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

***(IMS Health Inc. v. Ayotte)***

***(IMS Health Inc. v. Sorrell)***

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to review (and ultimately overturn) an appeals court decision that upheld 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.

The U.S. Court of Appeals for the First Circuit upheld the law in a decision issued in November 2008. In a brief filed in *IMS Health Inc. v. Ayotte*, WLF urged the Supreme Court to review that 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 legislators seems to think that laws of this sort 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. It contends that if pharmaceutical companies are not permitted to obtain prescriber-specific information from IMS and Verispan, they will be less able to persuade doctors to purchase expensive brand-name drugs -- with the result that the State’s health care costs will decrease. A federal district judge ruled in 2007 that the law violates the First Amendment; the First Circuit 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 may not, consistently with the First Amendment, restrict speech in an effort to "level the playing field" between pharmaceutical companies and state health officials. WLF argued that if New Hampshire wants to level the playing field, the First Amendment requires that it increase its own speech, not seeks to restrict others' speech.

WLF is also actively involved in parallel litigation that challenges an identical law adopted by Vermont. In that case, *IMS Health, Inc. v. Sorrell*, a federal district court conducted a trial in August 2008 and last week issued a decision upholding the Vermont law. WLF has pledged to file a brief in support of the plaintiff's anticipated appeal in that case.

WLF filed its Supreme Court brief on behalf of itself, two other nonprofit organizations (the Cato Institute and Reason Foundation), and a bipartisan group of five current and former state government officials: former Massachusetts Attorney General Thomas F. Reilly; Rep. Bill DeWeese, the Majority Whip in the Pennsylvania House of Representatives; Rep. Ken Guin, the Majority Leader of the Alabama House of Representatives; Rep. Ray Merrick, the Majority Leader of the Kansas House of Representatives; and Rep. Glenn Richardson, the Speaker of the Georgia House of Representatives.

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).