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## **COURT URGED TO STRIKE DOWN LAW BANNING SPEECH ON DRUG PRESCRIPTIONS**

*(IMS Health Inc. v. Ayotte)*

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the First Circuit in Boston to protect First Amendment rights by striking down a New Hampshire law that blocks access to critical healthcare information. The law criminalizes the collection and disclosure of information about the prescribing practices of physicians.

A three-judge panel of the First Circuit upheld the law in a decision issued in November. In a brief filed in *IMS Health Inc. v. Ayotte*, WLF urged all the judges sitting on the First Circuit to rehear the case and reverse the panel's decision. WLF argued that the New Hampshire law violates the First Amendment by prohibiting disclosures of truthful information, even disclosures arising outside the context of advertising. WLF argued that such prohibitions are only rarely permissible and only then when based on showings of the most compelling of government needs.

"New Hampshire is virtually alone in prohibiting the dissemination of information about doctors' prescribing patterns," said WLF Chief Counsel Richard Samp after filing WLF's brief. "A handful of doctors seems to think that laws of this sort protect their privacy and/or hold down Medicaid costs. 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 role in health care; 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 involves New Hampshire's Prescription Restraint Law, which took effect on June 30, 2006. The Act provides that no "prescriber-identifiable data" relative to prescription information may 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 violates 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 has sought to defend its legislation as serving its interests in reducing prescription drug costs and upholding the privacy

interests of doctors. A federal district judge ruled in 2007 that the law violates the First Amendment; the First Circuit panel reversed that decision and reinstated the law.

WLF's brief took particular aim at the panel's conclusion that the law does not even implicate First Amendment rights. The panel held that the law regulates conduct, not speech. Noting that IMS Health's business consists of the dissemination of aggregated data, the panel held that to the extent that the law impinges at all upon speech, that speech is "of scant societal value." WLF blasted that conclusion as a frontal assault on the First Amendment. WLF cited numerous Supreme Court cases in which similar types of data dissemination have been deemed worthy of First Amendment protection.

WLF also argued that New Hampshire cannot pretend to be engaged merely in the regulation of conduct given that its statute does not focus generally on a disfavored type of conduct (*e.g.*, a prohibition of all data transfers) but rather focuses on the content of what is being conveyed by IMS Health – *i.e.*, it prohibits data transfers only if they convey information about the prescribing habits of doctors. WLF argued that such content-based regulations have always been subject to exacting First Amendment scrutiny.

If the First Circuit rejects the rehearing petition, IMS is expected to seek review in the U.S. Supreme Court. WLF has pledged to assist in any such effort.

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](http://www.wlf.org).