

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 07-1945
Lower Ct. Case No. 06-cv-280-PB

KELLY A. AYOTTE, as Attorney General
of the State of New Hampshire
Defendant/Appellant,

v.

IMS HEALTH INCORPORATED, a Delaware Corporation and
VERISPAN, LLC, a Delaware Limited Liability Company
Plaintiffs/Appellees
Supports Affirmance

On Appeal from the United States District
Court for the District of New Hampshire

Amicus Brief of
The National Association of Chain Drug Stores
in Support of Plaintiffs/Appellees
Supports Affirmance

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CORPORATE DISCLOSURE STATEMENT

The National Association of Chain Drug Stores (“NACDS”) is a corporation with no parent or subsidiary corporation. No publicly held company owns 10% or more of the NACDS’ stock.

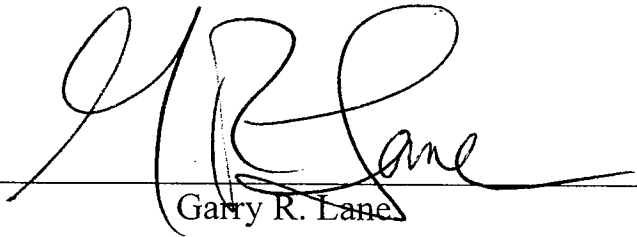

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IDENTITY OF THE AMICUS AND STATEMENT OF INTEREST

The National Association of Chain Drug Stores (“NACDS”), hereby submits this amicus brief in support of the appellees with the consent of both parties.

NACDS is the nation’s largest association of retail drug stores. Its membership consists of the nation’s leading retail chain pharmacies.¹ Chain pharmacies operate more than 39,000 pharmacies, employ 114,000 pharmacists, fill more than 2.4 billion prescriptions yearly, and have annual sales of nearly \$750 billion. Chain-operated community retail pharmacies fill nearly 72% of the more than 3.4 billion prescriptions dispensed annually in the United States. Other members include more than 1,000 suppliers of products and services to the chain drug industry.

NACDS’s mission is to represent the views and policy positions of member chain drug companies to help them succeed in servicing the needs of the communities they serve. In the state of New Hampshire, NACDS has thirteen members who operate over 200 community retail pharmacies.

NACDS works to enable and support its members to better meet the ever-changing needs of their patients and customers, while representing the practical,

¹ The chain community pharmacy industry is comprised of approximately 21,865 traditional chain drug stores, 10,163 supermarket pharmacies, and 7,438 mass merchant pharmacies.

legislative and regulatory needs of community pharmacies across the nation. To continually meet these demands, NACDS regularly launches new programs, creates new organizations, and expands its critical functions in communications, government affairs and member programs and services.

These NACDS programs and services emphasize:

- a. Involvement in pharmacy and health-related issues;
- b. Promoting the value and role of community retail pharmacy in the health care system;
- c. Ensuring the community retail pharmacy perspective is communicated to and understood by legislators and policy-makers;
- d. Providing appropriate forums for retailers to interact with their suppliers and business partners;
- e. Creating a favorable political and business climate in which NACDS member companies can carry out their business plans;
- f. Developing and promoting policies and programs aimed at improving merchandise distribution and retail operations efficiency;
- g. Ensuring effective channels of communication between members and the association.

NACDS provides a wide range of services to meet the needs of the chain drug industry in accordance with these goals and objectives.

NACDS' members are lawfully in possession of truthful information about prescriptions relating to New Hampshire prescribers. The information at issue is not private, as it contains no patient-identifiable information, and is of great public

importance because it enables transparency in the provision of healthcare to all segments of our society. The passage of 2006 N.H. Laws 328, codified as N.H. Rev. Stat. Ann. §§ 318:47-f & 318:47-g & 318-B:12, IV (2006) (the “Prescription Restraint Law”) has a direct impact on NACDS members’ ability to communicate such information to the appellees and others.

NACDS believes that the appellees have sufficiently demonstrated in their answer brief the various reasons why the Prescription Restraint Law violates the plaintiffs’ First Amendment rights to receive and disseminate prescriber-identifiable information originating from the state of New Hampshire for purposes prohibited by the statute. This brief is intended to leave no doubt that NACDS members in possession of prescriber-identifiable information wish to communicate the information to the appellees and such communication does not compromise patient-privacy.

ARGUMENT

I

The Prescription Information Does Not Compromise Patient Privacy

For many years prior to the passage of the prescription restraint law, members of NACDS have engaged in the practice of licensing, selling or transferring prescriber-identifiable information to companies, such as the

appellees, for various purposes which could be prohibited by the statute. The prescription information includes information from prescriptions originating from several states, including the state of New Hampshire. The prescription information that the members of NACDS provide to IMS Health and Verispan do not contain patient-identifiable information, and so patient privacy is safeguarded. The prescription data does contain the prescriber's name, the name of the medicine listed on the prescription, and the name of the medicine actually sold.² Traditionally, such information is not considered private because it does not reveal any of the private or personal patient facts that historically have enjoyed judicial protection from public scrutiny.

The proponents of the legislation touted the statute as being necessary to protect the privacy of New Hampshire doctors, but prescription records contain no private information about the prescribers. The only information concerning prescribers contained in prescription records generally consists of the prescriber's name, office address, telephone number, the name of the medication being prescribed and the quantity of the medication to be dispensed. The prescription records do, however, reveal information about the *professional* decisions made by

² See Plaintiffs' Trial Exhibit #6 at ¶6 (the plaintiffs' trial exhibits were made part of the record on appeal by virtue of the plaintiffs' motion to supplement the record to include those exhibits filed in on September 14, 2007, and this Court's order granting the motion on September 19, 2007).

New Hampshire prescribers, information of great concern to those in the business of manufacturing and selling the medications that the doctors prescribe and the members of the public consume. Thus, information about what New Hampshire doctors are prescribing cannot be regarded as private, particularly since the New Hampshire statute allows the information to be made available to *anyone* who expresses an intent to use it for non-commercial purposes.

II.

Pharmacies Wish to Communicate the Prescriber-Identifiable Information

The State argued at trial that the appellees lacked the requisite standing to bring the claims because pharmacies and similar entities are the only ones mentioned in and targeted by the statute. The district court correctly rejected this argument.

In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748 (1976), the Supreme Court invalidated on First Amendment grounds a statute providing that a pharmacist licensed in the state of Virginia would be found “guilty of unprofessional conduct if he ‘(3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription.’” *Id.* 425 U.S. at 751-52 (citation omitted). Even though they were not themselves subject to the statute’s prohibitions, a group of

individual consumers of prescription drugs sued the Pharmacy Board claiming that the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs. *Id.* at 753-54. The Court agreed, noting that “[f]reedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases.” *Id.* The Court concluded that “[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.” *Id.*; see also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information . . . is fundamental to our free society”).

The First Amendment rights of the Virginia consumers are no different from the rights enjoyed by the appellees in this case. Over 200 NACDS member pharmacies are located in the state of New Hampshire. These members’ customers for the most part obtain medical treatment in the state of New Hampshire. As part of such treatments, the customers are given prescriptions by their New Hampshire physicians that they then take to any of the retail pharmacies owned by members of NACDS in the state of New Hampshire. When the customer brings the prescription to the local retail pharmacy, the pharmacy stores the prescription

information as part of its records. The members of NACDS provide prescription records to the appellees in part to assist them and pharmaceutical companies in their efforts to develop efficient means of improving healthcare. NACDS believes that aggregation and analysis of prescriber-identifiable data in prescription records substantially improves public health by facilitating the review of prescription practices and the efficient distribution of information to prescribers concerning best prescription practices. NACDS members pharmacists are willing speakers and the protection afforded by the First Amendment therefore extends to them, to the communication about prescriptions written in New Hampshire that NACDS members wish to convey and to the appellees, who wish to receive the prescription information for non-deceptive purposes.

The state of New Hampshire cannot restrict the free-flow of prescriber-identifiable information solely on the basis of whether the information will be used for commercial or non-commercial purposes without violating the First Amendment rights of the pharmacies and the health information companies. "[T]ruthful statements which are neither misleading nor offensive are protected by the First Amendment even though made for a commercial purpose." *Splawn v. State of Cal*, 431 U.S. 595, 601 (1977). "[A]ll ideas having even the slightest redeeming social importance ... have the full protection of the guaranties [of the First Amendment]," *Roth v. United States*, 354 U.S. 476, 484 (1957). This premise

was echoed in *Virginia Bd. of Pharmacy*, where the Court questioned whether commercial speech "is so removed from any exposition of ideas, and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, that it lacks all protection." 425 U.S. at 762 (citations and internal quotation marks omitted). The Court answered this question with a resounding "no." The Court reiterated its condemnation of the "highly paternalistic" approach which seeks to benefit citizens by keeping them ignorant. There is a "potent alternative" to that approach: "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Bates v. State Bar of Arizona*, 433 U.S. 350, 365 (1977) (quoting *Virginia Bd. of Pharmacy*, 425 U.S. at 770).

The right to know or to hear or receive information is one of the principal underpinnings of the First Amendment. As the Court pointed out in the *Virginia State Bd. of Pharmacy* opinion, there have been numerous decisions over the past thirty years recognizing First Amendment protection of the right to know, in a variety of contexts. See *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386; *Stanley v. Georgia*, 394 U.S. at

564; *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

The state of New Hampshire has decided that scientists, researchers and insurance companies can have full access to prescriber-identifiable information but that health information companies, pharmaceutical or biotechnical companies cannot. The State's desire to restrict the free flow of the prescriber-identifiable information in the hands of NACDS members cannot be justified as advancing any legitimate governmental interest, much less the substantial governmental interest that is constitutionally required to justify such a blatant suppression of speech. Accordingly, NACDS fully supports the appellees and asks that the Court affirm the invalidation of the Prescription Restraint Law to the extent that it prohibits the licensing, sale, use or transfer of prescriber-identifiable data.

CONCLUSION

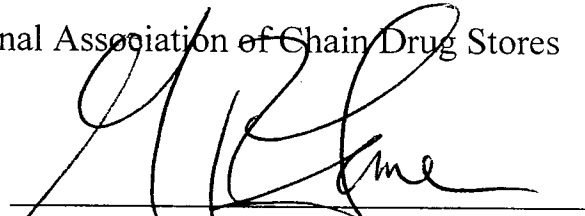
The Court should affirm the district court's decision.

Date: October 11, 2007

Respectfully submitted,

National Association of Chain Drug Stores

By:

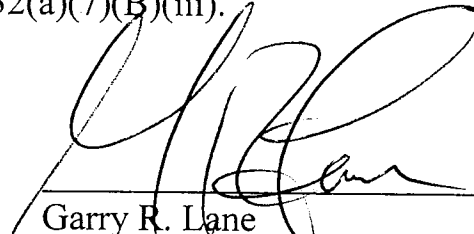


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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,432 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via first-class, postage prepaid, on October 11, 2007, to:

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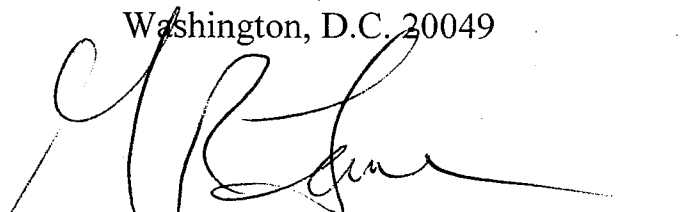
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