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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.

In a brief filed in *IMS Health Inc. v. Ayotte*, 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. 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 earlier this year that the law violates the First Amendment; New Hampshire is appealing that decision.

New Hampshire has asserted that the appeals court should defer to the State's judgment that the Act will 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 accomplishes that purpose in a narrowly tailored manner -- that is, it does not needlessly interfere with speech rights. WLF's brief argued 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 focused on explaining why the two cases cited by New Hampshire in support of its deference argument (*Turner Broadcasting I* and *Turner Broadcasting II*) are 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.

WLF argued that when government regulators seek to uphold content-based speech restrictions, the burden of proof always falls on government to justify those restrictions, regardless whether the speech at issue is fully protected political speech or is "commercial speech" -- a category of speech that is generally afforded a somewhat reduced level of First Amendment protection. There is no basis in Supreme Court case law for an argument that governments are permitted to reduce that evidentiary burden by asking courts to defer to their factual findings, WLF argued.

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.