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**COURT UPHOLDS NEW HAMPSHIRE LAW
BANNING SPEECH ON DRUG PRESCRIPTIONS
(*IMS Health Inc. v. Ayotte*)**

The U.S. Court of Appeals for the First Circuit in Boston this week rejected a First Amendment challenge to 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 decision was a setback for the Washington Legal Foundation (WLF), which filed a brief in the case, *IMS Health Inc. v. Ayotte*, urging that the law be struck down. 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.

The three-judge appellate panel held that the First Amendment was not even applicable to the challenged law, which the court characterized as a regulation of commercial practices rather than a regulation of speech. It held, alternatively, that the law was a permissible restriction on commercial speech -- because (it determined) the restriction directly advanced New Hampshire's interest in reducing sales of brand-name prescription drugs in a manner that kept speech restrictions to a minimum. The appeals court ruling overturned a 2007 federal district court decision, which had struck down the law on First Amendment grounds.

"The First Circuit decision is likely to encourage other States to follow New Hampshire's lead in prohibiting the dissemination of information about doctors' prescribing patterns," said WLF Chief Counsel Richard Samp after reviewing the decision. "New Hampshire seems to believe that banning the dissemination of truthful information will somehow reduce its Medicare/Medicaid costs, despite the absence of any empirical evidence to support that belief. 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 argues that the law will make it harder for drug companies' sales forces to convince doctors to prescribe higher-cost brand name drugs, because the absence of doctor-specific prescribing information will make it harder for drug companies to identify which doctors are most susceptible to sales pitches.

In its brief urging that the district court injunction be upheld, 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. WLF argued that New Hampshire failed to demonstrate that its speech ban would accomplish its intended purpose, or that other, non-speech regulations would not be equally effective.

The First Circuit also rejected the plaintiffs' claim that the New Hampshire law violated the Commerce Clause by seeking to regulate activity taking place totally outside the State. But in doing so, the court may have construed the law so narrowly that it will have little or no immediate effect on the plaintiffs' activities. Nonetheless, New Hampshire -- emboldened by its victory on the First Amendment issues -- can be expected to take steps in the coming months to make clear that its statute does, in fact, significantly restrict efforts to collect and make commercial use of information about the prescribing habits of New Hampshire doctors.

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.