and their relationships
25 with doctors and patients. So insurers are not -- do

1 not need to buy the data from pharmacies. They have it
2 without purchasing it.

3 JUSTICE SCALIA: So -- so the data is not
4 private in the sense that the physician who prescribes
5 knows that nobody will know what he is prescribing and
6 how much he prescribes and how often, because there are
7 a lot of people who do know that, right?

8 MS. ASAY: That's correct, Your Honor, there
9 are people who know what the doctor prescribes and what
10 the patient has received.

11 JUSTICE SCALIA: So the only thing it
12 assures the physician, the physician who prescribes, is
13 that he won't be bothered by drug companies who, on the
14 basis of their knowledge of information which other
15 people have, approach him in order to market their
16 drugs? That's basically all it assures the prescribing
17 physician, right?

18 MS. ASAY: It assures the prescribing
19 physician that his information about prescribing
20 practices will not be used for marketing without his
21 consent. It's like the difference --

22 JUSTICE SCALIA: And, and he could achieve
23 the same objective, could he not, by simply refusing to
24 talk to the marketer. When the marketer says, you know,
25 I want to talk to you about a new drug, he says: I

1 don't talk to drug manufacturers and marketers.

2 MS. ASAY: He could not achieve the same
3 result, Your Honor. What the record shows is that
4 doctors are particularly concerned about having access
5 to the best information and the most complete
6 information to make decisions for their patients. And
7 this data, as was discussed by Dr. Granday below, by
8 Kesselheim, by Mr. Erhari, the former sales
9 representative -- they all discussed how the data ends
10 up being used to filter the information that doctors
11 receive. So they receive less --

12 JUSTICE ALITO: One of the Respondents
13 argues that the statute would permit, does permit, the
14 use of this information for what they call a counter-
15 detailing effort. Is that correct?

16 MS. ASAY: It is not correct, Your Honor, to
17 the extent that Respondents have suggested that
18 Vermont's academic detailing program, which is called
19 the evidence-based education program, uses this data.

20 JUSTICE ALITO: That wasn't really my
21 question. My question was does the statute permit it.
22 If Vermont wanted to do that, the University of Vermont
23 or some other entity wanted to do that, would the
24 statute permit it?

25 MS. ASAY: Well, the statute would not

1 permit the sale for that purpose, which is a separate
2 provision of the statute, because academic detailing is
3 not an exemption. They would also -- and then the
4 question of whether the information would be available
5 would default back to the pharmacy board rules, which
6 again --

7 JUSTICE KENNEDY: Could that data be sold to
8 a university for research purposes? The university
9 says: We really want this information to do some
10 research. Could the data be sold to the university for
11 that purpose?

12 MS. ASAY: Yes, Your Honor, the statute does
13 permit it to be sold for health care research --

14 JUSTICE KENNEDY: Could the researcher then
15 have a profile, a data bank, that is very helpful to the
16 general public, and sell that to the general public, to
17 the newspapers and so forth?

18 MS. ASAY: We do not believe so, Your Honor,
19 because of the background regulations that govern this
20 information, including Pharmacy Board Rule 20, which we
21 cited at page 4 of our brief, which also places
22 restrictions on disclosure of patient and practitioner
23 --

24 JUSTICE KENNEDY: No, no. It's sold to the
25 researcher. The researcher then comes up with a design

1 or database that is very fascinating for a number of
2 reasons. Can that researcher sell it to the New England
3 Journal of Medicine?

4 MS. ASAY: I'm not sure if I understand
5 whether the question is about the data itself or results
6 drawn from the data. But to the extent that the statute
7 allows the sale of the data for research, the
8 restriction on the other uses would accompany the sale,
9 and --

10 JUSTICE GINSBURG: Would you clarify --

11 JUSTICE KENNEDY: I still am not - I still
12 am not sure. In my hypothetical, what would happen?

13 MS. ASAY: When the -- if the pharmacy sold
14 --

15 JUSTICE KENNEDY: The pharmacy sells to the
16 researcher.

17 MS. ASAY: Right. If that happened --

18 JUSTICE KENNEDY: The researcher is at the
19 university. The researcher has a data bank or has some
20 results that are very fascinating. The researcher then
21 wants to sell that to the New England Journal of
22 Medicine. What result under the statute?

23 MS. ASAY: The statute would have required
24 the pharmacy to prevent the further dissemination of the
25 data except for health care research.

1 JUSTICE GINSBURG: You answered my question
2 earlier that they don't sell it to anyone else. That's
3 why I was trying to clarify your answer to Justice
4 Kennedy, because you told me the only sale -- the
5 pharmacists, they sell this to the data miners, they do
6 not sell it to the other people. But now you're
7 answering Justice Kennedy's question, yes, they sell it
8 to universities.

9 MS. ASAY: I apologize, Your Honor, if I was
10 not clear. As a factual matter, we know absolutely that
11 the pharmacies do not sell it to researchers. I had
12 understood this to be a hypothetical, if they did. But
13 as a factual matter, they do not.

14 JUSTICE SCALIA: How does it increase the
15 prescribing physician's right of privacy that the data
16 about his prescribing can only be given away but can't
17 be sold? Does that make him feel happier about his
18 privacy?

19 MS. ASAY: What it allows the doctor to do
20 is to avoid an intrusive and invasive marketing
21 practice.

22 JUSTICE SCALIA: He can do that by saying:
23 I don't want to talk to you.

24 MS. ASAY: The doctor cannot -- can shut off
25 any communication and any information from the

1 pharmaceutical companies by slamming the door on the
2 detailers, but that's not necessarily in the interest of
3 doctors or patients. And what this --

4 JUSTICE SCALIA: That may well be, but then
5 just don't tell me that the purpose is to protect their
6 privacy. Now you're arguing a totally different
7 purpose: It makes it easier for the physician to cut
8 off approaches by drug companies that want to sell
9 drugs. If that's the purpose of this statute, it's
10 quite different from protecting his privacy. His
11 privacy isn't protected by saying you can't sell it but
12 you can give it away.

13 MS. ASAY: Your Honor, I think the
14 legislature here was using privacy to refer to the
15 autonomy interest that everyone has to some degree in
16 controlling the flow or the use of information about
17 them. This Court recognized in the Reporters Committee
18 case in the FOIA context that there was a privacy
19 interest in the aggregation of information on an FBI rap
20 sheet.

21 JUSTICE SOTOMAYOR: Counsel, that --
22 assuming there's some form of privacy that relates to
23 not being harassed because there's certainly legislative
24 record of doctors or groups of doctors testifying to
25 feeling harassed by detailers, if Thompson requires a

1 less restrictive method, why does this have to be an
2 opt-in rather than an opt-out? Because isn't an opt-out
3 I call up and say I, don't want you to have this
4 information? So isn't an opt-out less restrictive?

5 MS. ASAY: An opt-out would not protect the
6 privacy interests as much because it would assume that
7 doctors want to consent. I would like to say that here
8 the statute is --

9 JUSTICE SOTOMAYOR: Well, but, given the
10 restrictions on speech, why is that a bad thing?
11 Meaning you don't really intend to tell us that the
12 State couldn't and wouldn't -- just like we got all of
13 that advertising relating to the opt-out on telephone
14 solicitations, virtually every American knew they could
15 do it if they chose. Maybe some didn't, but a vast
16 majority did. You can't really say Vermont's incapable
17 of telling doctors in a mailing or in some public
18 professional magazine, if you want to opt out, here's
19 the number?

20 MS. ASAY: Well, in fact, Your Honor, that's
21 exactly what the State does. Every time that the
22 doctors relicense, which is every 2 years, they get a
23 form and they can make a decision one way or the other
24 on the form that they receive. So it's perfectly
25 tailored to allow the doctors to decide and to not

1 restrict any marketing between a willing listener and a
2 willing speaker.

3 JUSTICE GINSBURG: There's another --
4 there's another purpose that I would like you to comment
5 on, and that is the, the State is interested in
6 promoting the sale of generic drugs and correspondingly
7 to reduce the sale of brand name drugs. And if that's
8 the purpose, why doesn't that run up against what this
9 Court has said that you can't, you can't lower the
10 decibel level of one speaker so that another speaker, in
11 this case the generics, can be heard better?

12 MS. ASAY: The State does have an interest
13 in reducing health care costs here. What's important
14 about this statute is the mechanism by which it allows
15 doctors to decide what information and what kind of
16 marketing they want, and it's different because what
17 it's about is access to information in this highly
18 regulated area. It's the difference between a doctor
19 who prescribes a nonprescription drug and a patient who
20 can take that information, walk into the pharmacy with a
21 \$20 bill and leave with their medication, and no one has
22 learned anything about what the doctor prescribed for
23 the patient, about the patient's concerns, or the
24 doctor's concerns.

25 CHIEF JUSTICE ROBERTS: You want to lower --

1 you want to lower your health care costs, not by direct
2 regulation, but by restricting the flow of information
3 to the doctors, by, to use a pejorative word, but by
4 censoring what they can hear to make sure they don't
5 have full information, so they will do what you want
6 them to do when it comes to prescribing drugs, because
7 you can't take, I gather, direct action and tell them,
8 you must prescribe generics, right?

9 MS. ASAY: I disagree, Your Honor, for --
10 for two reasons. The statute does not limit any of the
11 information that doctors receive. So the State has not
12 in any way intervened in the information that the
13 pharmaceutical manufacturers can provide to the doctors.
14 They are free --

15 CHIEF JUSTICE ROBERTS: You're restricting
16 their -- you're -- you're making it far more burdensome
17 for the manufacturers to reach their intended audience,
18 right? It's as if I want -- there's a demonstration in
19 town, all right? They need a permit to hold the
20 demonstration. They get the permit. I want to hold a
21 counter-demonstration, and you're saying it doesn't make
22 any difference whether I know where their demonstration
23 is going to be or not?

24 MS. ASAY: I disagree, Your Honor. The --
25 the ability of drug companies to locate the doctors that

1 are interested in their products is -- is not something
2 that calls for this data. It's very --

3 JUSTICE KENNEDY: Well, I think maybe you're
4 being -- you were the one that made the argument that
5 the State has an interest in reducing health care costs.
6 I assume that is by selling generics. And the Chief
7 Justice asked you a question: In effect, aren't you
8 doing this by regulating speech? And you say no, you
9 disagree. I don't understand that answer that you gave
10 to the Chief Justice.

11 MS. ASAY: It's not a restriction on speech
12 because it's a restriction only on the access to the
13 information that the pharmaceutical manufacturers would
14 like to use to inform their advertising, and it's only
15 in play if the doctors have objected to the use.

16 JUSTICE SCALIA: The information necessary
17 for effective speech is what you're saying, right?

18 MS. ASAY: Your Honor, it's --

19 JUSTICE SCALIA: It only restricts the
20 information necessary for really effective speech?

21 MS. ASAY: No, I disagree. For
22 pharmaceutical manufacturers to approach --

23 JUSTICE SCALIA: They're looking for it
24 because it -- it identifies those doctors that they
25 would like to approach with their information which may

1 say, you know, our product is much better than the
2 generic; our quality control is -- you know, whatever.
3 There are arguments on both sides of those things. And
4 you are making it more difficult for them to speak by
5 restricting access to information that would enable
6 their speech to be most effective.

7 MS. ASAY: And -- their speech would be more
8 effective if they had access to patient information, if
9 they had access to their competitors' trade secrets.
10 There's certainly other information available that they
11 would like to use in marketing, but is not available to
12 them by law, and it -- it's our position that in the
13 same way they do not have a right to demand access to
14 information about the doctor's prescribing practices
15 without his consent.

16 If there are no further questions --

17 CHIEF JUSTICE ROBERTS: Well, we'll -- we'll
18 give you -- we seem to have questions. We'll give you
19 additional time for rebuttal, so you don't -- don't
20 worry that we're cutting into that.

21 But you're making a judgment about how
22 their -- whether or not their speech will be as
23 effective or not. Don't you think they're the ones who
24 are entitled to make that judgment? It doesn't mean
25 that you're right or wrong. It just means that we would

1 not rely on your determination that it is -- their
2 speech is just as effective. They're the ones doing the
3 speaking and they think it's not.

4 MS. ASAY: Again, Your Honor, I don't think
5 we disagree that the -- the pharmaceutical manufacturers
6 consider this information useful and helpful in
7 targeting their marketing campaigns. The issue in this
8 case is whether their right trumps the right of the
9 doctor.

10 And if you go back to -- to the source of
11 this information, to the underlying transaction, the
12 doctor prescribing the drug for a patient and the
13 pharmacy dispensing it, the doctor and the pharmacy have
14 the same stake in that transaction. And until this
15 point the pharmacy has had complete control over whether
16 the information gets sold into this commercial stream
17 for marketing use. And all the statute does is put the
18 doctor on the same -- in the same place as the pharmacy
19 in terms of deciding what further use can be made of the
20 information.

21 JUSTICE ALITO: Can I ask you this question?
22 Do you agree with the Solicitor General's interpretation
23 of the statute?

24 MS. ASAY: Yes, we do, Your Honor.

25 JUSTICE ALITO: Did you make that argument

1 below? Is that a change in your position?

2 MS. ASAY: It is not a change in our
3 position. It is not an issue that was pressed below,
4 because of the facts on the ground. There is only one
5 transaction here. There's a sale from the pharmacies to
6 the data vendors for these commercial purposes.

7 JUSTICE KENNEDY: But isn't this
8 inconsistent with what you told the court of appeals?

9 MS. ASAY: In our court of appeals brief,
10 for example, at page 29 to 30, we describe that sentence
11 of the statute as restricting both the sale of the
12 information and the use for marketing. And on page --

13 JUSTICE KENNEDY: So you -- you're
14 representing to us that you told the court of appeals
15 the statute should be interpreted as the SG is
16 interpreting it here; that's your representation?

17 MS. ASAY: It is my representation that --
18 that we did not say anything contrary to that, Your
19 Honor; and that it really was not pressed below. So I
20 would not say that we, in our briefs below, fully laid
21 out the position as the SG has, but we did not disagree
22 with it, either.

23 JUSTICE SCALIA: Well, that's an important
24 position. If you -- if that indeed was the meaning of
25 the statute, you should have told the court of appeals,

1 don't you think? Is it enough to say we didn't say no?
2 You should have said yes. You should have said this is
3 what it means.

4 MS. ASAY: And again, Your Honor, if I could
5 point also to pages 47 to 48 of our -- of our Second
6 Circuit brief, we did frame the issue as whether there
7 was a right to buy and sell prescription records. The
8 issue has always been in the case. But again the facts
9 on the ground, there has only been this one transaction,
10 and that -- that really was what we were litigating
11 about.

12 JUSTICE ALITO: Well, the court of appeals
13 on page 22a of the petition, summarizing what it
14 understood you to be arguing, says: "The statute only
15 imposes restrictions on the sale or use of such data for
16 marketing or promoting a prescription drug." That was
17 an inaccurate characterization of your -- the Second
18 Circuit did not understand your argument?

19 MS. ASAY: Again, Your Honor, I -- I don't
20 think that the argument was really framed clearly below.
21 But we did not --

22 JUSTICE ALITO: Could you please -- could
23 you please answer yes or no? If you're changing your
24 position, you're changing your position. It seems to me
25 this is an important point, and if the Second Circuit

1 based its decision on a misunderstanding of Vermont's
2 interpretation of its own statute, I would think you
3 would at least bring that out in the petition for
4 rehearing.

5 MS. ASAY: I -- I understand, Your Honor.

6 JUSTICE ALITO: And you did not?

7 MS. ASAY: We did not.

8 JUSTICE KAGAN: And could you explain how
9 you're going to interpret your statute going forward and
10 apply your statute going forward?

11 MS. ASAY: Yes, Your Honor. We interpret
12 the first clause of the statute to be a restriction on
13 sale, except for sale for the exemptions that are set
14 forth in the statute. And the other provisions of the
15 statute: The second provision is a restriction on the
16 use for marketing; and the third provision is a
17 restriction that would apply to pharmaceutical
18 manufacturers who have obtained the data for permissible
19 purposes and -- and need to abide by the continuing
20 restriction on the use. And the consent provision would
21 apply to each of those parts of the statute.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: We'll afford you 5
24 minutes for rebuttal.

25 Mr. Kneedler.

1 ORAL ARGUMENT OF EDWIN S. KNEEDLER,
2 ON BEHALF OF THE UNITED STATES,
3 AS AMICUS CURIAE, SUPPORTING the PETITIONERS

4 MR. KNEEDLER: Mr. Chief Justice, and may it
5 please the Court:

6 The Vermont statute protects important
7 interests that the Vermont legislature could recognize
8 in physician autonomy and control over information that
9 concerns them. When a patient brings a prescription to
10 a pharmacy, after that point the patient information is
11 protected under HIPAA and under State law. That leaves
12 two primary actors in that transaction -- the physician
13 and the pharmacy. Both are professionals, both are
14 subject to regulation under a comprehensive, closed
15 system for the distribution of drugs.

16 Prior to the time this statute was enacted,
17 the pharmacy had complete control over the disposition
18 of that information. What this statute does is put the
19 physician, the prescriber, on an equal footing with
20 respect to the pharmacy -- with the pharmacy, with
21 respect to the use of the information about that
22 prescriber, but only with respect to the use of the
23 information in marketing to that prescriber. It is a
24 narrowly drawn statute that enables the physician, not
25 the State, enables the physician to determine whether

1 the information that he was required to furnish in
2 connection with the prescribing of a drug will be used
3 in the marketing of products to that -- to that
4 physician.

5 CHIEF JUSTICE ROBERTS: So he's required to
6 provide it, but he would be required to provide it quite
7 apart from the government regulation, right? I mean,
8 the pharmacy needs to know who to make the prescription
9 out to.

10 MR. KNEEDLER: Well, it's because it's a
11 prescription drug. Federal and State law require a
12 prescription for a prescription drug. But if this was
13 not a prescription drug, a person can go into a drug
14 store and purchase a nonprescription drug just like any
15 other item in a drug store, not have to furnish the
16 name, not have to furnish any of this information. So
17 the information is furnished because of the requirement
18 of a prescription which is of long standing.

19 So this statute is really of a piece with a
20 -- with a number of other types of regulations to
21 protect -- protect privacy, for example, the Driver's
22 Privacy Protection Act, where a person is required to
23 furnish certain information in order to get a driver's
24 license. That statute prohibits the commercial
25 exploitation of that information.

1 JUSTICE SCALIA: But it doesn't protect his
2 privacy. I mean, the -- his name and -- and the extent
3 of his prescriptions can be given away for a lot of
4 uses. It doesn't protect his privacy.

5 MR. KNEEDLER: It -- it --

6 JUSTICE SCALIA: It protect -- it enables
7 him to protect himself against drug companies that want
8 to talk to him.

9 MR. KNEEDLER: And that's -- the term
10 "privacy" is used to embrace that sort of autonomy and
11 control over information. That's -- that's the way in
12 which we're --

13 JUSTICE SCALIA: All right, so long as I
14 know that's what you're talking about. When you say
15 "privacy," you don't mean the prescriber's concern that
16 people will know that he prescribed certain drugs. He
17 doesn't care about that, right.

18 MR. KNEEDLER: Well, he certainly does --

19 JUSTICE SCALIA: That is not protected by
20 this law.

21 MR. KNEEDLER: He -- he certainly -- he
22 certainly does care about that. And the --

23 JUSTICE SCALIA: It's not protected by this
24 law.

25 MR. KNEEDLER: Well, there are other --

1 there are other principles that protect it. The --
2 the -- the State's pharmacy regulations require
3 pharmacies to maintain the confidentiality --

4 JUSTICE SCALIA: I'm talking about what this
5 law protects. It does not protect his privacy in that
6 sense. It protects his privacy in the sense that it
7 enables him to avoid having to say go away when a
8 salesman for the -- for the -- for the drug company
9 comes, right?

10 MR. KNEEDLER: Yes, well -- it -- it -- it's
11 a lesser version of that, a less restrictive version of
12 that, because it doesn't put either the pharmaceutical
13 company or the physician in the position of an
14 all-or-nothing situation.

15 What -- what the law allows is the physician
16 to -- to say, you can -- you can come visit me, but I
17 don't want you to use this information that has
18 otherwise been kept confidential under pharmacy rules to
19 market to me. That enables the physician to choose to
20 have what the physician may choose -- may see as a more
21 objective presentation. It puts --

22 JUSTICE SCALIA: You mean it doesn't even
23 protect his privacy in the sense that it enables him not
24 to have to say go away. It doesn't even protect that.
25 They -- he -- he will still have to say that --

1 MR. KNEEDLER: If he -- if he doesn't --

2 JUSTICE SCALIA: -- if the drug company
3 approaches him without having this information.

4 MR. KNEEDLER: If -- if he doesn't want to
5 talk to the -- to the detailer at all.

6 JUSTICE SCALIA: All right.

7 MR. KNEEDLER: But what this allows for --
8 physicians see value to this, but what this allows for
9 is for the physician to say: I don't want my
10 information to be used by this drug company in a way --
11 sort of inside information about my overall prescribing
12 practices. I would -- I would prefer to have a
13 presentation made to me without the information about
14 me, but information about the drugs that might be --

15 JUSTICE ALITO: What about the doctor who
16 didn't want the information distributed to anybody,
17 academic researchers, anybody? Does the law give
18 that -- give the doctor that option?

19 MR. KNEEDLER: It -- it does not, but
20 that's -- that's common in -- in -- in confidentiality
21 statutes. For example, HIPAA, which protects the
22 personal information of -- of persons in the health care
23 system, that information can be used and frankly would
24 have to be used, for example, for paying insurance
25 claims. The insurer needs to know what prescriptions or

1 what other medical services might have been provided.

2 The same thing with respect to insurers
3 controlling their costs, because there are formularies
4 and preferred drug lists. And so, people in that
5 position necessarily have to be able to use prescriber
6 information in order to find out whether -- whether
7 something was suitably prescribed under the preferred
8 drug list. So, it -- it's --

9 CHIEF JUSTICE ROBERTS: I thought our
10 precedents made -- indicated that it's problematic for
11 the State to make a determination about what uses
12 information can be -- to what uses information can be
13 put, particularly when it's an interested party as it is
14 here.

15 MR. KNEEDLER: Well, what the statute does
16 is allow the physician -- or the prescriber to make that
17 choice. It's information about the prescriber that the
18 prescriber was required to furnish in connection with
19 issuing a prescription.

20 CHIEF JUSTICE ROBERTS: I thought you told
21 me that -- I thought you told me that this doesn't
22 protect physician privacy to the extent of saying this
23 information can't be used for academic purposes even if
24 you, the physician, don't want it to be used for those
25 purposes?

1 MR. KNEEDLER: Right, and -- and -- and
2 again, that -- that's true in a variety of -- of --

3 CHIEF JUSTICE ROBERTS: So the physician
4 doesn't get to decide for what uses the information --

5 MR. KNEEDLER: Not -- not -- not altogether,
6 but that doesn't mean that there is no confidentiality
7 interest or no autonomy or control interest, because a
8 physician practicing medicine knows that his patient's
9 insurer is going to --

10 CHIEF JUSTICE ROBERTS: What if the statute
11 -- I'm sorry. What if the statute said this information
12 can be used for any number of purposes, except not for
13 anybody who is going to criticize the State of Vermont?

14 MR. KNEEDLER: No, that would not be -- that
15 would not be permissible. It would not be germane to --

16 CHIEF JUSTICE ROBERTS: This information --
17 this information cannot be used for any purposes -- can
18 be used for any purposes except a purpose that will make
19 things more expensive for the State of Vermont?

20 MR. KNEEDLER: Well, I mean, that's --
21 that's a very broad goal. I mean, here -- here what the
22 State has done is -- is put the control in the
23 physician, who is a critical player in the -- in the
24 delivery system. So it's narrowly tailored to the
25 physician's use of the information about him in -- in

1 connection with how -- how he will be approached.

2 It's also important to recognize that this
3 is very different from the general advertising cases
4 this Court has had under the commercial speech doctrine.
5 This is not public advertising. This I think falls into
6 the camp of Dun and Bradstreet, where you have a -- a
7 targeted limited business audience, a -- a -- really
8 one-on-one. It's not -- it's not radio or television
9 advertising. It's one-on-one advertising in which the
10 public interest is -- is much more limited, and it's
11 one-on-one with respect to the very person whose
12 information was first furnished by the physician to the
13 pharmacy, so --

14 JUSTICE KENNEDY: Well, that's because the
15 pharmaceutical company deems this to be the most
16 efficient. What you're saying is that the State can
17 prohibit the most efficient sort of speech, whereas if
18 it just had general dissemination which didn't serve any
19 particular purpose, that would be all right.

20 MR. KNEEDLER: But it --

21 JUSTICE KENNEDY: -- but if it becomes --
22 becomes focused and important and effective, then the
23 State can prohibit it.

24 MR. KNEEDLER: It's allowing the other
25 person to that representation visit to decide whether

1 information about him, not other information; about him
2 -- will be used in that situation. It's very much like
3 a don't -- a "do not call" statute or a "do not mail"
4 statute, in which people have the right to say: Do not
5 contact me for commercial information, except this one
6 is more limited. This one says --

7 CHIEF JUSTICE ROBERTS: What if you say --

8 MR. KNEEDLER: -- do not use information
9 about me to contact me.

10 CHIEF JUSTICE ROBERTS: Let's say I don't
11 like to be bothered by people knocking on my door by
12 saying, sign this petition. Can I -- to protect my
13 privacy interests, can I prevent that as a general
14 matter?

15 MR. KNEEDLER: No, but you could post a sign
16 saying "no solicitations," and I think under this
17 Court's cases that -- that sort of protection --

18 JUSTICE SCALIA: Can the State enact a law
19 that, say, petition signers cannot approach somebody
20 unless he has given his prior consent?

21 MR. KNEEDLER: No, but I think the --

22 JUSTICE SCALIA: Of course not.

23 MR. KNEEDLER: But I think the State
24 could -- could enact a law that said if someone posts a
25 sign saying do not -- do not approach me, do not knock

1 on my door for this purpose --

2 JUSTICE SCALIA: Doctors can do that if they
3 don't want to talk to the --

4 MR. KNEEDLER: If they don't want to talk at
5 all. But this -- but this -- this is -- this is
6 addressed to a more limited problem and therefore is
7 more narrowly tailored, which is that it -- what --
8 what -- what the pharmaceutical company can't do without
9 the physician's consent is to -- is to use information
10 that was gathered about that very individual to approach
11 him.

12 It puts -- it puts the physician on an equal
13 footing with the pharmacy at the -- at the beginning of
14 the -- of the stream of commerce, it puts the physician
15 on -- on an equal footing with the pharmacy or the
16 pharmaceutical company at the other end by saying: I'm
17 going to keep that information about me to myself if
18 you'll -- if you are approaching me.

19 JUSTICE GINSBURG: Mr. Kneedler, in most of
20 our commercial speech cases there has been a commodity.
21 Here it's a record maintained by the pharmacist. We
22 think of a pharmacist as selling the brand name or
23 generic name, but whose list is this? Whose record is
24 it? Is it the pharmacist's record the way goods, stock
25 in trade, would be?

1 MR. KNEEDLER: May I answer -- answer the
2 question?

3 CHIEF JUSTICE ROBERTS: Yes.

4 MR. KNEEDLER: It is -- it is in the
5 possession of the pharmacy. But what the State has done
6 is to legitimately recognize that the physician has a
7 stake in some of the information on that list, and in
8 that respect the list is a -- is a commodity. The State
9 is regulating its commodity aspect, not its
10 communicative or expressive aspect, in -- in this
11 statute.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Goldstein.

14 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

15 ON BEHALF OF THE RESPONDENTS

16 MR. GOLDSTEIN: Mr. Chief Justice, and may
17 it please the Court, good morning:

18 You will want to have available you to the
19 red brief of IMS Health, Incorporated, which in its
20 appendix reproduces the statutes and findings. And the
21 reason we have to look at the statutes and findings in
22 this argument is because the case can't be decided as a
23 matter of absolutes.

24 We know that statutes like HIPAA do protect
25 private information in third parties' hands and they are

1 constitutional. On the other hand, we also know that a
2 governmental restriction on the use of information could
3 be used to distort the marketplace of ideas. So the
4 case is going to have to be decided somewhere in the
5 middle. And in order to do that, we're going to have to
6 figure out where in the middle Vermont ended up.

7 Now, in doing that I want to clarify I think
8 three things in the questioning of the first half hour.
9 They are about what the practice are -- practices are at
10 issue here; what this statute does, actually what's the
11 rule; and why is it that Vermont did it.

12 So as to Justice Ginsburg's question, are
13 there other sales, the State gave you the correct answer
14 that the pharmacy companies don't sell to researchers,
15 but that's somewhat misleading. They sell to us, and we
16 sell to the researchers, we sell to the government, the
17 intermediaries like IMS Health. That's because we're
18 the aggregator. So it is not correct to say that the
19 only sale is for pharmaceutical marketing.

20 Second, on the important question of what
21 this statute --

22 JUSTICE GINSBURG: I asked whether there are
23 sales to any other entities.

24 MR. GOLDSTEIN: Yes, and I said the State
25 gave you the accurate answer. But the implication of

1 the answer I think was not quite correct, because there
2 are sales for purposes other than for marketing.

3 JUSTICE KAGAN: But if this was a general
4 sale provision, then that would include those sales that
5 you're talking about?

6 MR. GOLDSTEIN: It would not, because the
7 point would then -- and I'll come to the statute in a
8 minute, because all the exemptions -- right? So
9 there's -- there's a debate that Justice Alito focused
10 on about what does the statute mean, and I do want to
11 turn to that in a second.

12 But to jump ahead to your question, Justice
13 Kagan, assume that it's a general sale prohibition.
14 Then there are all the exemptions and the exemptions
15 take all of these other uses out from the sale
16 prohibition: for academic research, to go to the
17 government, and for clinical trials, for health care
18 research. Those are all exempted from the general sale
19 prohibition.

20 So let's do turn, if you don't mind, to what
21 it is the statute actually does. It is an important
22 point. First, I am going to come to our brief, but I
23 just want to read something. For your later reference
24 I'm going to have been reading from page 42 of PhRMA's
25 brief, and this is what -- what the State told the

1 Second Circuit, quote: "Data vendors may continue to
2 acquire, edit, and sell this information to whomever
3 they choose so long as that person does not use the
4 information for detailing."

5 In turn, the Second Circuit --

6 JUSTICE KENNEDY: What was your page again?

7 MR. GOLDSTEIN: Sorry. That's going to be
8 from the PhRMA brief, the other red brief at page 42, at
9 the top of the page.

10 So, to whomever they choose, so long as that
11 person does not use the information for detailing. The
12 Second Circuit said: Okay, you're the State; here's how
13 we understand the statute. The statute only imposed --
14 quoting again, this is from 22A, it's the language that
15 Justice Alito quoted -- the statute only imposes
16 "restrictions on the sale or use of such data for
17 marketing or promoting a prescription drug." So that's
18 what they understood the statute to do.

19 Now, then the question becomes why did they
20 do it? This was -- Justice Scalia, you tried really
21 hard to get them just to admit, let's just acknowledge
22 what the point is here. And the State tries to deny
23 that the purpose here is to limit the information
24 getting into the hands of the doctor. We don't have to
25 rely on the State's lawyers. The State legislature was

1 very helpful here.

2 So if we go to the appendix of the IMS brief
3 now, page 1a, okay. Right at the top, the State says
4 their goal is -- this is finding number 1 at the bottom
5 of it -- containing health care costs.

6 Then in finding number 2 they explain why
7 they did it: "There is a strong link between
8 pharmaceutical marketing activities, health care
9 spending and the health of Vermonters."

10 Then finding number 3: "The goals of
11 marketing programs are often in conflict with the goals
12 of the State."

13 And my favorite, obviously, is number 4:
14 "The marketplace for ideas on medicine safety, the State
15 determined, was operating in conflict with the goals of
16 the State." They didn't like the marketplace of ideas.

17 Now, it is true, we acknowledge, that
18 another thing the State wanted to do was to give the
19 doctors some more control. It's in -- it's in -- there
20 is an opt-out option.

21 But can I just take you to how the State
22 explained what it was doing? That's just going to be on
23 page 7. Now, the State's lawyer and the Solicitor
24 General have explained to you that they believe that
25 doctors were concerned only with marketing and only with

1 marketing to them. That's not true. Finding 29. We
2 have to go all the way to number 29 to get to this goal
3 of the State: "Health care professionals in Vermont" --
4 I'm on page 7: "Health care professionals in Vermont
5 who write prescriptions for their patients have a
6 reasonable expectation that the information in that
7 prescription, including their own identity and that of
8 the patient, will not be used for purposes other than
9 the filling and processing of the payment for that
10 prescription."

11 It's not just about pharmaceutical
12 marketing. The doctors say -- we all love this; there's
13 stuff about us in our daily lives that we wish was
14 entirely private. The doctors here said: Hey, it would
15 be great for us if this information, we had complete
16 control over it. Doctors also would love if medical
17 malpractice judgments weren't broadly known. There are
18 all kinds of government records they would prefer not to
19 be out into the public sphere.

20 But then we ask ourselves, all right -- and
21 that's why I asked you to have this brief available --
22 what did the State do? Did the State in fact enact a
23 general privacy provision? Is it like HIPAA or instead
24 is all that the State did here target the use for
25 marketing, while it allows the use of the same data for

1 the opposite message by insurers and also by the
2 government?

3 So here's the statute. It appears on page 9
4 of the appendix. I want to start with subsection A
5 because the State helpfully reiterates its goals here.
6 The second half of this paragraph: "The State sought to
7 ensure costs are contained in the private health care
8 sector, as well as for State purchasers of prescription
9 drugs, through the promotion of less costly drugs and
10 ensuring prescribers received unbiased information."
11 That's what they're trying to do. They're trying to
12 say: We would like the drug companies to have a harder
13 time finding the doctors while the insurance companies
14 and the State have an easy time finding the doctors.

15 CHIEF JUSTICE ROBERTS: But there is another
16 interest here besides the State's concern about health
17 care costs, and that is the physician's privacy
18 interests.

19 MR. GOLDSTEIN: Yes.

20 CHIEF JUSTICE ROBERTS: You can sell this
21 information to whomever you want, right?

22 MR. GOLDSTEIN: Yes.

23 CHIEF JUSTICE ROBERTS: You could sell to it
24 a journalist who wants to expose physicians in a
25 particular area who prescribe a lot of a particular

1 medication.

2 MR. GOLDSTEIN: Yes.

3 CHIEF JUSTICE ROBERTS: So the public can
4 discern well, this is the guy who is treating these
5 people; we don't like these people, so we're going to
6 Pickett outside his clinic.

7 MR. GOLDSTEIN: Sure.

8 CHIEF JUSTICE ROBERTS: Now, nothing
9 prevents you from doing that, right?

10 MR. GOLDSTEIN: That's correct.

11 CHIEF JUSTICE ROBERTS: Well, don't you
12 think that's protecting physicians' privacy, to prevent
13 that from happening?

14 MR. GOLDSTEIN: Oh, I apologize. We're
15 allowed to do it before and after the statute, is my
16 point. Remember, what the statute does is -- and this
17 was the debate that Justice Alito tried to point us to
18 about what the statute actually does and the Second
19 Circuit, what it understood the statute to mean. And I
20 should also say the cert petition didn't say that there
21 was a problem with that.

22 Vermont picked out one thing. It said:
23 Look, when drug companies can find the doctors easily,
24 they can persuade the doctors to use more expensive
25 drugs. We pay a lot for drugs. We would prefer that

1 not happen, so we're going to make it harder. And the
2 State will have its counter-detailing program, it will
3 have its drug utilization review program, and insurers
4 will advocate for less expensive drugs. All the other
5 uses are still permitted.

6 If Vermont were serious about protecting the
7 doctors' privacy, as opposed to kind of a, a right of
8 publicity, a control over information about them, it
9 wouldn't have all these exemptions; it would have a
10 provision that says this is private information.

11 JUSTICE BREYER: All right, suppose --
12 suppose that the Federal Trade Commission after a 3-year
13 study of pharmaceutical manufacturing practices, decides
14 -- finds the following. They say: We have found that
15 when drugs are sold to doctors it is very important that
16 the doctor find out what's curable, what the drug does,
17 how much it costs; and by the way, all those things
18 apply no matter who the doctor is. Who the doctor is,
19 is irrelevant. And therefore marketing that focuses
20 upon who the doctor is and what his previous practices
21 were is irrelevant and harmful and false; and therefore
22 we find that it is a false and deceptive practice under
23 section 5 of the Federal Trade Commission Act to use the
24 following prior practices of the doctor in selling him
25 new drugs, because it's irrelevant and because it's

1 false and because it's harmful. And they enact that as
2 a -- as a rule of the Federal Trade Commission.

3 Does the Constitution of the United States
4 forbid them, having made those findings in detail, from
5 controlling advertising to prevent what they have
6 determined is a false and misleading practice?

7 MR. GOLDSTEIN: I do know -- I don't know,
8 but I do know the First Amendment applies to the rule.

9 JUSTICE BREYER: Oh, nobody says it doesn't
10 apply. The question --

11 MR. GOLDSTEIN: They -- they do. I've got a
12 couple people --

13 JUSTICE BREYER: I'm not interested in what
14 they're saying for the present purposes. I'm
15 interested, surprisingly enough, in what I'm saying.

16 (Laughter.)

17 JUSTICE BREYER: So therefore I would like
18 to know the answer.

19 MR. GOLDSTEIN: Right.

20 JUSTICE BREYER: This is a highly regulated
21 industry.

22 MR. GOLDSTEIN: Yes.

23 JUSTICE BREYER: If the Federal Trade
24 Commission's specialists and experts in false and
25 deceptive advertising concludes that this is a false and

1 deceptive practice, are you going to say that the
2 Constitution of the United States forbids them from
3 doing that?

4 MR. GOLDSTEIN: I am, but I'm also going to
5 say that I don't have to win that argument to win this
6 case.

7 JUSTICE BREYER: Well -- well, when you say
8 you are, is there any precedent that says they can't
9 regulate false and misleading practice? Of course you
10 see where I'm going.

11 MR. GOLDSTEIN: I do.

12 JUSTICE BREYER: If they can, why can't
13 Vermont?

14 MR. GOLDSTEIN: Sure. If it's actually
15 false and misleading. You can't just --

16 JUSTICE BREYER: Well, they said it was
17 biased --

18 MR. GOLDSTEIN: I --

19 JUSTICE BREYER: -- and they -- they have
20 made a study of it in the legislature and that's their
21 conclusion.

22 MR. GOLDSTEIN: I don't think that the
23 government can say that because speech is so influential
24 it is false and biased. But I will say, Justice Breyer,
25 in my defense that --

1 JUSTICE SCALIA: I don't take "biased" to
2 mean false. "Biased" means one-sided.

3 MR. GOLDSTEIN: Yes, that's exactly right.
4 And what we like --

5 JUSTICE SCALIA: You state the true facts
6 only on one side and not the other.

7 MR. GOLDSTEIN: Right.

8 JUSTICE SCALIA: This case has not been
9 argued as a case restricting false advertising, has it?

10 MR. GOLDSTEIN: No, it's a case about
11 restricting true advertising.

12 Justice Breyer, can I just make one point
13 really quick? And that is, you dissented in Thompson v.
14 Western States and your dissent in that case says these
15 are drugs, the compounded drugs that have not been
16 approved by the FDA, and I'm very concerned that you're
17 evading the FDA regulatory requirements about truthful
18 advertising.

19 These are the opposite drugs. These are the
20 drugs that all the messages that are being conveyed here
21 have been preapproved by the FDA. This is truthful and
22 accurate speech, and the State only wants one side of
23 the debate to get out.

24 JUSTICE BREYER: That's where I was going.

25 MR. GOLDSTEIN: Okay.

1 JUSTICE BREYER: I chose an example that's
2 beyond your case.

3 MR. GOLDSTEIN: That's why it's called a
4 hypothetical.

5 JUSTICE BREYER: But that's why I wondered
6 how you would respond to that. So -- I thought that was
7 one that was going to be obviously constitutional, but
8 you're going to stop me there. So -- so what I want to
9 say --

10 MR. GOLDSTEIN: Yes.

11 JUSTICE BREYER: -- is how is this
12 different?

13 MR. GOLDSTEIN: Sure.

14 JUSTICE BREYER: And I suppose I don't know
15 the extent to which this does or does not promote
16 unbiased information from going to the doctors, and
17 isn't that a matter for the doctors themselves and the
18 Vermont legislature rather than this Court to decide?

19 MR. GOLDSTEIN: Sure. A couple of things
20 about that. First, as I said, these are messages that
21 have been cleared by the experts. The FDA has to review
22 all the detailing communications.

23 Second, the doctors do get to say: I don't
24 want you to come visit me. They do that all the time.
25 My dad's a doctor; he doesn't visit with detailers.

1 This is instead a rule about whether you can talk
2 about -- about someone, not talk to someone.

3 The drug companies and the intermediaries
4 are talking about drug -- about prescriber practices,
5 and you can decide who you want to try and approach.
6 There's nothing alleged to be false or misleading.

7 Third, the way the First Amendment works in
8 the marketplace of ideas that so upsets Vermont is that
9 both sides get to tell their story, right? The thing
10 that is supposed to be biased here is that the drug
11 companies have too much money. That is not a basis for
12 restricting speech.

13 The way it works is if the message is
14 accurate, as the FDA has determined it to be, the drug
15 companies can go make their pitch. Vermont can come
16 along and make the opposite pitch. Terrific. So can
17 insurance companies.

18 But what you can't do is have a rule that
19 says one side is going to have a much harder time
20 getting to their audience.

21 JUSTICE SOTOMAYOR: Mr. Goldstein, I -- I
22 understand your argument and I have a difficulty. Today
23 with the Internet and with computers, there's virtually
24 no privacy individuals have. Any transaction you do
25 could be spread across the world instantaneously, and

1 for the longest time catalogs would sell your name and
2 address to other catalogers, and if you bought one
3 product from one company, you would get a thousand
4 catalogs from 50 million others.

5 Today the industry is policing that, in part
6 to get the State not to intercede, by giving you an
7 opt-out option. And so, if you're a consumer who
8 doesn't want a million catalogs, the industry is giving
9 you the right to opt out, so they don't sell your
10 address.

11 If there is, as I see, some interest that
12 the State legitimately has in protecting that part of
13 the public who says, I entered into this transaction, I
14 didn't really want you to sell my name, I didn't want
15 you to do other things with it, all I did was this
16 transaction, why can't the State say -- there is a
17 difference in my mind between an opt-in and opt-out?
18 Why can't the State say, your desire to enter a
19 transaction in which you're doing just that transaction
20 and not others is something we can protect?

21 MR. GOLDSTEIN: It can. And let me explain
22 why it is that that rule -- and let me typify it for
23 you. There is a pending bill in the Congress called the
24 McCain-Kerry Consumer Protection Act and it does what
25 you're talking about. It says we're not just going to

1 leave it to the industry; we're going to have a set of
2 governmental rules.

3 Let me distinguish that bill from what goes
4 on under Act 80. What that says is that if you are a
5 consumer and you engage in a transaction, you have the
6 right to opt out of any unauthorized uses, because it's
7 just between you and the business, right?

8 So there are three differences between that
9 and this. The first is the structure of the statute.
10 That's not what this statute does. This statute says
11 every use of the information is just fine, except this
12 one, this one that allows one speaker who we don't
13 really like to go out and convey its message.

14 The second difference is the public
15 importance of the speech involved. What that consumer
16 information would be used for is to make some random
17 consumer pitch to you or about you. This is information
18 about lifesaving medications where the detailer goes in
19 and talks about double blind scientific studies that are
20 responsible for the development of drugs that have
21 caused 40 percent of the increase in the lifespan of the
22 American public. So there's a tremendous difference in
23 the public importance.

24 The third is the fundamentally different
25 nature of the privacy interest. Unlike your consumer

1 transaction over the Internet, this is a doctor. You
2 can call up any doctor's office and find out what their
3 prescribing practice is. It's part of their business.

4 Imagine the following conversation, if you
5 will, and that is, and -- and if you want to look for a
6 place in the common law where this comes from, it would
7 be section 652D of the Restatement (Second) of Torts,
8 what things are private and what aren't. It asks
9 whether a reasonable person would be outraged.

10 If one doctor were to say to another one,
11 you know what, Dr. Smith told people that three out of
12 four times I prescribe Aciphex for -- as a proton pump
13 inhibitor, would anybody be outraged about that? No.
14 But if you knew that the -- the company that you bought
15 from on the Internet was selling that information or if
16 they were giving away private medical information, you
17 would genuinely be outraged.

18 So, Justice Sotomayor, the reason I started
19 this argument about it has to end up in the middle is we
20 know that statutes like that have to be constitutional.
21 At the same time, we know that the government can use
22 controls over information to really distort speech. So
23 the question is, what happens in this statute? And this
24 statute has a structure that's not intended to protect
25 privacy. It would look totally different.

1 JUSTICE SOTOMAYOR: I read in one of the
2 briefs that pharmacies were not permitting either
3 patients and/or doctors to opt out; that if a patient
4 came in and said I don't want my doctor's information
5 sold, or a doctor has called the pharmacy and said, I
6 don't want you to sell my information, the pharmacies
7 are not respecting those limitations.

8 MR. GOLDSTEIN: Well --

9 JUSTICE SOTOMAYOR: So why don't I read this
10 statute as simply doing what the consumer statutes are
11 doing, which is giving people some control outside of
12 the limited transaction that they're engaged in?

13 MR. GOLDSTEIN: Sure. A couple of things.
14 Remember, the patients have nothing to do with this.
15 The State doesn't give any control to the patient. That
16 would be true before or after. So we're talking about
17 the doctors.

18 I -- I did concede, when I read you finding
19 29 at page 7 of the appendix, that this does give a
20 little bit more control to the doctor. I mean, it just
21 does.

22 JUSTICE GINSBURG: May I stop you?

23 MR. GOLDSTEIN: Yes.

24 JUSTICE GINSBURG: You say that this statute
25 doesn't give the patient any control. But the patient

1 is already taken care of by the Federal law. You can't
2 -- I mean, the patient is protected. The question is
3 whether the physician should be as well.

4 MR. GOLDSTEIN: I agree, Justice Ginsburg.
5 Justice Sotomayor in her question to me said, why don't
6 I read this as giving -- she said that they aren't
7 giving patients options about what happens with this
8 prescription information. My only point was this
9 statute doesn't change it.

10 You're quite right that our -- our position
11 is no threat to the protection of private health
12 information, which is reasonably regarded as extremely
13 confidential. So, on the question of whether it give
14 some greater control, it does. But what -- the thing
15 you have to focus on here is the line that it draws in
16 when it gives greater control is a line that's intended
17 to discriminate against a speaker.

18 You have to look, take -- I'll give you an
19 example of this, Cincinnati v. Discovery Network. The
20 City of Cincinnati came to you and said, look, we've
21 eliminated the commercial news racks, and these people
22 who want to sell their commercial stuff should use
23 something other than news racks. We're targeting the
24 blight that comes from commercial news racks. This
25 Court said: Look, you can't redefine your interests to

1 reflect your statute. You can't --

2 JUSTICE BREYER: Could the Federal Power --
3 the Federal Energy Regulatory Commission say, we want
4 you to collect certain information about who is using
5 what natural gas and give it to the fire department?
6 It's for the fire department in case of emergency, and
7 what we don't want to have happen is it's used to stove
8 manufacturers to sell homeowners gas stoves.

9 MR. GOLDSTEIN: Sure.

10 JUSTICE BREYER: They could do that?

11 MR. GOLDSTEIN: Yes. That's LAPD v. United
12 Reporting.

13 JUSTICE BREYER: All right, fine. If they
14 could do that, why can't they do this?

15 MR. GOLDSTEIN: Because the key point in
16 LAPD v. United Reporting is that it's in the hands of
17 the government. Let me -- the fact --

18 JUSTICE BREYER: Well, this is
19 information -- see, this is information that starts off
20 being collected because the government requires it to be
21 collected. So it's there for that reason. And the
22 government says we want you to get this information,
23 it's done for this purpose, so, you know, other
24 purposes, and we don't want it to be used for commercial
25 advertising purposes. That's what they say they've done

1 in this statute.

2 MR. GOLDSTEIN: That's what they say.
3 They're just not right.

4 The --

5 (Laughter.)

6 MR. GOLDSTEIN: This information -- I would
7 direct you to the amicus brief -- you don't have to pull
8 it out right now, but for later. The brief of the
9 National Association of Chain Drugstores, if you just
10 make a reference, on pages 10 to 11 collects the history
11 of how this information has been gathered. And they
12 make the point that the Court did in the first 30
13 minutes, that of course the doctor is going to put his
14 name on the prescription. We have to be able to call
15 the doctor and say: I can't read your handwriting.

16 JUSTICE KENNEDY: Suppose you had a statute
17 in which the pharmacy cannot give the information or
18 sell the information to anybody; it must remain with the
19 pharmacy.

20 MR. GOLDSTEIN: Yes.

21 JUSTICE KENNEDY: A copy of the prescription
22 must be given to the State of Vermont. The State of
23 Vermont then has the same restrictions that this statute
24 has. That would be LAPD.

25 MR. GOLDSTEIN: That would be LAPD. If

1 the -- it would be almost LAPD.

2 JUSTICE KENNEDY: And what -- and I want to
3 know what your answer would be. If LAPD is correct --

4 MR. GOLDSTEIN: Right.

5 JUSTICE KENNEDY: Then what ruling would we
6 have to make in my hypothetical case?

7 MR. GOLDSTEIN: Sure. If it's in the hands
8 of the -- so let me just make sure I am on the same
9 page. I am going to answer your question directly.

10 The pharmacy can't disclose it directly to
11 anyone else. The government gets a copy of it. That
12 does not make it LAPD. If the pharmacy was government-
13 owned, that would be LAPD. Now, let me answer your
14 hypothetical. Right? LAPD, it was an arrest record, it
15 was in the hands only of the State. The Court said:
16 Look, this is the State's information. Justice
17 Ginsburg's concurrence says: It's like a subsidy, the
18 decision whether to give it out or not.

19 Now, in your hypothetical, which is it is in
20 a private hand, but it is banned for any other use --
21 that would be a real privacy statute. I think that it
22 would still be unconstitutional, but it would be much
23 closer.

24 The reason it might be unconstitutional is
25 twofold. First, that the privacy interest in it I think

1 is not very significant, because it's how the doctor
2 runs his or her business, and second it would still
3 allow the discrimination. If you were convinced in your
4 hypothetical that what Vermont was trying to do is what
5 it said it was doing here in its findings, and that is,
6 to make it harder for the drug companies to reach the
7 audience and make it easier for the insurance company
8 and the government to reach their audience, Greater New
9 Orleans Broadcasting, which involves a ban on private
10 casino speech but not tribal and governmental speech,
11 says discriminating against speakers like that is very
12 troubling. So that's I think how your hypothetical --

13 JUSTICE SOTOMAYOR: So what you're saying I
14 think to Justice Kennedy is answering my earlier
15 question by saying the State cannot constitutionally
16 stop the spread of information. So if the State said to
17 the pharmacy, all you can do is fill the prescription,
18 that's what doctors think pharmacies are doing, and
19 that's all you can do, you're saying that's
20 unconstitutional?

21 MR. GOLDSTEIN: I am saying that that's
22 unconstitutional. I am also saying that the reason is
23 very specific to this kind of information, that is that
24 it would allow speaker discrimination, and I am also
25 saying most emphatically that is not this case. That

1 would be a much closer case. It would look much more
2 like a real privacy statute.

3 What I would take from the hypothetical is
4 not the lesson we should lose -- and you should never
5 take that lesson --

6 (Laughter.)

7 MR. GOLDSTEIN: -- but the -- but instead
8 the lesson that that's what's so different about this
9 statute. This statute, as in all the language quoted
10 earlier, says Katie bar the door, do whatever you want
11 to do with this stuff, just don't do something we
12 disagree with when it comes to the message.

13 JUSTICE SOTOMAYOR: So you're really -- you
14 are really hinging your argument on the discrimination
15 aspect --

16 MR. GOLDSTEIN: I am --

17 JUSTICE SOTOMAYOR: -- that --that drug
18 companies or detailers are being treated differently
19 than any other user of this information?

20 MR. GOLDSTEIN: That is a principal part of
21 our argument. I did say before in describing the
22 Kerry-McCain bill, that there were three things, not
23 just the discrimination, but the greater public interest
24 of the -- the detailer speech and the lower privacy
25 interest, so I wouldn't throw those out.

1 Now can I just preempt an argument that my
2 friend from the Vermont -- State of Vermont is going to
3 say in her rebuttal? And that, is she's going to come
4 and say that, look, the insurance companies are actually
5 paying for the drugs. All their -- this exception is
6 not one that's about advocacy, and I just want to make
7 sure we all know ahead of time because I don't get a
8 surrebuttal, that that's not accurate.

9 So if -- if you still have the IMS brief
10 with you at page 53 this time, so at page 53 the first
11 paragraph is about the State's own use of this
12 information for a variety of purposes. There is -- the
13 reply brief for the State introduces a debate about
14 today whether they are using the NPI data for
15 counter-detailing. There is no dispute that they use it
16 for other State programs, like the drug utilization
17 program -- that's the quotes in the first paragraph.
18 But the better paragraph is going to be -- it's the
19 second paragraph, it starts, the State -- "the statute's
20 parallel formulary compliance exemption." And this
21 paragraph talks about advocacy by the insurance
22 companies. So it's not just that the drug -- insurance
23 company says to the doctor, I'll pay for -- \$5 for this
24 drug, but the insurance companies take PI data under the
25 exemption in the statute, go to doctors and say we

1 really think this cheaper drug would be better. That is
2 straight-out speaker discrimination.

3 So we quote Kolassa: "Insurance companies
4 are using physician-identifiable information to call
5 physicians to try to get them to comply with
6 formularies, to try to get them to change their
7 prescribing in a way that may or may not be in the
8 patient's best interests. In just" -- this is a further
9 quote -- "In just the last couple of years there has
10 been an amazing increase in the amount of information
11 provided by payers, insurers that will send scientific
12 documents to physicians" -- I've rolled over to page
13 53 -- "will call when physicians are prescribing too
14 much or too little of a product and provide them with
15 information." It goes on and on -- "virtually several
16 times a day."

17 So that is the message that I would take
18 away from the argument, and that is we are emphatically
19 in favor of the constitutionality of HIPAA, of the
20 McCain-Kerry bill, the things that concerned you. You
21 have to decide this case in the middle about what
22 Vermont actually did, and it was unbelievably candid
23 about what it was trying to do. It said the marketplace
24 of ideas doesn't work for us, and so it designed a
25 statute -- and you can decide this case very narrowly on

1 the ground that what Vermont did is it went too far is
2 in just saying we're not actually trying to protect
3 privacy; what we're trying to do is give the doctors
4 control when it suits our own best interests.

5 I do want to preempt one other last
6 argument, and that is the suggestion that this isn't
7 paternalistic at all. Right? We just let the doctors
8 decide. But the State's goal, what the State is trying
9 to do, is paternalistic. The reason the State picked
10 this one exemption, the reason it picked between these
11 speakers, is because it doesn't want this message to get
12 to the doctors. And if you can keep --

13 JUSTICE BREYER: It used to be true there
14 was something called a regulated industry.

15 MR. GOLDSTEIN: Yes.

16 JUSTICE BREYER: And selling was within
17 activity among many.

18 MR. GOLDSTEIN: Sure.

19 JUSTICE BREYER: And there were lots of
20 regulations that could be imposed upon selling.

21 MR. GOLDSTEIN: Sure, right.

22 JUSTICE BREYER: Are you saying that all
23 those should be reexamined?

24 MR. GOLDSTEIN: I -- I thankfully am not.
25 Here are the -- here are the cases. This was the

1 argument that was made and rejected in Virginia Board of
2 Pharmacy which was about a pharmacy rule. They said
3 that it would be unprofessional. Then the Solicitor
4 General in the person of Mr. Kneedler came you to in
5 Thompson v. Western States and said we need to stop this
6 compounded drug marketing because this is heavily
7 regulated; this is a closed market, and the Court said,
8 I'm sorry, no. The nature of a marketplace of ideas is
9 you get to say your piece and the other side gets to say
10 their piece. The FDA heavily regulates this area, the
11 information is perfectly accurate and it's incredibly
12 valuable.

13 CHIEF JUSTICE ROBERTS: You would have no
14 objection I take it, if there were not the academic
15 exception and if the State didn't -- didn't push its own
16 contrary program?

17 MR. GOLDSTEIN: We would have much less of
18 an objection, and that's no accident. Let me just say
19 this is not a flaw in the drafting. The State really
20 wanted to push its counter message, and thankfully so.
21 This government has a real interest here. Insurers have
22 a real interest here, but so does the other side of the
23 debate, and what the State doesn't get to do is just
24 pick sides and prevent the debate from happening.

25 CHIEF JUSTICE ROBERTS: How would -- if you

1 were truly concerned about physician privacy --

2 MR. GOLDSTEIN: Yes. Yes.

3 CHIEF JUSTICE ROBERTS: You didn't want
4 people to know that this physician prescribed this drug
5 more often because it tells you a lot about his
6 practice --

7 MR. GOLDSTEIN: Sure. Sure.

8 CHIEF JUSTICE ROBERTS: -- that he may not
9 want known, how would you -- how would you write this
10 statute?

11 MR. GOLDSTEIN: You would take Justice
12 Kennedy's hypothetical, and I don't think the Court has
13 to confront whether such a statute would be
14 constitutional because it would be very different.

15 CHIEF JUSTICE ROBERTS: Would you remind me
16 what Justice Kennedy said?

17 (Laughter.)

18 MR. GOLDSTEIN: Sure. He said the rule is
19 the pharmacy can't give it to anybody.

20 CHIEF JUSTICE ROBERTS: Okay. Who's --

21 JUSTICE KAGAN: How about the pharmacy can't
22 sell it to anybody?

23 MR. GOLDSTEIN: I don't -- I don't
24 understand why that protects privacy. That protects
25 against commercialization, but I don't think the

1 government has nearly as much interest in
2 commercialization as it does in actual privacy. Section
3 652D of the restatement of torts doesn't talk about the
4 outrage of being able to use -- we have a capitalist
5 economy, and we sell newspapers and books and that sort
6 of thing. Commercialization isn't a bad thing. It's a
7 question of whether privacy is genuinely protected.

8 JUSTICE SOTOMAYOR: Could you do it --

9 JUSTICE KENNEDY: It's not exactly not this
10 case but just in the abstract, do we have a rule that if
11 there are two statutes, A, the statute is passed for a
12 bad purpose, B, the statute is not passed for a bad
13 purpose, if the statute is otherwise the same, are they
14 both unconstitutional or just one and why? And what
15 case do I look to other than maybe Church of Lukumi?

16 MR. GOLDSTEIN: You look to -- yes, we
17 win -- Thompson v. Western States. Remember what the
18 government's argument there was: If you allow the
19 marketing of compounded drugs that are not FDA approved
20 you will evade the very important FDA regulatory
21 program. That was a perfectly important rationale, and
22 the Court said but it also has the purpose of keeping
23 information out of the hands of doctors. It's
24 unconstitutional.

25 I'll give you another example. Grosjean,

1 Minneapolis Star and -- Raglan -- those are cases about
2 taxing the instruments of communication. So a tax on
3 newsprint, a tax on ink; and the Court said we're not
4 worried about your bad motive, you have a very important
5 rationale in trying to raise revenue, that's a perfectly
6 valid purpose; but what you're also doing is you're
7 picking out the press and you're making it harder to
8 speak; it's unconstitutional.

9 CHIEF JUSTICE ROBERTS: This -- this is, Mr.
10 Kneedler explained this is the government's information.
11 Why can't -- you wouldn't have to have it if it weren't
12 prescription. It was the fact that it has to be
13 prescribed that requires this information. The
14 government frequently controls the use to which
15 information can be put. It makes me file a tax return,
16 and it doesn't allow, you know, dissemination of that.
17 It restricts it.

18 MR. GOLDSTEIN: Right.

19 CHIEF JUSTICE ROBERTS: And presumably it
20 could say that if an accountant prepares my tax return,
21 that accountant can't sell it, either.

22 MR. GOLDSTEIN: Right.

23 CHIEF JUSTICE ROBERTS: How is this any
24 different?

25 MR. GOLDSTEIN: Oh, okay. Two pieces to the

1 puzzle. The first is why can't I demand it from the
2 IRS? Okay? And second is going to be why can't the
3 accountant give it away? The first one is LAPD, and
4 it's the same true -- the same thing is true of campaign
5 finance reports. The government has plenary authority;
6 when you give information to the government, what the
7 government then does with the information.

8 The important lesson to be derived from LAPD
9 is that nine members of the Court seemingly agreed --
10 and I defended the statute in that case -- nine members
11 of the court in that case agreed that if this had been
12 private reports rather than the government's reports,
13 then the statute would have been unconstitutional.

14 The reason your tax preparer can't give it
15 away, the reason I can't give away attorney-client
16 secrets, the reason that the government is going to be
17 able to tell Internet companies that they can't give
18 await the consumer information is that it's really
19 private. But what if, instead, the government had a
20 rule that says tax preparers can't give out tax
21 information when it will encourage people to protest
22 against their taxes? But if it will encourage people to
23 comply with their taxes, it's perfectly fine. You can't
24 draw lines that are intended to discriminate against
25 speakers. That's the main principle of our case.

1 Thank you very much.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Ms. Asay, you have five minutes.

4 REBUTTAL ARGUMENT OF BRIDGET C. ASAY

5 ON BEHALF OF THE PETITIONERS

6 MS. ASAY: I would like to begin with the
7 point that my friend was making about the use of the
8 information by insurance companies. Insurers are not
9 similarly situated to pharmaceutical manufacturers.
10 Insurers receive information directly from doctors and
11 parents in the ordinary course of their business and
12 they use it as part of providing and paying for care to
13 patients.

14 And when my friend described the fact that
15 insurers do that with doctors' information as speaker
16 discrimination, I would like to point out that -- the --
17 not only the record but the examples, for example, that
18 PhRMA points to on page 126 their brief show that
19 insurers have patient information for that purpose as
20 well. HIPAA allows those uses of both patient and
21 prescriber information to manage benefits.

22 So, to argue that pharmaceutical
23 manufacturers are being discriminated against if they
24 don't have access to the same health care information
25 that we provide to our insurance companies would --

1 would begin to raise serious questions about a statute
2 like HIPAA. And that -- that just highlights that in
3 this area of -- of private information and information
4 control that many of these statutes are structured in
5 such a way that there are expected and intended and
6 permissible uses of information, and other uses for
7 which people are allowed to have control over the
8 further use of their information. And here we're
9 talking about the control allotted to doctors.

10 We place an enormous amount of trust in
11 doctors to make the right treatment decisions for their
12 patients. Part of their ability to make that, those
13 decisions depends on the information that they receive.
14 And what doctors have said to the Vermont legislature
15 and to the Court in this case is that many of them find
16 this practice objectionable and that it is not helpful
17 to them or to their patients to have their information
18 monitored for this marketing purpose. And all that they
19 have asked for is the right to object. And I would like
20 to --

21 CHIEF JUSTICE ROBERTS: Ms. Asay, I want to
22 give you the chance to respond to a point that was
23 highlighted by your friend, which is the fourth
24 legislative finding, which does seem to say that the
25 State is doing this because it doesn't like an imbalance

1 in the marketplace of ideas.

2 MS. ASAY: Thank you, Your Honor.

3 The findings, first of all, have to be taken
4 as they were adopted, which was in support of not this
5 statute even as it was written, but as a much larger
6 bill that contained many sections, including a provision
7 that created the evidence based education program which
8 is a -- a clinical -- a -- a program to provide
9 voluntary education to doctors, and to the statute as it
10 used to be written, which -- which not only had this
11 provision for the doctors' choice and the use of the
12 information, but also mandated that pharmaceutical
13 detailers provide information affirmatively as part of
14 the marketing process.

15 CHIEF JUSTICE ROBERTS: Do we have -- were
16 there -- were there findings with respect to the statute
17 as enacted?

18 MS. ASAY: There are no findings that
19 accompany the amendment that resulted in this statute.

20 And to -- to return to, I think Justice
21 Kennedy's point from earlier, the statute, I think, has
22 to stand or fall on the restriction that it -- that it
23 allows for doctors. The Court, for example, in O'Brien
24 discussed the fact that striking down a statute because
25 the court disagreed with the record would -- would

1 simply mean that the legislature could adopt the same
2 statute again on a different record.

3 We would say here that what -- what's -- the
4 question before the Court really is, may doctors have
5 this opportunity to control the use of their information
6 about -- their nonpublic information about their
7 prescribing practices as a marketing tool or not, and
8 that -- that -- that should be the -- the focus of the
9 Court's inquiry.

10 I would also like to just return to the
11 point that -- that I believe I was making earlier that
12 this statute is so different from the cases in which the
13 Court has considered restrictions on the direct
14 commercial advertising and the provision of information
15 to the public.

16 This is an entirely nonpublic commercial
17 transmission of data. It -- it starts with a private
18 commercial transaction, it's a private commercial
19 exchange between the data vendors and the pharmacies.
20 It's used in a way that it is never disclosed publicly,
21 never included in the advertising message. There's no
22 restriction here on the information that's provided to
23 doctors. The truthful information that the FDA permits
24 to be provided about prescription drugs. And there's no
25 restriction on any exchange between a willing listener

1 and a willing speaker.

2 I believe my friend suggested that -- that
3 anyone could call a doctor's office and find out by
4 asking what the doctor prescribed. Pharmaceutical
5 manufacturers can do that as well. And if the doctor
6 volunteers that information, there can be that exchange
7 of information. The statute does not restrict it.

8 CHIEF JUSTICE ROBERTS: I take it there's --
9 there's -- it's against the law for a physician to say I
10 want you to fill this prescription in a particular
11 place, a particular pharmacy because I know that
12 pharmacy doesn't sell the information. They can't do
13 that, can they?

14 MS. ASAY: I don't believe they can, Your
15 Honor.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Counsel. The case is submitted.

18 (Whereupon, at 11:14 a.m., the case in the
19 above-entitled matter was submitted.)

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