

# The BLT: The Blog of Legal Times

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## Data Mining Case Heads to the Supreme Court

Two major publishers of health care data filed a petition today at the Supreme Court, raising cutting-edge questions about whether increasingly widespread data mining that is used for commercial purposes is protected by the First Amendment.

The petition, titled *IMS Health, Inc. and Verispan LLC v. Ayotte*, is an appeal of a controversial ruling last November by the U.S. Court of Appeals for the 1st Circuit. The appeals panel ruled that the data about drug prescriptions gathered by the companies is outside the protection of the First Amendment, in part because it has "scant societal value," in the same way that obscenity is not protected speech. The ruling written by Judge Bruce Selya said the pharmaceutical data at issue in the case was to be viewed, not as speech but as a commodity like "beef jerky" that can be regulated without running afoul of the First Amendment.

The appeals court upheld a 2006 New Hampshire law that banned using information about a doctor's prescribing history for the purpose of increasing drug sales. The target of the law was the business in which publishers obtain data from pharmacies about a doctor's prescription preferences and illnesses the doctor has treated (without patients' names) and then sell the data to pharmaceutical companies. Those companies, in turn, use the information for what is known as "detailing" -- sales meetings with physicians to tell them about their own drugs or treatments.

The data helps the companies tailor their sales pitches.

The New Hampshire legislature passed the law on the theory that the process encourages the sales of more costly drugs, to the detriment of consumers. Maine and Vermont have passed similar laws, and other states are considering it.

The 1st Circuit's ruling displays "an extremely narrow view of the First Amendment," says Thomas Goldstein, partner at Akin, Gump, Strauss, Hauer & Feld, who filed the [petition today](#) on behalf of the data companies. Goldstein says several amicus curiae briefs will be filed in coming weeks to support the petition and highlight its broader implications for a range of data collection services. "It's really important that the Court not look at this as a problem just in New Hampshire," he says.

The [Washington Legal Foundation](#) is one of the amicus groups planning to file, and its [chief counsel Richard Samp](#) says the law could threaten all forms of data collection and publishing -- right down to the stock tables in your local newspaper. By targeting the speech engaged in by pharmaceutical companies with physicians, Samp also says the New Hampshire law amounts to viewpoint discrimination. "New Hampshire's attempt to pick sides in free expression is the ultimate First Amendment sin," Samp says.

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