Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

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

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

No. 10–779. Argued April 26, 2011—Decided June 23, 2011

Pharmaceutical manufacturers promote their drugs to doctors through a process called "detailing." Pharmacies receive "prescriber-identifying information" when processing prescriptions and sell the information to "data miners," who produce reports on prescriber behavior and lease their reports to pharmaceutical manufacturers. "Detailers" employed by pharmaceutical manufacturers then use the reports to refine their marketing tactics and increase sales to doctors. Vermont's Prescription Confidentiality Law provides that, absent the prescriber's consent, prescriber-identifying information may not be sold by pharmacies and similar entities, disclosed by those entities for marketing purposes, or used for marketing by pharmaceutical manufacturers. Vt. Stat. Ann., Tit. 18, §4631(d). The prohibitions are subject to exceptions that permit the prescriber-identifying information to be disseminated and used for a number of purposes, *e.g.,* "health care research." §4631(e).

Respondents, Vermont data miners and an association of brand-name drug manufacturers, sought declaratory and injunctive relief against state officials (hereinafter Vermont), contending that §4631(d) violates their rights under the Free Speech Clause of the First Amendment. The District Court denied relief, but the Second Circuit reversed, holding that §4631(d) unconstitutionally burdens the speech of pharmaceutical marketers and data miners without adequate justification.

Held:

1. Vermont's statute, which imposes content- and speaker-based burdens on protected expression, is subject to heightened judicial scrutiny. Pp. 6–15.

Syllabus

(a) On its face, the law enacts a content- and speaker-based restriction on the sale, disclosure, and use of prescriber-identifying information. The law first forbids sale subject to exceptions based in large part on the content of a purchaser's speech. It then bars pharmacies from disclosing the information when recipient speakers will use that information for marketing. Finally, it prohibits pharmaceutical manufacturers from using the information for marketing. The statute thus disfavors marketing, *i.e.,* speech with a particular content, as well as particular speakers, *i.e.*, detailers engaged in marketing on behalf of pharmaceutical manufacturers. *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 426; *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 658. Yet the law allows prescriber-identifying information to be purchased, acquired, and used for other types of speech and by other speakers. The record and formal legislative findings of purpose confirm that §4631(d) imposes an aimed, content-based burden on detailers, in particular detailers who promote brand-name drugs. In 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. Heightened judicial scrutiny is warranted. Pp. 8–11.

(b) Vermont errs in arguing that heightened scrutiny is unwarranted. The State contends that its law is a mere commercial regulation. Far from having only an incidental effect on speech, however, §4631(d) imposes a burden based on the content of speech and the identity of the speaker. The State next argues that, because prescriber-identifying information was generated in compliance with a legal mandate, §4631(d) is akin to a restriction on access to government-held information. That argument finds some support in *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, but that case is distinguishable. Vermont has imposed a restriction on access to information in private hands. *United Reporting* reserved that situation—*i.e.,* "a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." *Id.,* at 40. In addition, the *United Reporting* plaintiff was presumed to have suffered no personal First Amendment injury, while respondents claim that §4631(d) burdens their own speech. That circumstance warrants heightened scrutiny. Vermont also argues that heightened judicial scrutiny is unwarranted because sales, transfer, and use of prescriber-identifying information are conduct, not speech. However, the creation and dissemination of information are speech for First Amendment purposes. See, *e.g.*, *Bartnicki* v. *Vopper*, 532 U. S. 514, 527. There is no need to consider Vermont's request for an exception to that rule. Section 4631(d) imposes a speaker- and content-based burden on protected expression, and that

circumstance is sufficient to justify applying heightened scrutiny, even assuming that prescriber-identifying information is a mere commodity. Pp. 11–15.

2. Vermont's justifications for §4631(d) do not withstand heightened scrutiny. Pp. 15–24.

(a) The outcome here 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. To sustain §4631(d)'s targeted, content-based burden on protected expression, Vermont must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. See *Board of Trustees of State Univ. of N. Y. v. Fox,* 492 U. S. 469, 480–481. Vermont contends that its law (1) is necessary to protect medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship, and (2) is integral to the achievement of the policy objectives of improving public health and reducing healthcare costs. Pp. 15–17.

(b) Assuming that physicians have an interest in keeping their prescription decisions confidential, §4631(d) is not drawn to serve that interest. Pharmacies may share prescriber-identifying information with anyone for any reason except for marketing. Vermont might have addressed physician confidentiality through "a more coherent policy," *Greater New Orleans Broadcasting*, *supra*, at 195, such as allowing the information's sale or disclosure in only a few narrow and well-justified circumstances. But it did not. Given the information's widespread availability and many permissible uses, Vermont's asserted interest in physician confidentiality cannot justify the burdens that §4631(d) imposes on protected expression. It is true that doctors can forgo the law's advantages by consenting to the sale, disclosure, and use of their prescriber-identifying information. But the State has offered only a contrived choice: Either consent, which will allow the doctor's prescriber-identifying information to be disseminated and used without constraint; or, withhold consent, which will allow the information to be used by those speakers whose message the State supports. Cf. *Rowan* v. *Post Office Dept.*, 397 U. S. 728. Respondents suggest a further defect lies in §4631(d)'s presumption of applicability absent an individual election to the contrary. Reliance on a prior election, however, would not save a privacy measure that imposed an unjustified burden on protected expression. Vermont also asserts that its broad content-based rule is necessary to avoid harassment, but doctors can simply decline to meet with detailers. Cf. *Watchtower Bible & Tract Soc. of N. Y., Inc.* v. *Village of Stratton*, 536 U. S. 150, 168. Vermont further argues that detailers'

Syllabus

use of prescriber-identifying information undermines the doctor-patient relationship by allowing detailers to influence treatment decisions. But if pharmaceutical marketing affects treatment decisions, it can do so only because it is persuasive. Fear that speech might persuade provides no lawful basis for quieting it. Pp. 17–21.

(c) While Vermont's goals of lowering the costs of medical services and promoting public health may be proper, §4631(d) does not advance them in a permissible way. Vermont seeks to achieve those objectives through the indirect means of restraining certain speech by certain speakers—*i.e.,* by diminishing detailers' ability to influence prescription decisions. But "the fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech. *Thompson* v. *Western States Medical Center*, 535 U. S. 357, 374. That precept applies with full force when the audience—here, prescribing physicians—consists of "sophisticated and experienced" consumers. *Edenfield* v. *Fane*, 507 U. S. 761, 775. The instant law's defect is made clear by the fact that many listeners find detailing instructive. Vermont may be displeased that detailers with prescriber-indentifying information are effective in promoting brand-name drugs, but the State may not burden protected expression in order to tilt public debate in a preferred direction. Vermont nowhere contends that its law will prevent false or misleading speech within the meaning of this Court's First Amendment precedents. The State's interest in burdening detailers' speech thus turns on nothing more than a difference of opinion. Pp. 21–24.

630 F. 3d 263, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, ALITO, and SOTOMAYOR, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined.