No. 98-678

In the Supreme Court of the United States

OCTOBER TERM, 1998

LOS ANGELES POLICE DEPARTMENT, PETITIONER

v.

UNITED REPORTING PUBLISHING CORPORATION

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the First Amendment prohibits California from providing that the personal addresses of crime victims and arrested suspects, collected and maintained in its law enforcement records, will be released to third parties only for certain specified purposes, and in particular only on the condition that the addresses "not be used directly or indirectly to sell a product or service."

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INTEREST OF THE UNITED STATES

Federal law provides for public access to federal government records under a variety of circumstances. See, *e.g.*, 5 U.S.C. 552 (1994 & Supp. III 1997) (Freedom of Information Act); 2 U.S.C. 438 (1994 & Supp. III 1997) (Federal Election Campaign Act of 1971); 5 U.S.C. App. 105 (1994 & Supp. III 1997) (Ethics in Government Act of 1978); 42 U.S.C. 1306 (Social Security Act); 5 C.F.R. 2634.603; 32 C.F.R. 84.21; 32 C.F.R. Pt. 1293, App. D; 45 C.F.R. 205.50; 45 C.F.R. 706.24; 47 C.F.R. 0.460. Each such provision places some restrictions on public access, and some contain "commercial purpose" restrictions similar to the one at issue in this case. See, *e.g.*, 2 U.S.C. 438 (1994 & Supp. III 1997); 5 U.S.C. App.

105(c)(1). Federal law also restricts the conditions under which state authorities may release certain information, including names and addresses, for commercial or other purposes. 18 U.S.C. 2721 (Driver's Privacy Protection Act of 1994); 42 U.S.C. 1306a (Social Security Act); see *Reno* v. *Condon*, petition for cert. pending, No. 98-1464. The United States accordingly has a strong interest in the proper analysis of the validity of such restrictions under the First Amendment.

STATEMENT

1. Before 1996, California law generally required each state and local law enforcement agency to "make public * * * the full name, current address, and occupation of every individual arrested by the agency." Cal. Gov't Code § 6254(f) (West 1995). Effective July 1, 1996, the state legislature amended Section 6254(f) to permit release of the addresses of those arrested, and of crime victims, only where the requester declares, under penalty of perjury, both that "the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator," and that "[a]ddress information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals." § 6254(f)(3) (West Supp. 1999). These restrictions apply only to current address information; they do not affect the availability of other information, such as the name, birth date, occupation, and physical description of an arrested individual or the factual circumstances of the arrest. See § 6254(f)(1) (West Supp. 1999).

Petitioner Los Angeles Police Department creates and maintains arrest records, and makes them publicly available in accordance with state law. Pet. App. 25a. Respondent United Reporting Publishing Corporation is a private

service that seeks to provide its customers with periodic reports of the names and addresses of individuals recently arrested by petitioner and other California law enforcement agencies. *Ibid.* Respondents' patrons include attorneys, insurance companies, drug and alcohol counselors, religious counselors, and driving schools, which may use the addresses supplied by respondent "for many purposes, including sending free literature to arrestees offering legal, drug, and alcohol counseling, cost information, and [information on] statutory and regulatory deadlines and other information concerning the crimes charged." Br. in Opp. 5.

2. Respondent sued petitioner and others in federal district court seeking declaratory and injunctive relief under 42 U.S.C. 1983, contending that the restrictions California has placed on the release of address information from arrest and crime reports violate the First Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Pet. App. 25a-26a; see C.A. E.R. 1-9 (Complaint). The district court granted summary judgment in favor of respondent, holding that the State's restrictions violate the First Amendment. Pet. App. 10a-23a.

The district court recognized that "the First Amendment does not provide plaintiff with a blanket constitutional right of access to arrestee addresses," and that "the state could constitutionally prevent everyone from having access to this information." Pet. App. 14a. The court concluded, however, that by "mak[ing] all arrestee information public, but then limit[ing] access only [on the part of] those who plan to use arrestee addresses in commercial speech," the State has "[f]unctionally * * * [imposed] a limitation on commercial speech." *Ibid.* In the court's view, because "[t]he government is the only source of this information and by statute is disseminating it to everyone except commercial users"

(*ibid.*), the State's restrictions amount to "a content-based indirect limitation on commercial speech which implicates the First Amendment" (*id.* at 16a). The court accordingly turned to the four-part test adopted by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), for use in analyzing restrictions on commercial speech. Pet. App. 16a-22a.

Applying that test, the court first noted that there was no contention that respondent's "proposed use of [address] information" would be misleading or unlawful. Pet. App. 16a. The court also accepted the substantiality of two pertinent governmental interests: mitigating the fiscal and administrative burden of processing information requests, and protecting recently arrested individuals from having the addresses they provided to the police used to subject them to commercial solicitation in their homes. *Id.* at 17a. The court rejected, however, the argument that the commercial-use restriction imposed by Section 6254(f)(3) would advance those interests in a "direct and material way." *Id.* at 18a; see *id.* at 17a-22a. For essentially the same reasons, the court also held that there was no "reasonable fit" between the State's asserted ends and the means it had chosen to accomplish them. *Id.* at 22a.

With respect to fiscal interests, the court thought it "doubtful" that the address restriction would save the government money, because agencies would still have to provide address information to authorized noncommercial users, and other information to all users. Pet. App. 18a. "The simple omission of addresses [for commercial requesters] will not minimize * * * agency expenses." *Ibid.* With regard to the State's interest in "protecting the privacy and tranquility of its residents," the court recognized (*ibid.*) that in *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 630 (1995), this Court upheld a prohibition on direct-mail solicitations by lawyers within 30 days of an accident, on the basis of the State's

interest in protecting "the personal privacy and tranquility of * * * citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma." The district court distinguished *Florida Bar*, however, on the grounds that California's restriction on commercial use of addresses is "permanent," and that in this case an arrested person's interest in obtaining "immediate legal assistance * * * so heavily outweighs any concern that arrestees may find such attorney solicitations offensive that the [privacy] justification borders on the disingenuous." Pet. App. 19a. The court found it "hard to see how direct mail solicitations invade the privacy of arrestees," who are free to throw them away, and it noted that Section 6254(f)(3) would allow "potentially much more pervasive invasions of privacy," such as having an arrested person's name and address "published in newspapers, broadcast on television, and/or obtained by an employer or even an enemy." *Id.* at 21a.

3. The court of appeals affirmed. Pet. App. 24a-36a.[1] After briefly discussing "the protection provided under the First Amendment to what has been commonly designated 'commercial' speech" (*id.* at 26a-27a), the court rejected (*id.* at 27a-29a) respondent's contention that "it uses arrestee [address] information to engage in fully-protected non-commercial speech, the regulation of which is subject to strict scrutiny" (*id.* at 27a). To the contrary, the court reasoned that respondent's "speech would be considered commercial under either a broad or a narrow definition," because respondent "sells arrestee information to clients; nothing more." *Id.* at 29a. The speech involved in that "pure economic transaction," the court concluded, is "entitled to only

[1] Although the Attorney General of California and a number of state law enforcement agencies were parties to the district court proceedings, only petitioner appealed from the district court's judgment. See Pet. App. 9a, 26a n.1; see also Pet. 2.

'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.'" *Id.* at 29a (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

Assessing California's restriction on the release of arrestee addresses under this Court's *Central Hudson* test (Pet. App. 29a-36a), the court of appeals agreed with the district court that "the speech at issue is neither illegal nor misleading" (*id.* at 30a) and that the State has a "substantial" interest in protecting the privacy of those who have been arrested, including their "ability to avoid intrusions" in their homes (*id.* at 31a).[2] The court also agreed, however, that the State's restriction "does not directly and materially advance the government's interest in protecting the privacy and tranquility of its residents." *Id.* at 32a; see *id.* at 34a.

The court first rejected petitioner's argument that restricting the release of addresses would "reduce[] the opportunity for commercial interests to create and maintain an unreliable criminal history information bank." Pet. App. 32a. Finding in the record on summary judgment "no evidence whatsoever" that commercial interests were likely to create such data banks, the court dismissed that potential harm as "no more than speculation and conjecture, which is insufficient to sustain a restriction on commercial speech." *Ibid.*

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[2] The court held that petitioner had waived, on appeal, any challenge to the district court's holding that the State's restrictions on the release of address information did not directly and materially advance a governmental interest in controlling costs. The court therefore considered "the only [governmental] interest at issue" on appeal to be "the asserted governmental interest in protecting the privacy of arrestees." Pet. App. 30a-31a & n.3. (Note that the carryover paragraph at pages 30a-31a is misprinted as part of the text of the opinion; in the original, that language appears at the end of footnote 3.)

The court acknowledged that the State's interest in reducing "direct intrusion[s] into the private lives and homes of arrestees and victims" by declining to authorize release of their addresses for commercial purposes was "somewhat more weighty." Pet. App. 32a-33a. It concurred, however, in the district court's conclusion that "[t]he fact that journalists, academicians, curiosity seekers, and other noncommercial users may peruse and report on arrestee records * * * belies [petitioner's] claim that the statute is actually intended to protect the privacy interests of arrestees." *Id.* at 33a. "Instead," the court observed, the State's restriction on disclosing addresses "appears to be more directed at preventing solicitation practices." *Ibid.* The court declined to accord that legislative goal great weight, both because it found it "hard to see how direct mail solicitations invade the privacy of arrestees," and because, the court reasoned, "the privacy of arrestees [is] not invaded by the solicitation itself, but by the solicitor's discovery of the information that led to the solicitation." *Ibid.*

Ultimately, the court concluded that "[t]he myriad of exceptions to § 6254(f)(3) precludes the statute from directly and materially advancing the government's purported privacy interest." Pet. App. 34a. The court relied heavily on *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), which struck down a federal prohibition on the disclosure of alcohol content on beer labels on the ground that the prohibition could not "directly and materially advance its aim" in view of "other provisions of the same act [that] directly undermine[d] and counteract[ed] its effects." Pet. App. 34a-35a (quoting *Coors*, 514 U.S. at 489). Citing *Coors* and its own decision in *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998), which invalidated a federal ban on broadcast advertisements for casino gambling "in light of the numerous exceptions to the ban" (Pet. App. 35a), the court of appeals felt "compelled

to hold that the numerous exceptions to § 6254(f)(3) for journalistic, scholarly, political, governmental, and investigative purposes render the statute unconstitutional under the First Amendment." *Ibid.*[3] Believing that "[h]aving one's name, crime, and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome [one's] present difficulties (for a fee, naturally)," the court concluded that "[t]he exceptions to § 6254(f)(3) 'undermine and counteract' the asserted governmental interest in preserving privacy just as surely as did the exceptions in *Coors Brewing* and *Valley Broadcasting*." *Id.* at 35a-36a. The court accordingly affirmed the district court's judgment invalidating California's restriction on the release of arrestee addresses for commercial purposes as "an unconstitutional infringement of [respondent's] First Amendment rights." *Id.* at 36a.[4]

SUMMARY OF ARGUMENT

The First Amendment forbids enactment of any law "abridging the freedom of speech, or of the press." U.S. Const. Amend. I. The freedoms it guarantees do not, however, include any general right to compel the public release of information contained in government records, and there is nothing to support recognition of any special right of access in this case. To the contrary, California's balancing of privacy and other interests in determining under what circumstances to authorize release of personal address informa-

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[3] The constitutionality of the advertising ban struck down in *Valley Broadcasting* is presently before this Court in *Greater New Orleans Broadcasting Ass'n* v. *United States*, No. 98-387 (argued Apr. 27, 1999).

[4] In light of its holding that Section 6254(f)(3) failed the "direct advancement" component of the *Central Hudson* test, the court did not consider either the final prong of that test or respondent's separate equal protection and due process claims. Pet. App. 36a nn.5-6.

tion from arrest and crime records is exactly the sort of public policy decision that should be resolved by the political branches of government.

The lower courts viewed California's decision to make address information available for journalistic, scholarly, and other specified purposes, but not for purposes of commercial solicitation, as an indirect limitation on respondent's commercial speech. They accordingly analyzed the constitutionality of California's rule under the test articulated by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). This Court has applied the *Central Hudson* test, however, only in cases involving direct prohibitions on speech. This case involves no such prohibition; and the fact that respondent and its customers may find it more difficult or expensive to obtain addresses if the government does not make that information available imposes no greater burden on their right to speak than is imposed on any speaker by the fact that it may cost money to find and reach an audience. There is accordingly no reason to review California's disclosure rules under *Central Hudson*.

The State's decisions about the uses for which information in public records should or should not be released are instead properly analyzed under principles this Court has developed in reviewing legislative decisions regarding the expenditure of public funds—a context in which a government has wide latitude to support or facilitate only activities that it considers to be in the public interest. This case involves no question of distinctions based on viewpoint; and the legislative decisions embodied in the State's disclosure rules reflect reasonable accommodations between the public interests that may be served by disclosure in various contexts, and the State's interest in protecting the individuals involved against unwarranted incremental invasions of their privacy. Thus, for example, the State's willingness to re-

lease address information requested for journalistic or political purposes serves the public interest in open and informed debate about governmental functions that lies at the very heart of the First Amendment. On the other hand, its decision not to make addresses available for purposes of private commercial solicitation serves personal privacy interests of a sort that, as this Court has previously recognized, the State has a legitimate interest in protecting.

There is little support for the court of appeals' conclusion that the State's willingness to make address information available for some purposes makes it impossible for a prohibition on disclosure for other uses to serve any state interest in protecting privacy. To the contrary, California's Legislature could reasonably conclude that the balance of privacy costs and countervailing public benefits favored disclosure in the circumstances specified by Section 6254(f)(3), but not disclosure for private commercial use. Rejecting that legislative balancing of interests as unconstitutional would require the State to adopt disclosure rules *less* protective of core First Amendment values in order to prevent commercial exploitation of personal information gathered through its official processes.

ARGUMENT

CALIFORNIA'S REFUSAL TO DISCLOSE, FOR COMMERCIAL USE, HOME ADDRESSES OF PERSONS WHOM ITS OFFICERS HAVE ARRESTED, OR WHO HAVE BEEN THE VICTIMS OF CRIMES, DOES NOT VIOLATE THE FIRST AMENDMENT

A. Freedom Of Speech Does Not Imply A General Constitutional Right Of Access To The Government Records At Issue In This Case

In Section 6254(f) of its Government Code, California has provided that certain information gathered by its law enforcement officers in the course of their duties—including

the names of persons arrested, the names of crime victims, and the circumstances of reported crimes and arrests—may be made available to any member of the public. Cal. Gov't Code § 6254(f)(1)-(2) (West Supp. 1999). The State has further provided, however, that the current address of a crime victim or arrested person will be disclosed only for "scholarly, journalistic, political, or governmental purpose[s]" or to a licensed private investigator, and only on the condition that the address "not be used directly or indirectly to sell a product or service." § 6254(f)(3) (West Supp. 1999). Nothing in the First Amendment requires the State to make such information from its files available at all, much less for commercial use.[5]

The First Amendment forbids enactment of any law "abridging the freedom of speech, or of the press." U.S. Const. Amend. I.[6] There is, however, an elementary distinction between an attempt to use governmental authority to prohibit or penalize speech, and a decision not to make available information in the possession of the government that a would-be speaker does not presently possess, but would like to obtain and then use in dealing or communicating with others.

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[5] Respondent's complaint alleges that Section 6254(f)(3) applies to bar respondent's access to address information, and challenges the law's restrictions as facially invalid under the federal Constitution. See C.A. E.R. 5-6. The courts below accepted respondent's premise (see Pet. App. 14a, 28a-29a), as does the question presented in the petition. Pet. i. As presented to this Court, therefore, this case involves no question concerning the specific nature of respondent's activities, and there is no history of application or construction of the law by relevant state administrative or judicial authorities.

[6] The strictures of the First Amendment apply to state governments by operation of the Fourteenth Amendment. See, *e.g.*, *Bridges* v. *California*, 314 U.S. 252, 267-268 (1941).

The First Amendment does not generally "mandate[] a right of access to government information or sources of information within the government's control." *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 15-16 (1978) (plurality opinion) (no right to inspect areas of county prison not otherwise open to the public); see *id.* at 8-16 (plurality opinion); *id.* at 16 (Stewart, J., concurring in the judgment) ("The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government."); Pet. App. 13a ("The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.") (quoting Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 636 (1975)); cf. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 32 (1984) (noting that party that obtained information through discovery in civil lawsuit had "no First Amendment right of access to information made available only for purposes of trying [its] suit"). To the contrary, although a limited, non-constitutional common law of access to public records has been recognized in some circumstances, see generally *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597-608 (1978), the area is one in which public policy has traditionally been set through general or specific disclosure statutes embodying considered legislative judgments about what information should be released from government records, to whom, and for what purposes. See, *e.g.*, Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. III 1997); Privacy Act of 1974, 5 U.S.C. 552a (1994 & Supp. III 1997); Presidential Records Act of 1978, 44 U.S.C. 2201 *et seq.*; *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487 (1994) (discussing interrelationship of FOIA, the Privacy Act, and the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.*, in the context of a union request for the home addresses of government employees); *United States Dep't of State* v. *Ray*, 502 U.S. 164, 173-179 (1991) (release of certain interview reports without redaction

of identifying information would constitute a "clearly unwarranted invasion of personal privacy" under FOIA); *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (same with respect to FBI "rap sheets"); *Department of the Air Force* v. *Rose*, 425 U.S. 352, 355, 378-382 (1976) (ordering disclosure, under FOIA, of "case summaries of [Air Force Academy] honor and ethics hearings, [but] with personal references or other identifying information deleted").

The proposition that there is no constitutional right of access to government information or proceedings is not unqualified. See *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 603-610 (1982) (public access to criminal trials).[7] Nor has it been entirely uncontroversial. See, *e.g.*, *Houchins*, 438 U.S. at 19, 27-38 (Stevens, J., dissenting); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 582-584 (1980) (Stevens, J., concurring); *id.* at 584-589 (Brennan, J., concurring in the judgment). This case does not, however,

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[7] The Court has recognized a qualified constitutional right of access to judicial proceedings that have traditionally been held in public, with a concomitant or alternative right of access to records of those proceedings. See, *e.g.*, *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) (access to voir dire proceedings or records thereof, subject to court's ability to protect privacy of potential jurors through properly justified and tailored orders); *Globe Newspaper Co.*, 457 U.S. at 603-610 (criminal trials); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (same) (plurality opinion); see also *id.* at 599 (Stewart, J., concurring in the judgment) ("[I]t has for centuries been a basic presupposition of the Anglo-American legal system that trials shall be public trials. * * * With us, a trial is by very definition a proceeding open to the press and to the public."); but see *Nixon* v. *Warner Communications*, 435 U.S. at 608-610 (no First or Sixth Amendment right of access to physical copies of tape recordings played at trial); *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979) (no constitutional right of access to pretrial proceedings, where trial judge concluded that closure was necessary to protect defendant's right to fair trial, and transcript was subsequently made available).

test any possible outer limits of the principle. Even proponents of a constitutional right to compel disclosure under certain circumstances have agreed that any such right, because its "'stretch * * * is theoretically endless,' * * * must be invoked with discrimination and temperance," taking into account the structural reasons for recognizing the right, and the particular nature of "the information sought and the opposing interests invaded" in any given situation. *Id.* at 588 (Brennan, J., concurring in the judgment) (citation omitted). That analysis would not support recognition of a right of access in this case, because California's decision not to release personal address information, contained in its arrest and crime records, for purposes of private commercial solicitation poses no threat to the fundamental structural interest in "securing and fostering our republican system of self-government." *Id.* at 587 (Brennan, J., concurring in the judgment). It is, to the contrary, a good example of exactly the sort of routine disclosure decision that "involve[s] questions of policy which generally must be resolved by the political branches of government." *Houchins*, 438 U.S. at 34 (Stevens, J., dissenting).

B. This Case Does Not Involve A Government Restraint On Commercial Speech

The district court specifically recognized (Pet. App. 12a-14a), and the court of appeals did not question, that there is no general constitutional right of access to the address information that California has declined to provide to respondent. Both courts focused, however, on the fact that California's disclosure law makes the address of an arrested person available (along with other information about the arrest) to persons who request it for certain specified purposes, while denying access to the address (although not to any of the other information) to "those who plan to use

arrestee addresses in commercial speech." *Id.* at 14a; see *id.* at 14a-16a, 20a-21a, 27a-29a, 33a-36a. In the courts' view, that differential provision of access to address information, based on its intended use by the requester, amounts to "an indirect limitation on [the requester's] commercial speech." *Id.* at 14a. Both courts therefore analyzed the State's disclosure restriction under the test articulated by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), for "the constitutionality of government regulations limiting commercial speech." Pet. App. 29a.

The State's restriction on disclosure is, of course, directed in part at preventing the commercial use of addresses obtained from the State's arrest records and crime reports. See Cal. Gov't Code § 6254(f)(3) (West Supp. 1999) (prohibiting use of disclosed addresses "directly or indirectly to sell a product or service"). The restriction is not, however, appropriately viewed, for First Amendment purposes, as a restriction or burden on respondent's speech.

Addresses from arrest records are valuable to respondent (and its clients) not primarily because of their own intrinsic speech value—any fact or idea that they themselves convey—but rather because they can be used to find a particular target audience that respondent's clients want to contact. The State's non-disclosure rule is designed in large part to prevent that instrumental use of addresses from its files.[8] It may well be that respondent (and therefore its customers) will be able to secure equivalent address information only at greater cost, or in some cases not at all, if a state or local law

[8] The State's rule presumably would also prevent disclosure of address information for the purpose of inclusion in a commercial database, where its value might lie in linking the fact of arrest (or of being a crime victim) to a personal record that might be sought by, for example, prospective employers, lenders, or insurers.

enforcement agency does not make it available to them. The fact remains, however, that California's decision to make addresses from its law enforcement files available for some purposes but not for others "impose[s] no restraint on the freedom of any [person or business] to communicate any message to any audience." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997); see also *Regan* v. *Taxation With Representation*, 461 U.S. 540, 546 (1983) (conditioning tax-deductibility of contributions on organization's refraining from lobbying does not involve "regulat[ion of] any First Amendment activity"); *FEC* v. *International Funding Inst., Inc.*, 969 F.2d 1110, 1113-1114 (D.C. Cir.) (en banc) (federal law requiring disclosure of political contributor lists but forbidding others to use those lists to solicit contributions or for commercial purposes "cannot be said in any sensible way to infringe upon the defendants' first amendment right to solicit contributions"), cert. denied, 506 U.S. 1001 (1992); *id.* at 1118-1119 (R.B. Ginsburg, J., concurring) (same statute cannot "credibly" be portrayed "as one that impels [potential users] * * * to desist from" their own First Amendment activity). That respondent and its customers will, in the absence of disclosure by the government, have to find other sources for the addresses of persons to whom they would like to direct their solicitations imposes no more of a burden on their First Amendment rights than does the fact that they will have to buy the envelopes and pay the postage. Compare *Regan*, 461 U.S. at 549-550 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); *International Funding Inst.*, 969 F.2d at 1113 (prohibiting use of disclosed information does not "impose any new burden upon" prospective user, but "simply leaves undisturbed a pre-existing barrier").

This Court's cases applying the *Central Hudson* test have all involved government rules that directly prohibited cer-

tain kinds of speech. See, *e.g*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996) (price advertising); *Edenfield* v. *Fane*, 507 U.S. 761 (1993) (in-person solicitation); *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (targeted direct-mail advertising); *Central Hudson*, *supra* (advertising promoting use of electricity); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (price advertising); compare *Wileman Bros.*, 521 U.S. at 469 & n.12 (distinguishing these cases on same ground). A similar analysis might be applied to material penalties imposed on speech—an unusual tax imposed only on particular sorts of advertising, for example, or the withdrawal of an otherwise available government benefit (such as a business license) on the ground that the speaker had engaged in some disfavored form of speech, or refused to endorse a government-favored position. Compare, *e.g.*, *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972); *Speiser* v. *Randall*, 357 U.S. 513 (1958). This case, however, involves something quite different: a legislative decision that information developed and possessed by the government itself should not be made freely available for merely commercial use, whether or not that use includes speech. There is no warrant for subjecting that legislative decision about the appropriate uses of information compiled on public authority, at public expense, and for public purposes, to the sort of searching review that the Court has previously applied only to direct governmental restrictions on private speech. Compare *NEA* v. *Finley*, 118 S. Ct. 2168, 2179 (1998) (quoting *Maher* v. *Roe*, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.")); *Regan*, 461 U.S. at 545-546 (distinguishing "penalty" cases in the context of a government choice to support some activities but not others).

C. California's Decision To Make Personal Address Information That Was Gathered Through Public Processes Available For Limited Purposes, But Not For Commercial Use, Does Not Violate The First Amendment

As noted above (see page 15, *supra*), the courts below believed that California's non-disclosure rule was subject to scrutiny under the *Central Hudson* test because it amounted to a content-based discrimination against commercial speech. See also, *e.g.*, *Lanphere & Urbaniak* v. *Colorado*, 21 F.3d 1508, 1511-1513 (10th Cir. 1994) (adopting same threshold analysis, although upholding restriction at issue). As we have explained, however, although California's disclosure rules no doubt make it more difficult for respondent and its clients to ascertain the addresses of members of their target audience, that incidental effect does not amount to a governmental restraint on commercial speech. The State's decisions about the uses for which information in public records should or should not be released are instead properly analyzed under principles this Court has developed in reviewing decisions by a legislature regarding the expenditure of public funds. In that context, it is clear that a government has "wide latitude" to support or facilitate only activities that it considers to be in the public interest. See *NEA* v. *Finley*, 118 S. Ct. at 2178-2179; *Regan*, 461 U.S. at 548 (heightened scrutiny does not apply "whenever Congress subsidizes some speech, but not all speech"); *Rust* v. *Sullivan*, 500 U.S. 173, 192-200 (1991); *Maher* v. *Roe*, *supra*; *International Funding Inst.*, 969 F.2d at 1115 (rejecting, in context of constitutional challenge to prohibition against use of disclosed information for solicitation or commercial purposes, the argument that "if the Government facilitates some type of speech, then its decision not to facilitate another, related type of speech is subject to strict scrutiny").

Even in subsidy or facilitation cases, this Court has cautioned that "the Government may not 'ai[m] at the suppression of dangerous ideas.'" *NEA* v. *Finley*, 118 S. Ct. at 2178 (quoting *Regan*, 461 U.S. at 548); see also *International Funding Inst.*, 969 F.2d at 1118-1119 (R.B. Ginsburg, J., concurring). In *NEA*, for example, the Court observed that "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case," and that "if a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate." 118 S. Ct. at 2178 (quoting *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)). This case, however, raises no such concern.

California has not provided for release of address information for some journalistic purposes but not others, or for some commercial purposes but not others, based on the viewpoint of the requester—much less done so in a manner that seeks to "leverage" its control over the information in law enforcement files so as to have a coercive effect on private speakers. The State has not provided that addresses may be released to members of one political party but not others, or to scholars who support the police but not others, or otherwise endeavored, through its address disclosure restrictions, to favor or disfavor any idea. It permits disclosure to anyone who requests address information for one of the authorized purposes, and it forbids anyone to whom it discloses addresses to use them to sell any "product or service to any individual or group," without regard to the speech content of the product or service in question or the viewpoint of the requester. Cal. Gov't Code § 6254(f)(3) (West Supp. 1999); see *International Funding Inst.*, 969 F.2d at 1118 (R.B. Ginsburg, J., concurring) (federal election law restriction on use of disclosed contributor lists for

solicitation or commercial purposes "does not differentiate on the basis of the solicitor's *viewpoint*").[9]

Of course, distinctions drawn by government rules regarding the release of information must also, like other laws, be rationally related to the pursuit of legitimate governmental purposes, whether those rules are tested under the First Amendment or under equal protection principles. See, *e.g.*, *Regan*, 461 U.S. at 546-551 (discussing both); cf. *United States* v. *Kokinda*, 497 U.S. 720, 733 (1990) (claim that one form of speech has been treated differently from others "is more properly addressed under the equal protection component of the Fifth Amendment").[10] Indeed, the court of

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[9] The Court struck down a legislative distinction between commercial and non-commercial speech in *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993), which involved a city ordinance that permitted distribution of newspapers through sidewalk newsracks, but prohibited similar distribution of "commercial handbills." See *id.* at 412-415. That case is inapposite here, because unlike this one it involved a direct restraint on a particular mode of speech in spaces freely open to the public. In any event, *Discovery Network*'s "narrow" holding reflected the Court's conclusion that the city's distinction between commercial and non-commercial publications bore "no relationship *whatsoever* to the particular interests that the city ha[d] asserted," and rested on no more than a "bare assertion that the 'low value' of commercial speech [was] a sufficient justification for [a] selective and categorical ban." *Id.* at 424, 428; see also *id.* at 429-430. As we explain below, California's differentiation between commercial solicitation and scholarly, journalistic, and other permitted uses rests on reasonable legislative judgments about the public interest in facilitating those different uses and the risks of harm that each of them might pose.

[10] Neither court below reached respondent's equal protection claim, Pet. App. 22a, 36a n.6, although each court's decision ultimately turned on the conclusion that Section 6254(f)(3) subjects respondent to unjustifiably disparate treatment. Accordingly, if this Court rejects (as it should) the lower courts' First Amendment analysis, it might be appropriate to vacate the judgment below and to remand the case to give respondent the opportunity to pursue any remaining equal protection claim. On the other hand, the Court's analysis of the reasonableness of California's rules for

appeals' decision in this case ultimately turned on the court's conclusion that the State's decision not to permit disclosure of addresses from its arrest and crime reports for commercial purposes was not a "rational" way to serve the State's concededly important interest in protecting personal privacy, in view of the State's willingness to disclose the same information for "journalistic, scholarly, political, governmental, and investigative purposes." Pet. App. 35a. That is incorrect.[11]

The disclosure rules set out in Section 6254(f)(3) appear, indeed, to be designed to preserve public access to address information from arrest and crime reports to the extent that such access is likely to serve public interests, including the interest in informed debate about government operations that lies at the heart of the First Amendment. With the exception of addresses of victims of certain specified crimes (such as rape and other sexual assaults, child or spousal

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First Amendment purposes may foreclose any facial equal protection challenge.

[11] The court of appeals relied heavily (Pet. App. 34a-35a) on this Court's decision in *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), which invalidated a federal statute that prohibited brewers from including information about alcohol content on their product labels. Like *Discovery Network* (see note 9, *supra*), *Coors* involved direct regulation of commercial speech—in that case through a "unique and puzzling regulatory framework" of different rules governing the labeling and advertising of alcoholic beverages. 514 U.S. at 489. Applying heightened scrutiny under *Central Hudson*, the Court found the complex of rules in question to be "irrational[]" when considered as a whole. *Ibid.*; see *id.* at 488-490. This case, by contrast, does not involve a direct regulation of speech, and the state disclosure scheme at issue differentiates, in a limited regard, between certain *non*-commercial uses of address information from public records and *any* use of that information for the purpose of "sell[ing] a product or service." That distinction was not at issue in *Coors*; and, as we explain below, the legislative decisions reflected in the California scheme are reasonable, both individually and taken as a whole.

abuse, stalking, and hate crimes), which are to be kept completely confidential, the law requires that addresses be disclosed, on request, not only for governmental purposes, but also for scholarly or journalistic purposes. Those provisions ensure that address information will be available in aid of any inquiry undertaken with a view to monitoring or evaluating government performance. Compare *United States Dep't of Defense*, 510 U.S. at 497 (In deciding whether release of information would be an "unwarranted invasion of personal privacy" under FOIA exemption, "the only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'").

California's provision for disclosure of addresses for "political" purposes, while seemingly unlikely to be frequently invoked, further ensures that addresses will be available whenever necessary to inform political debate—the preeminent First Amendment value. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269-271 (1964). Finally, a provision concerning licensed private investigators allows for access in a presumably limited number of cases in which address information is germane to a legitimate, specifically focused private investigation. In all of those situations, California's Legislature has determined that the State's interest in making information gathered by public authorities available for public purposes outweighs its interest in protecting a crime victim's or arrested person's residual privacy interest in that specific address information.

The State has struck a different balance with respect to requests for address information for private commercial purposes—or for any other purpose not listed in Section 6254(f)(3), such as casual inquiries from members of the public. In those circumstances, the California Legislature

evidently concluded that any interests served by free disclosure were outweighed by personal privacy concerns. Compare *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (FOIA requester's interest in obtaining Bureau of Land Management mailing list in order to provide recipients of BLM newsletter with additional information is not a public interest weighing in favor of disclosure under FOIA privacy exemption). That judgment is a reasonable one, and it is entitled to considerable judicial deference.

The addresses at issue in this case are personal information of a sort that this Court has previously recognized as affected with a substantial personal privacy interest, which the State may legitimately seek to protect. See *United States Dep't of Defense*, 510 U.S. at 500-501 (government employees' interest in nondisclosure of home addresses outweighs any interest in disclosure cognizable under FOIA); cf. *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 626-632 (1995) (state interest in protecting citizens from intrusion of direct-mail offers to provide legal services shortly after accident or disaster). The addresses in state arrest and crime records were gathered by public authorities, often upon official demand, for the public purpose of investigating and punishing violations of the criminal law. Cf. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. at 32-33 (noting, in upholding protective order against publication, that newspaper had obtained the information in question "only by virtue of the trial court's [compulsory] discovery processes").[12] As we have explained

[12] Address information in arrest records will have been provided under the obvious compulsion of the arrest itself, or independently generated by government officers during the course of an investigation. See *Pennsylvania* v. *Muniz*, 496 U.S. 582, 600-602 (1990) (discussing request for address as part of routine booking process). Addresses of crime victims will have been collected either as required by law, or as a practical condition of the victim's invoking society's largely exclusive public mechanisms for the investigation and punishment of crime.

(see pages 21-22, *supra*), the purposes for which California has authorized disclosure are all ones that the state legislature could reasonably have concluded serve important public interests—including the interests most centrally protected by the First Amendment—and therefore warrant release of address information, even at some incremental cost to personal privacy.

By contrast, private commercial use of addresses "to sell a product or service," Cal. Gov't Code § 6254(f)(3) (West Supp. 1999), is far less likely to serve any *public* purpose. Cf. *Reporters Comm.*, 489 U.S. at 766 n.18, 771-775 (recognizing different public and private interests in disclosure of information from government files). Such use would, however, be much more likely to include or facilitate private commercial solicitation, in person or by mail or telephone, of the individuals involved. Those individuals would very likely surmise, accurately, that their addresses had been made available for that purpose by state authorities. California's lawmakers could reasonably conclude that some citizens would find such solicitation intrusive, and would consider it an unwarranted *incremental* invasion of their privacy for the State to have disclosed to the solicitors personal information that it had obtained from them only on compulsion, or at least for serious public purposes. Compare *Florida Bar*, 515 U.S. at 626-630 (recognizing intrusive and potentially offensive nature of mail solicitations under some circumstances); *United States Dep't of Defense*, 510 U.S. at 500-501 ("[W]hen we consider that other parties, such as commercial advertisers and solicitors, must [under FOIA] have the same access * * * to the employee address lists sought in this case, * * * it is clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant."); *Reporters Comm.*, 489 U.S. at 762-771 (recognizing substantial interest in avoiding incremental invasions of privacy, even where the same information is in some

respects "public"); *Lanphere*, 21 F.3d at 1514 (identifying "maintaining public confidence in our system of justice" as a state interest supporting prohibition on commercial use of addresses from state records). Moreover, the court of appeals improperly denigrated the State's expressed concern with the private use of address information from crime and arrest records in commercial databases, which indeed raise well recognized (and growing) privacy concerns. Compare Pet. App. 32a (dismissing petitioner's concern over privacy implications of commercial data banks as "no more than speculation and conjecture") with, *e.g.*, *Reporters Comm.*, 489 U.S. at 766 (recognizing that federal Privacy Act "was passed largely out of concern over 'the impact of computer data banks on individual privacy'"); *id.* at 760, 764, 766-767, 769-771 (recognizing special privacy concerns created by computer data banks); cf. *Florida Bar*, 515 U.S. at 629-630 (criticizing treatment of privacy concerns in prior decision as "casual" and "perfunctory").

The court of appeals concluded that, although protection of personal privacy was an important governmental interest, it was "not rational for a statute which purports to advance the governmental interest in protecting the privacy of arrestees to allow the names and addresses of the same to be published in any newspaper, article, or magazine in the country." Pet. App. 35a. That argument, however, misconstrues the nature of the government's interest, which involves not protecting the secrecy of government information, but avoiding facilitation by the government of unwarranted invasions of personal privacy. Compare *id.* at 33a (discussing when violation of privacy interest occurs). As the term "unwarranted" implies, the State pursues that interest not as an absolute, but by seeking to limit the types of intrusions that the government itself will facilitate to those that can be justified by what the State views as legitimate public interests.

The court of appeals' assessment also relied on a speculative characterization of the likely result of disclosures authorized by California's rules. The court adduced no evidence, for example, that journalists seek personal address information from any substantial portion of the State's arrest or crime records; that, when they do so, they normally publish that information; or that any such publication normally results in an objective or perceived invasion of privacy comparable to having one's home address included on one or more lists and then being contacted, in person or by mail, by commercial solicitors. It seems at least as likely that members of the press might routinely review general arrest information, but would request addresses only in cases of particular public interest—and then often only for purposes of contacting an individual themselves. "Scholarly" requests for individual addresses would seem even more likely to be sporadic, and even less likely to result in substantial invasions of privacy.[13] Disclosures for "political" or private investigatory purposes (*ibid.*) similarly seem unlikely to be frequent; and while they might be disclosures that the persons affected would prefer not to occur, the State could properly conclude that in such cases the countervailing public interest in disclosure would be strong.[14]

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[13] While scholars might sometimes contact individuals whose addresses they had obtained, they might also request address information solely for statistical purposes, which would involve no material invasion of individual privacy interests.

[14] Cf. *Reporters Comm.*, 489 U.S. at 761 (quoting *Reporters Comm. for Freedom of the Press* v. *United States Dep't of Justice*, 831 F.2d 1124, 1129 (D.C. Cir. 1987) (Starr, J., dissenting) ("Although there may be no public interest in disclosure of the FBI rap sheet of one's otherwise inconspicuously anonymous next-door neighbor, there may be a significant public interest—one that overcomes the substantial privacy interest at stake—in the rap sheet of a public figure or an official holding high government office."), rev'd, 489 U.S. 749 (1989)).

There is, therefore, little to support the court of appeals' apparent conclusion (Pet. App. 35a) that the "numerous exceptions" set out in Section 6254(f)(3) would make it impossible for the general rule of non-disclosure—and, in particular, the rule that addresses may not be disclosed or used for commercial purposes—to serve any state interest in protecting privacy. To the contrary, it is by no means clear that the privacy "cost" of the statutory exceptions would be substantial, or even material, in the great majority of cases, particularly considered in relation to the countervailing public interests to be served by disclosure. The privacy cost of disclosure for commercial purposes, on the other hand, is plain, as is the lack of any substantial public interest to justify incurring it. So, at any rate, California's Legislature was entitled to conclude; and nothing in the First Amendment precludes the State from adopting an information-disclosure policy based on those conclusions. Indeed, any contrary holding would require the State, in order to prevent commercial exploitation of personal information gathered through its official processes, to adopt non-disclosure rules that would be significantly *less* protective of core First Amendment values. Cf. *Kokinda*, 497 U.S. at 733 ("The dissent would create, in the name of the First Amendment, a disincentive for the Government to dedicate its property to any speech activities at all."). That would be a perverse and unwarranted result.[15]

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[15] A governmental decision not to provide *any* information about some or all arrests might raise different concerns, particularly if (as seems likely) there proved to be some historical tradition of making public at least some information about the exercise of that core government power. See generally note 7, *supra*. This case raises no such issue, because California continues to provide full public access to detailed information on every arrest and crime report—all information, indeed, except the "current address" of the crime victim or person arrested. See Cal. Gov't Code § 6254(f) (West Supp. 1999).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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