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COURT VOIDS NEW HAMPSHIRE LAW BANNING SPEECH ON DRUG PRESCRIPTIONS

(IMS Health Inc. v. Ayotte)

The U.S. District Court for the District of New Hampshire yesterday broadly protected First Amendment rights by striking down a New Hampshire law that blocked access to critical healthcare information. The law criminalized the collection and disclosure of information about the prescribing practices of physicians.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in the case, *IMS Health Inc. v. Ayotte*. WLF argued that the New Hampshire law violated the First Amendment by prohibiting disclosures of truthful information, even disclosures arising outside the context of advertising. The district court agreed with WLF that such prohibitions are impermissible where, as here, they do not directly advance any substantial government interest and/or are broader than necessary to advance such interests.

New Hampshire has not yet announced whether it will appeal yesterday's decision. WLF has pledged its support to efforts to uphold the decision on appeal.

"New Hampshire is the only state in the country that prohibits the dissemination of information about doctors' prescribing patterns," said WLF Chief Counsel Richard Samp after reviewing the district court decision. "A handful of doctors seems to think that laws of this sort protect their privacy. But if more such laws are adopted, the loser will be the American healthcare system. The information that New Hampshire is trying to ban plays a vital healthcare role; it is used to monitor the safety of medications, implement drug recalls, and rapidly communicate information to doctors about innovative new treatments," Samp said.

The case involved New Hampshire's Prescription Restraint Law, which took effect on June 30, 2006. The Act provided that no "prescriber-identifiable data" relative to prescription information could be used or transferred for any commercial purpose. IMS Health Inc. and Verispan LLC, two companies in the business of collecting and distributing health information on a nationwide basis, filed suit against the Act, alleging that it violated their First Amendment rights. The Act has prevented them from collecting and distributing information about what drugs are being prescribed by New

Hampshire doctors, even though the companies ensure that no information about individual patients is ever included in their data. New Hampshire sought to defend its legislation as serving its interests in reducing prescription drug costs and upholding the privacy interests of doctors. The court ruled that, in light of doctors' commercial status, they lack any "privacy" interests in their prescribing practices. The court also held that New Hampshire failed to demonstrate that any cost savings could be achieved without undermining public health.

New Hampshire also asserted that the district court should defer to the State's judgment that the Act would lead to decreased expenditures on prescription drugs (by reducing the ability of a pharmaceutical company to make high-pressure sales pitches to doctors identified by their prescribing habits as potential customers), and that the Act accomplished that purpose in a narrowly tailored manner -- that is, it did not needlessly interfere with speech rights. The district court agreed with WLF that it would be inappropriate for the court to defer to the factual findings of the New Hampshire legislature in this manner. Much of WLF's brief had focused on explaining why the two cases cited by New Hampshire in support of its deference argument (*Turner Broadcasting I* and *Turner Broadcasting II*) were inapposite. WLF argued that the *Turner* decisions are relevant only when courts are reviewing content-neutral speech restrictions. When, as here, courts are reviewing laws that restrict speech based on the content of that speech, no judicial deference is warranted, WLF argued. The district court agreed with WLF that the *Turner Broadcasting* decisions did not support New Hampshire's deference argument.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States, including many in New Hampshire. It devotes a significant portion of its resources to protecting the speech rights of the business community.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.