

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

RUSH LIMBAUGH,	:	
Plaintiff/Appellant,	:	CASE NO. 4D03-4973
	:	
vs	:	
	:	
STATE OF FLORIDA,	:	
Defendant/Appellee.	:	
.....	:	

**MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE SUBMITTED ON
BEHALF OF AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.**

Pursuant to Florida Rule of Appellate Procedure 9.370, the American Civil Liberties Union of Florida (“ACLU”) moves this Court for leave to file a brief as *amicus curiae* in partial support of the appeal filed by Rush Limbaugh to this Court. In support of this motion, the proposed *Amicus* states as follows:

1. Florida’s constitutional right to privacy, Article I §23 Fla. Const., protects the privacy of a patient’s medical records.¹ *See State v. Johnson*, 814 So.2d 390, 393 (Fla. 2002)(“a patient’s medical records enjoy a confidential status by virtue of the right to privacy contained in the Florida Constitution, and any attempt on the

¹ Article 1, Section 23 of the Florida Constitution, “the people of this state exercised their prerogative” to recognize a privacy right that “offers more protection from governmental intrusion” and “is much broader in scope” than the privacy right afforded by the Federal Constitution. *In re T.W.*, 551 So. 2d 1186, 1191-92 (Fla. 1989).

part of the government to obtain such records must first meet constitutional muster.’). Recognizing the importance of patient privacy, the Florida Legislature has codified the method by which the state must obtain patient medical records, requiring notice and the opportunity to be heard *before seizure of records*. Fla. Stat. § 456.057(5)(a); see also Fla. Stat. 395.3025(4)(d). This appeal arises from the state’s *ex parte* seizure of medical records in plain derogation of legislatively established procedure. The ACLU believes that the state’s failure to follow the legislatively mandated procedure impermissibly impinges upon Florida’s constitutional right to privacy; in short, the ACLU believes the state must obey the law as written.

2. The American Civil Liberties Union of Florida is the Florida affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization with nearly 400,000 members, approximately 18,000 in the State of Florida, dedicated to defending the Bill of Rights embodied in the United States Constitution and the declaration of rights embodied in the Florida Constitution, including the right to privacy. The proper resolution of this appeal is a matter of substantial concern to the ACLU of Florida.

3. The ACLU has a long standing interest in protecting the privacy rights of individuals and has participated in some of the most important constitutional cases before the courts dealing with such protections. See, e.g. *Griswold v. Connecticut*,

381 U.S. 479 (1965)(striking down Connecticut law forbidding use of contraceptives). Just this past year, the ACLU has been *amicus* before the Supreme Court in *Lawrence v. Texas* ___U.S. ___, 123 S.Ct. 2472 (2003)(striking down Texas sodomy statute); *United States v. American Library Ass’n, Inc.* ___U.S. ___, 123 S.Ct. 2297 (2003)(upholding Children’s Internet Protection Act); *Sell v. United States*, ___U.S. ___, 123 S.Ct. 2174 (concerning the constitutionality of forcing defendants to take medication to render them competent to stand trial); *Smith v. Doe*, 538 U.S. 84 (2003)(concerning constitutionality of Alaska’s sex offender registration act). Indeed, the ACLU has itself been directly involved in defending privacy rights. *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002).

4. In Florida, the ACLU has participated in cases dealing with the constitutionality of laws infringing upon the right to privacy guaranteed by the Florida Constitution as well. *North Florida Woman’s Health and Counseling Services, Inc.*, ___So.2d ___, 2003 WL 21546546, 28 Fla.L.Wkly. S641 (July 10, 2003)(striking down Florida Parental Notice of Abortion Act); *Renee B. v. Florida Agency for Health Care Admin.*, 790 So.2d 1036 (Fla. 2001)(challenge to prohibition of Medicaid funding for medically necessary abortions); *City of North Miami v. Kurtz*, 653 So.2d 1025 (Fla. 1995)(challenge to City’s requirement that job applicants be tobacco free for one year prior to application); *In re: T.W.*, 551 So.2d 1186 (Fla.

1989)(striking down parental consent for abortion by minor); *G.P. v. State*, 842 So.2d 1059 (Fla. 4th DCA 2003)(striking down state statute requiring women consenting to adoption to reveal identities of sexual partners); *In re J.D.S.*, Case No. 5D03-1921 (Fla. 5th DCA, decision pending) regarding appointment of guardian for fetus of severely disabled woman raped while in state care); *Schiavo v. Bush*, Case No. 03-008212-CI-20 (Pinellas County Circuit Court, pending)(challenging statute granting Governor right to stay removal of life support following final adjudication of rights, including right to privacy, by Florida courts).

5. The ACLU of Florida brings a unique perspective before this Court for consideration, a perspective which differs from the interests of the appellant (who seeks to prevent the disclosure of his medical records) and the State of Florida (who seeks to obtain the medical records) in this action. Whether the State may ultimately prevail in its efforts to obtain Rush Limbaugh's medical records is not of concern to the ACLU. Rather, we seek to vindicate every Floridian's fundamental right to privacy by ensuring that the State be required to comply with sections. 456.057(5)(a) and 395.3025(4)(d) of the Florida Statutes when it wishes to obtain patient records.

WHEREFORE, the ACLU of Florida respectfully request that this Court issue an order granting it leave to file a brief as *amicus curiae* in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was mailed to James L. Martz, Assistant State Attorney, 401 North Dixie Highway, West Palm Beach, FL 33401, and Roy Black, 201 South Biscayne Boulevard, Suite 1300, Miami, FL 33131, this 9th day of January, 2004.

Jon May, Esq