

No. 07-1945

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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IMS HEALTH INCORPORATED, a Delaware Corporation; and  
VERISPAN, LLC, a Delaware Limited Liability Company,  
*Plaintiffs-Appellees,*

v.

KELLY A. AYOTTE, New Hampshire Attorney General,  
*Defendant-Appellant.*

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**On Appeal from the United States District Court  
for the District of New Hampshire  
U.S. District Judge Paul Barbadoro**

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**BRIEF OF WASHINGTON LEGAL FOUNDATION AS  
AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES  
SUPPORTING AFFIRMANCE**

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**CERTIFICATE OF INTEREST  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed.Cir.R. 47.4, the Washington Legal Foundation (WLF) states that the following is a complete list of every party/amicus represented on this brief and/or has an interest in the outcome of this case, and the name of every law firm and attorney that has appeared for the parties/amici in this Court and in the Court below:

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Pursuant to Fed.R.App.P. 26.1, WLF states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation or stock owned by any publicly held company.

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Richard A. Samp

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## **IDENTITY AND INTERESTS OF *AMICUS CURIAE***

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states, including many in New Hampshire. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to promoting the free speech rights of the business community, appearing before numerous federal courts in cases raising First Amendment issues. *See, e.g., Nike v. Kasky*, 539 U.S. 654 (2003). WLF has successfully challenged the constitutionality of Food and Drug Administration restrictions on speech by pharmaceutical manufacturers. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed*, 202 F.3d 331 (D.C. Cir. 2000). WLF is engaged in litigation against the federal Centers for Medicaid and Medicare Services, raising a First Amendment challenge to CMS restrictions on truthful speech by health care providers. *Washington Legal Found. v. Leavitt*, No. 06-1490 (D.D.C., filed Aug. 24, 2006).

WLF is concerned that by unduly restricting the dissemination of truthful information by pharmacists and others, the State of New Hampshire is hindering improvements in public health. This brief addresses First Amendment issues only; WLF does not address Appellees' separate constitutional claims that the

challenged legislation is void for vagueness and violates the Commerce Clause. In particular, the brief explains why it would be inappropriate for this Court, when considering Appellees' First Amendment claims, to defer to the conclusions of the New Hampshire legislature regarding the supposed need for restrictions on truthful speech. WLF is filing this brief with the consent of all parties.

### **STATEMENT OF THE CASE**

At the request of Appellees IMS Health Inc. (IMS) and Verispan LLC and following a trial, the district court granted a permanent injunction against enforcement of a New Hampshire statute, the Prescription Restraint Law or Act,<sup>1</sup> which took effect on June 30, 2006. The Act provides, *inter alia*, that (subject to limited exceptions) no “prescriber-identifiable data” relative to prescription information may be “licensed, transferred, used, or sold” by any “pharmacy benefits manager, insurance company, electronic transmission intermediary, retail, mail order, or Internet pharmacy or other similar entity, for any commercial purpose.” RSA 318:47-f.

Plaintiffs IMS and Verispan are companies in the business of collecting

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<sup>1</sup> 2006 N.H. Laws 328, codified as N.H. Rev. Stat. Ann. 318:47-f & 318:47-g & 318-B:12, IV (2006).

and distributing health information, research, and analysis. Prior to adoption of the Act, they regularly purchased prescription information from New Hampshire pharmacies; such information contained no patient-identifiable data but did contain data regarding prescriptions written by identifiable New Hampshire doctors. As outlined in their brief, IMS and Verispan used that prescriber-identifiable data for a wide variety of purposes. Appellees' analysis of the data allowed them to determine which doctors prescribe which drugs, information which has been extremely valuable to pharmaceutical and biotech companies, academic and medical researchers, government agencies, and others. However, the Act prohibits Appellees from using or selling the results of their analysis (or even arranging for the transfer of prescriber-identifiable data from pharmacies to Appellees) for any "commercial purpose" – defined as including "advertising, marketing, promotion, or any activity that could be used to influence sales or market share of a pharmaceutical product, influence or evaluate the prescribing behavior of an individual health care professional, or evaluate the effectiveness of a professional pharmaceutical detailing sales force." RSA 318:47-f.

Appellees contend that the Act, by imposing content-based restrictions on their rights to convey truthful information to others, violates their rights under the First Amendment to the United States Constitution. They contend that the

restrictions are subject to “strict scrutiny” because they purport to regulate fully protected speech, a scrutiny (Appellees contend) that the Act cannot hope to withstand. Alternatively, Appellees contend that the speech restrictions are subject to heightened scrutiny under the First Amendment standards applicable to commercial speech and that they are invalid under those standards as well.

New Hampshire has sought to defend its legislation as serving its interests in reducing prescription drug costs and upholding the privacy interests of doctors. In the district court and in its brief to this Court, New Hampshire has argued that federal courts ought to defer to its legislature’s conclusion that the Act will actually achieve those goals, citing two Supreme Court decisions that touch on the propriety of judicial deference to legislative fact-finding: *Turner Broadcasting System, Inc. v. Federal Communications Comm’n*, 512 U.S. 622 (1994) (“*Turner I*”); and *Turner Broadcasting System, Inc. v. Federal Communications Comm’n*, 520 U.S. 180 (1997) (“*Turner II*”). N.H. Br. 45-51. In the course of a lengthy decision striking down the Act on First Amendment grounds, the district court rejected those deference arguments. *IMS Health Inc. v. Ayotte*, 498 F. Supp. 169, 177 n.12 (D.N.H. 2007). WLF is filing this brief to address the deference issue. WLF respectfully submits that the deference described in *Turner I* and *Turner II* is wholly misplaced in these proceedings.

## SUMMARY OF ARGUMENT

The federal courts have long recognized that the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages conveyed by private individuals. While the courts have very occasionally upheld content-based speech restrictions, they have always imposed on the government a heavy burden of demonstrating the necessity of such restrictions. Even when the speech on which restrictions are imposed is deemed “commercial speech” – that is, speech that does no more than propose a commercial transaction – courts have made clear that it is the regulators who bear the burden of justifying their content-based speech restrictions. In none of the cases in which the U.S. Supreme Court has addressed First Amendment challenges to restrictions on commercial speech has the Court so much as suggested that it was willing to defer to a legislature’s determinations regarding the need for such restrictions or their likely effectiveness.

Appellees contend that the speech restrictions imposed by the Act are fully protected speech subject to strict judicial scrutiny. Should the speech silenced by the Act ultimately be deemed by this Court to constitute commercial speech, Appellees argue in the alternative that the Act cannot survive review under the

*Central Hudson* test, the test normally applied to restrictions imposed on commercial speech. Regardless which of those two standards of review is ultimately adopted by this Court, there is no support in First Amendment case law for an argument that the Court should defer to any fact-finding engaged in by the New Hampshire legislature when it adopted the Act. Rather, for New Hampshire to demonstrate to this Court that there was a sufficient factual predicate for the speech restrictions imposed by the Act, it was incumbent upon the State to introduce at trial competent evidence to support its factual claims. The district court acted properly in evaluating that evidence without deferring to any legislative fact-finding.

The Supreme Court has counseled deference to legislative fact-finding in one and only one type of First Amendment challenge: cases in which government regulations have an incidental impact on speech but the regulations are content-neutral; that is, the regulations impose restrictions without regard to the content of the speech at issue. *Turner I* and *Turner II* are the most prominent examples of Supreme Court willingness to defer to congressional fact-finding when reviewing First Amendment challenges to content-neutral speech restrictions. Those cases involved the cable industry's challenge to the "must carry" provisions of a 1992 federal law, whereby cable television operators were

required to devote a percentage of their channels to the transmission of local broadcast television stations. The Court determined that the “must carry” provisions were content-neutral because they were imposed without regard to the content of programming broadcast by the over-the-air stations whose signals the cable operators were required to carry. Under those circumstances, the Court determined that the “must carry” provisions should be reviewed under an intermediate standard of First Amendment scrutiny set forth in *United States v. O’Brien*, 391 U.S. 367 (1968).<sup>2</sup> *Turner I*, 512 U.S. at 662.

In determining whether the “must carry” provisions could meet the *O’Brien* test, the Court said that it was appropriate for courts to defer to congressional fact-finding regarding the need for those provisions, whether those provisions would actually further the federal government’s goals, and whether Congress could achieve its goals through measures that were less intrusive on First Amendment rights. *Turner I*, 512 U.S. at 665-67; *Turner II*, 520 U.S. at

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<sup>2</sup> Under *O’Brien*, a content-neutral regulation will be sustained if:

[I]t furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377.

195-96. The Court nonetheless cautioned that even in the context of review of content-neutral statutes, deference should not extend to the ultimate determination of constitutional law, nor did it foreclose independent judicial review of congressional fact-finding. *Turner I*, 512 U.S. at 666 (“[T]he deference afforded to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law.”).

Nothing in *Turner I* or *Turner II* suggests that the deference afforded congressional findings made in connection with content-neutral statutes should extend to legislative findings made in connection with statutes, such as the Act, that quite clearly are *not* content-neutral. Such deference may on occasion be warranted when a statute is content-neutral, because under those circumstances there is no reason to suspect that any speech restrictions imposed by the statute are motivated by legislative hostility to the content of the affected speech. But such suspicion inevitably arises whenever speech is made subject to regulation based on its subject matter, rendering inappropriate any overriding presumptions of regularity. Under those circumstances, the Supreme Court has invariably imposed the burden on government regulators to produce any and all evidence necessary to justify their speech restrictions, without deferring to legislative findings that may have accompanied enactment of the law imposing those

restrictions.

WLF does not understand New Hampshire to be arguing that the Act is content-neutral. Any such argument would be frivolous; the Act very clearly targets speech based on its content. The Act prohibits the licensing, transferring, using, or selling of information concerning one very specific topic: prescription information containing “patient-identifiable” or “prescriber-identifiable” data. RSA 318:47-f. Thus, the speech made subject to prohibition is defined *solely* by its content. Under those circumstances, judicial deference to any fact-finding by the New Hampshire legislature is unwarranted; the State should be required to prove, through introduction of competent evidence, that it has met the applicable First Amendment test.

In any event, there is no evidence that the New Hampshire legislature ever engaged in a fact-finding enterprise even remotely similar to the extensive fact-finding engaged in by Congress before it adopted the “must carry” provisions at issue in *Turner I* and *Turner II*. The Supreme Court was willing to defer to Congress’s findings in part because Congress arrived at its findings (which were incorporated directly into the legislation) only after lengthy study of regulatory schemes of “inherent complexity” involving industries “undergoing rapid economic and technological change.” *Turner II*, 520 U.S. at 196. In contrast,

the New Hampshire legislature incorporated into the Act no factual findings regarding why it felt compelled to impose restrictions on truthful speech. New Hampshire has cited snippets of legislative history indicating why the Act was adopted: to control health care costs and to protect doctors' privacy. But New Hampshire has not cited to any fact-finding directly relevant to the First Amendment issues at hand, *e.g.*, findings that the Act would directly advance New Hampshire's goals, or that alternative measures not involving speech restrictions would not adequately address the State's concerns. Accordingly, there simply is not any legislative fact-finding to which the Court could defer even if it were so inclined. Nothing in *Turner I's* or *Turner II's* endorsement of deference to *explicit* legislative fact-finding in a limited number of circumstances provides support for New Hampshire's request that the Court create an entirely new and deferential standard of review in First Amendment cases.

## ARGUMENT

### **I. COURTS TRADITIONALLY HAVE EMPLOYED EXACTING SCRUTINY OF STATUTES ALLEGED TO INFRINGE FIRST AMENDMENT RIGHTS, WITHOUT DEFERRING TO LEGISLATIVE FINDINGS REGARDING JUSTIFICATIONS FOR SUCH INFRINGEMENT**

The federal courts have long recognized that the First Amendment, subject only to narrow and well-understood exceptions, does not countenance

governmental control over the content of messages conveyed by private individuals. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989). “As a general matter, ‘state action to punish the publication of truthful information seldom can satisfy constitutional standards.’” *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979)). While the courts have very occasionally upheld content-based speech restrictions, they have always imposed on the government a heavy burden of demonstrating the necessity of such restrictions. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 665 (2005) (“When plaintiffs challenge a content-based speech restriction, the burden is on the government to prove that the proposed alternatives will not be as effective as the challenged statute.”); *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

Even when the speech on which restrictions are imposed is deemed “commercial speech” – that is, speech that does no more than “propose a commercial transaction,” *Bd. of Trustees v. Fox*, 492 U.S. 469, 473 (1989) – courts have made clear that it is the regulators who bear the burden of justifying their content-based speech restrictions. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (“[T]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.”); *Thompson v. Western States Medical*

*Center*, 535 U.S. 357, 373 (2002). The evidentiary burden is not light; for example, the government’s burden of showing that a commercial speech regulation advances a substantial government interest “in a direct and material way . . . ‘is not satisfied by mere speculation or conjecture; rather, a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will alleviate them to a material degree.’” *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield*, 507 U.S. at 770-71). In none of the cases in which the U.S. Supreme Court has addressed First Amendment challenges to restrictions on commercial speech has the Court so much as suggested that it was willing to defer to a legislature’s determinations regarding the need for such restrictions or their likely effectiveness. Such willingness would be inconsistent with the language quoted above; the burden of demonstrating that harms are “real” and that commercial speech restrictions alleviate those harms to “a material degree” would amount to nothing if the government could meet that burden by simply pointing to legislative fact-finding.

Appellees contend that the speech restrictions imposed by the Act are fully protected speech subject to strict judicial scrutiny. *See, e.g., Burson*, 504 U.S. at 198 (content-based restrictions on non-commercial speech are subjected to

“exacting scrutiny,” and will be upheld only if the government can show that the restrictions are necessary to serve a “compelling state interest” and are “narrowly drawn to achieve that end.”) Should the speech silenced by the Act ultimately be deemed to constitute commercial speech, Appellees argue in the alternative that the Act cannot survive review under the *Central Hudson* test, the test normally applied to restrictions imposed on commercial speech.<sup>3</sup> Regardless which of those two standards of review is ultimately adopted by this Court, there is no support in First Amendment case law for an argument that the Court should defer to any fact-finding engaged in by the New Hampshire legislature when it adopted the Act. Rather, for New Hampshire to demonstrate to the trial court that there was a sufficient factual predicate for the speech restrictions imposed by the Act, it was incumbent upon the State to introduce at trial competent evidence to support its factual claims. The district court acted properly in

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<sup>3</sup> Under the four-part *Central Hudson* test, courts consider as a threshold matter whether the commercial speech concerns unlawful activity or is inherently misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, then the challenged speech regulation violates the First Amendment unless government regulators can establish that: (1) they have identified a substantial government interest; (2) the regulation “directly advances” the asserted interest; and (3) the regulation “is no more extensive than is necessary to serve that interest.” *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557, 566 (1980).

evaluating the evidence without deferring to any legislative fact-finding.

**II. *TURNER I* AND *TURNER II* ESTABLISHED THAT DEFERENCE TO LEGISLATIVE FACT-FINDING IS APPROPRIATE IN CASES INVOLVING CHALLENGES TO CONTENT-NEUTRAL SPEECH RESTRICTIONS**

The Supreme Court has counseled deference to legislative fact-finding in one and only one type of First Amendment challenge: cases in which government regulations have an incidental impact on speech but the regulations are content-neutral; that is, the regulations impose restrictions without regard to the content of the speech at issue. *Turner I* and *Turner II* are the most prominent examples of Supreme Court willingness to defer to congressional fact-finding when reviewing First Amendment challenges to content-neutral speech restrictions. Because New Hampshire relies primarily on *Turner I* and *Turner II* in making its deference arguments, WLF discusses those decisions at length in order to demonstrate their inapplicability to this case.

*Turner I* and *II* involved a challenge to Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534 and 535 (the “must carry” provisions). After extensive hearings, Congress had determined *inter alia* that: many cable companies had effective monopolies on cable operations within their jurisdictions; because many households were

equipped to receive television signals only through their cable systems, over-the-air television stations could not compete effectively with cable companies unless their signal was carried by those companies; cable companies had a strong economic incentive to stop carrying the signals of over-the-air stations; because cable companies had, in fact, ceased carrying the signals of many over-the-air stations, those stations were being driven out of business; and the public interest would be served by maintaining the greatest possible diversity in television programming. Accordingly, Congress adopted the “must carry” provisions to: (1) preserve the benefits of over-the-air broadcasting; (2) promote “fair” competition in the television programming market; and (3) promote the widespread dissemination of information from a multiplicity of sources. The law required cable operators to devote a percentage of their available channels to the transmission of local broadcast stations.

*Turner I* and *II* ultimately upheld the “must carry” provisions, in each instance by 5-4 votes. Much of *Turner I* was devoted to determining whether the “must carry” provisions should be deemed content-neutral. The Court ultimately decided that the provisions were, indeed, content-neutral because they were imposed without regard to the content of programming broadcast by the over-the-air stations whose signals the cable operators were required to carry. Under

those circumstances, the Court determined that the “must carry” provisions should be reviewed under an intermediate standard of First Amendment scrutiny set forth in *United States v. O’Brien*, 391 U.S. 367 (1968).<sup>4</sup> *Turner I*, 512 U.S. at 662.

In determining whether the “must carry” provisions could meet the *O’Brien* test, the Court said that it was appropriate for courts to defer to congressional fact-finding regarding the need for those provisions, and whether those provisions would actually further the federal government’s goals. *Turner I*, 512 U.S. at 665 (“We agree that courts must accord substantial deference to the predictive judgments of Congress.”); *Turner II*, 520 U.S. at 195 (“We owe Congress’ findings deference in part because the institution is far better equipped to amass and evaluate the vast amounts of data bearing upon legislative questions”) (citations omitted); *id.* at 196 (“[D]eference must be accorded to [Congress’s] findings as to the harm to be avoided and to the remedial measures

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<sup>4</sup> As noted *supra* at 7 n.2, *O’Brien* provides that a content-neutral regulation will be sustained if:

[I]t furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377.

adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.”). Thus, the Court in *Turner II* deferred to Congress’s factual conclusion that the cable industry posed a threat to broadcast television. *Id.* at 199, 208, 211.<sup>5</sup>

Although the Court in *Turner I* and *II* deemed it appropriate to defer to some degree to Congress’s explicit fact-finding in connection with its adoption of the “must carry” provisions, it is important to recognize the limited scope of that deference. In particular, nothing in *Turner I* and *II* suggests that the deference accorded congressional findings made in connection with content-neutral statutes should extend to legislative findings made in connection with statutes, such as the Act, that quite clearly are *not* content-neutral.<sup>6</sup> Moreover,

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<sup>5</sup> *Turner I* had previously determined that the “must carry” provisions were content-neutral and thus should be subject to intermediate review under the *O’Brien* test. The Court held that there was insufficient evidence regarding whether the broadcast television industry was really in jeopardy and the extent to which the “must carry” provisions would interfere with the programming decisions of cable operators. *Id.* at 667-68. Accordingly, the Court remanded the case to the district court for additional fact-finding. *Id.* at 668. The “must carry” provisions were upheld under the *O’Brien* test on remand, and the Court affirmed that decision in *Turner II*.

<sup>6</sup> Justice Stevens’s separate opinion states explicitly that *Turner I*’s statements regarding deference *apply only in the context of content-neutral statutes* whose primary focus is economic regulation and whose speech regulation is only secondary. He explained:

the deference extends only to fact-finding, not to conclusions of constitutional law. *Turner I* and *II* do not suggest, for example, that courts should defer to a legislative determination that a particular speech restriction does not violate the *Central Hudson* test. Furthermore, the Court made clear that it was not intending to foreclose independent judicial review of congressional fact-finding. *Turner I*, 512 U.S. at 666 (“[T]he deference afforded to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law.”). Also, the Court granted deference to congressional fact-finding only after noting that Congress had addressed the factual issues explicitly and extensively; the “inherent complexity” of the applicable regulatory scheme; and the “rapid economic and technological change[s]” in the area. *Turner II*, 520 U.S. at 196. Those statements suggest that deference is far less warranted when the legislative fact-finding is not explicitly set forth in the statute, is not extensive, or involves less complex issues (and thus judges are better equipped

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[W]e cannot abdicate our responsibility to decide whether a restriction on speech violates the First Amendment. But the factual findings accompanying economic measures that are enacted by Congress itself and that have only incidental effects on speech merit greater deference than those supporting content-based restrictions on speech.

*Turner I*, 512 U.S. at 671 n.2 (Stevens, J., concurring in part and concurring in the judgment). Because Justice Stevens’s vote provided the crucial fifth vote for the majority in *Turner I*, his opinion is particularly meaningful.

to independently review the fact-finding). Finally, *Turner I* and *II* counsel judicial deference to fact-finding by *Congress* but are silent regarding whether federal courts should extend deference to the fact-finding of other legislative bodies.

### **III. *TURNER I* AND *TURNER II* DO NOT SUGGEST THAT THE COURT SHOULD DEFER TO LEGISLATIVE FACT-FINDING BY THE NEW HAMPSHIRE LEGISLATURE IN CONNECTION WITH LEGISLATION THAT IS NOT CONTENT-NEUTRAL**

Nothing in *Turner I* or *Turner II* suggests that the deference afforded congressional findings made in connection with content-neutral statutes should extend to legislative findings made in connection with statutes, such as the Act, that quite clearly are *not* content-neutral. As noted above, Justice Stevens stated explicitly that deference should *not* extend beyond content-neutral statutes. Moreover, Supreme Court First Amendment decisions issued in the years after *Turner I* and *II* were decided (in 1994 and 1997, respectively) have provided no indication that the Court intended such an extension. That is true of post-*Turner* commercial speech cases (*e.g.*, *Thompson v. Western States*) and as well as post-*Turner* cases in which strict scrutiny was applied to the challenged speech restriction (*e.g.*, *Bartnicki v. Vopper*). In both types of cases, the Court not only makes no mention of deference but also continues to use language indicating that

the government bears a heavy evidentiary burden of justifying its content-based speech restriction. Indeed, *Bartnicki* refused to defer to congressional fact-finding that a blanket prohibition against disclosure of illegally intercepted telephone calls would reduce the number of illegal interceptions (and instead applied strict scrutiny to strike down the blanket prohibition as a First Amendment violation), despite the dissent's explicit claim that *Turner I* and *II* required that the Court exercise such deference. *Bartnicki*, 532 U.S. at 550 (Rehnquist, C.J., dissenting).

As *Turner I* and *II* recognized, there are valid grounds for deferring to congressional fact-finding undertaken in connection with content-neutral statutes, because under those circumstances there is no reason to suspect that speech restrictions imposed by the statute are motivated by legislative hostility to the content of the affected speech. But such suspicion inevitably arises whenever speech is made subject to regulation based on its subject matter, rendering inappropriate any overriding presumptions of regularity. As one commentator has stated, in such situations “both the content-based act and the motives of the actor are constitutionally suspect. In this context, it makes no sense for courts to accord any deference to the determinations made by those actors.” Note, *Deference to Legislative Fact Determinations in First Amendment*

*Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312, 2324 (1998).

WLF does not understand New Hampshire to be arguing that the Act is content-neutral. Any such argument would be frivolous; the Act very clearly targets speech based on its content. The Act prohibits the licensing, transferring, using, or selling of information concerning one very specific topic: prescription information containing “patient-identifiable” or “prescriber-identifiable” data. RSA 318:47-f. Thus, the speech made subject to prohibition is defined *solely* by its content. The Supreme Court has made clear that any such speech restrictions should be deemed content-based. *See, e.g., Turner I*, 512 U.S. at 643 (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.”). It makes no difference that the Act does not seek to silence a particular idea or viewpoint; it is sufficient to categorize a restriction as content-based if the restriction applies to all speech on a single topic regardless of the viewpoint expressed. *See, e.g., Simon & Schuster, Inc. v. Members of New York State Crimes Victims Board*, 502 U.S. 105, 117 (1991) (in determining whether a regulation of speech is content-based, “it is irrelevant whether the state is trying to suppress particular ideas.”). Under these circumstances, extending judicial deference to any fact-finding by the New Hampshire legislature is unwarranted; the district

court properly required the State to prove, through introduction of competent evidence, that it met the applicable First Amendment standard.

New Hampshire has raised a somewhat related argument that is equally lacking in merit. New Hampshire claims that the Act should not be deemed regulation of speech at all, but rather should be a deemed regulation of the “use” of information. *See* N.H. Br. at 27-33. New Hampshire argues that the Act’s prohibition on the “use” of certain information for commercial purposes is merely “a regulation of nonexpressive conduct.” *Id.* at 33. New Hampshire’s effort to distinguish between speech and conduct is without merit, given that the “conduct” that the State seeks to regulate is the distribution of information with very specific content. In a factually analogous context, all nine Supreme Court justices indicated that regulation of the type being attempted by New Hampshire should be deemed regulation of speech. *Los Angeles Police Dep’t v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999).<sup>7</sup>

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<sup>7</sup> In *United Reporting*, the plaintiffs facially challenged a California statute that prohibited disclosure of police department arrest records to firms that refused to agree not to use those records for commercial purposes. A majority of the Court rejected the facial challenge, finding that the First Amendment was not implicated when a government allows some citizens access to public records but denies access to others. But all nine justices agreed that if the plaintiffs could gain access to the records without government assistance, any government effort to prevent their use of the records would implicate the First Amendment. *See United Reporting*, 528 U.S. at 40 (“This is not a case in which the government is

**IV. DEFERENCE IS UNWARRANTED FOR THE ADDITIONAL REASON THAT THE NEW HAMPSHIRE LEGISLATURE NEVER ENGAGED IN A FACT-FINDING ENTERPRISE EVEN REMOTELY SIMILAR TO THE EXTENSIVE FACT-FINDING AT ISSUE IN *TURNER I* AND *TURNER II***

A key feature of *Turner I* and *II* was the extensive investigation undertaken by Congress over a three-year period before it adopted the Cable Television Consumer Protection and Competition Act of 1992. Moreover, in adopting that legislation, Congress included its findings of fact within the legislation. In upholding the law’s “must carry” provisions, the Supreme Court made clear that Congress’s extensive investigation of a complex subject and its adoption of findings of fact within the legislation played a significant role in the Court’s willingness to defer to legislative fact-finding. *Turner II*, 520 U.S. at 195, 196. In contrast, the Court has made clear that it is far less likely to defer to congressional fact-finding in First Amendment cases when Congress has failed to make particularized findings of the type at issue in *Turner I* and *II*. *See, e.g.,*

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prohibiting a speaker from conveying information that the speaker already possesses.”); *id.* at 42-43 (Ginsburg, J., with whom O’Connor, Souter, and Breyer, JJ., joined, concurring) (“Anyone who comes upon arrestee information in the public domain is free to use the information as she sees fit. [Once the information is published in a legal newspaper, the challenged statute] *would indeed be a speech restriction if it then prohibited people from using that published information to speak to or about arrestees.*”) (emphasis added ); *id.* at 46 (Stevens, J., with whom Kennedy, J., joined, dissenting).

*Gonzales v. Raich*, 545 U.S. 1, 21 (2006) (Court will insist on particularized factual findings from Congress in connection with legislation, when there is “a special concern, such as the protection of free speech.”).

There is no evidence that the New Hampshire legislature ever engaged in a fact-finding enterprise even remotely similar to the extensive fact-finding engaged in by Congress before it adopted the “must carry” provisions at issue in *Turner I* and *Turner II*. The Supreme Court was willing to defer to Congress’s findings in part because Congress arrived at its findings (which were incorporated directly into the legislation) only after lengthy study of regulatory schemes of “inherent complexity” involving industries “undergoing rapid economic and technological change.” *Turner II*, 520 U.S. at 196. In contrast, the New Hampshire legislature incorporated into the Act no factual findings regarding why it felt compelled to impose restrictions on truthful speech. New Hampshire has cited snippets of legislative history indicating why the Act was adopted: to control health care costs and to protect doctors’ privacy. But New Hampshire has not cited to any fact-finding directly relevant to the First Amendment issues at hand, *e.g.*, studies concluding that the Act would directly advance New Hampshire’s goals, or that alternative measures not involving speech restrictions would not adequately address the State’s concerns. Accord-

ingly, there simply is not any legislative fact-finding to which courts could defer even if they were so inclined.

Congress, of course, has available to it huge amounts of investigatory resources, resources available neither to federal courts nor to New Hampshire. *Turner II* cited to that disparity in resources as one reason why federal courts should defer to congressional fact-finding. *Turner II*, 520 U.S. at 195 (“We owe Congress’s findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.”) That rationale calls into question whether federal courts should ever defer to State legislatures (with their far more limited resources than Congress) with respect to fact-finding in First Amendment cases. But even if federal court deference to State legislatures might sometimes be appropriate, it certainly is not appropriate in cases, such as this one, in which the State legislature adopted the Act without first addressing in at least some detail such fundamental questions as what effect will the Act have on overall drug pricing, will the law decrease the number of sales visits that drug company representatives pay to New Hampshire doctors, or will it lead to an increase in sales calls because sales representatives will now be unable to target doctors who are heavy users of their company’s drugs.

## CONCLUSION

*Amicus curiae* Washington Legal Foundation (WLF) respectfully requests that the Court affirm the judgment of the district court.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I am an attorney for *amicus curiae* Washington Legal Foundation (WLF). Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF: (1) complies with the type-volume limitations of Rule 32(a)(B), because, according to the word processing system used to prepare this brief (WordPerfect 12.0), it contains 5,621 words, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance; and (2) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because it has been prepared in 14-point, proportionately spaced Times New Roman type.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2007, two copies of the brief of *amici curiae* WLF, *et al.*, in support of Plaintiffs-Appellees were placed in the U.S. Mail, first-class postage prepaid, and were also sent by email addressed as follows:

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