IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC04-2219

RUSH LIMBAUGH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF PETITIONER RUSH LIMBAUGH

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CONCISE STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of American Physicians and Surgeons, Inc. (the "Association"), by and through counsel, respectfully submits this *amicus curiae* brief in support of Petitioner Rush Limbaugh, pursuant to Florida Rule of Appellate Procedure 9.370. Founded in 1943, the Association is a nationwide not-for-profit organization organized under the laws of Indiana. Among its members are physicians who reside and practice medicine in Florida.

The Association is dedicated to insuring the highest ethical standards in the practice of medicine and defending the confidential patient-physician relationship. The Association consistently participates in litigation concerning these issues. Its members are deeply concerned about the intrusion of law enforcement into medical judgment and care of patients whose pain is best treated by opioid medications and other controlled substances.

The Association also has a strong interest in the privacy of patient-physician communications, including those of pain patients. The prospect of the State serving search warrants on physicians, without notice to their patients, is chilling to the Association's members and their practice of palliative care. If the decision below is affirmed, then physicians will be

turned against their own patients in an inappropriate and highly undesirable manner. The State would not ordinarily seize personal notes and records of journalists without prior notice and an opportunity to object, and the sensitivity of medical issues requires similar vigilance against overreaching law enforcement.

Independent and funded virtually entirely by physicians, the Association brings its viewpoint to these issues at bar.

SUMMARY OF THE ARGUMENT

This Court should answer in the affirmative the certified question:

> Do §§ 395.3025(4) and 456.057(5)(a) bar the State from obtaining a search warrant to seize and inspect a patient's medical records without providing the patient notice and a prior hearing to oppose the seizure and inspection?

There is no reason to authorize the State to seize, without prior notice and an opportunity to object, a citizen's medical records; there is every reason to prohibit such seizure, as recognized by Sections 395.3025(4)(d) and 456.057(5)(a)(3) of the Florida Statutes. Our employment, insurance, relationships, ability to be elected to political office, and willingness to speak freely with our physicians all depend on protection of confidentiality in medical records. If personal medical records can be taken and used against patients without their prior knowledge and opportunity to object,

then the result is clear: patients will withhold information from their doctors that might be helpful to their treatment.

Below, dissenting Judge May aptly observed that "[t]he special nature of the doctor-patient relationship dates back 2400 years to the age of Hippocrates." *Limbaugh v. State*, 887 So. 2d 387 (Fla. 4th DCA 2004) (May, J., concurring in part and dissenting in part). Tradition and the Florida Constitution embrace the protection of patient confidentiality outlined in the Oath of Hippocrates: "All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, **I will keep secret and never reveal**." http://www.aapsonline.org/ethics/oaths.htm (emphasis added). The Florida Constitution implicitly codifies this Oath in its Section 23, entitled "Right to Privacy." That provision mandates that "[e]very natural person has the right to be let alone and free from government intrusion into the person's private life except as otherwise provided herein. …." It is an infringement on this honored Oath and the Florida Constitution to seize sensitive medical records from a patient without notice and an opportunity to object. Where, as here, the very intrusion is to uncover what the patient told his physician, the violation of patient-physician confidentiality is particularly

offensive and unjustified. Nothing in the law permits this egregious violation of trust between patients and their doctors.

The overly broad seizure below demonstrates the need for due process in these situations. The State obtained its search warrants on an *ex parte* basis, resulting from a sweeping application of the "doctor shopping" statute. Fla. Stat. § 893.13(7)(a)8. But medical records unrelated to the potential charges were taken, on the inadequate theory that patient Limbaugh had seen several doctors to treat pain. Visits by a patient to multiple prescribing doctors are unremarkable, and cannot legitimize a wholesale search, without notice, of all his records. Such an intrusion violates Florida law as well as federal and state constitutional rights of the patient to medical record privacy. Patient-physician confidentiality does not permit the virtually limitless search warrants issued in this case.

A patient's comments (or lack thereof) to a doctor while seeking treatment for pain is presumptively protected speech under the First Amendment and is also private information under the Fourth and Fourteenth Amendments. Only a compelling state interest and strong evidentiary showing, after full notice to the patient, would justify this intrusion, and even then disclosure should only be with the strict safeguards required by *Whalen v. Roe*, 429 U.S. 589 (1977). These heightened requirements are

violated when medical records are taken without prior notice and an opportunity to be heard.

If these warrants for patient Limbaugh's records are allowed, then the chilling effect on the practice of medicine in the State of Florida will be enormous. Doctors will reasonably fear unjustified government scrutiny of what they include or omit from the medical charts of private patients. To avoid the professional risk, doctors will further refuse to treat pain patients adequately. Only by denying care will doctors be able to honor their Oath of Hippocrates and escape the fate of being compelled to testify against their own patients. Such a dilemma would never be forced upon the legal profession, and it should not be allowed to disrupt the medical profession either. Pain patients, for their part, will face new apprehension about what is written in their medical files, and a new obligation to review and demand changes lest the State claim that they did not say something to a doctor. If pain patients lose their privacy by seeing multiple doctors, then patients will need to assume control over the charts that may be used against them.

A health care system that is already in crisis can hardly take on these new burdens and intrusions on patient-physician communications. Chronic pain patients, treated like pariahs in health care, are particularly vulnerable to the State's new intrusion. Prosecutors should not assume unfettered

access, without notice to the patient, to the patient's medical records merely because he had undertreated pain and may have received prescriptions from multiple doctors.

ARGUMENT

I. SECTIONS 395.3025 AND 456.057, INTERPRETED IN LIGHT OF CONSTITUTIONAL AND TRADITIONAL SAFEGUARDS, PROTECT PATIENTS AGAINST SEIZURES OF MEDICAL RECORDS WITHOUT THE PATIENT'S KNOWLEDGE.

Section 395.3025(4) is clear: "Patient records are confidential and must not be disclosed without the consent of the person to whom they pertain." Disclosure can occur without patient consent only if authorized by "a court of competent jurisdiction and proper notice by the party seeking such records to the patient or his or her legal representative." Fla. Stat. § 395.3025(4)(d). Here, the State did not provide the patient with any opportunity for redaction of highly private or potentially embarrassing and irrelevant information from targeted medical records. This search and seizure constitute a far greater invasion of patient Limbaugh's privacy than, say, a warrantless search on his home. Assertions in the search warrants' affidavits that patient Limbaugh saw "four different physicians within a five-month period," which is hardly unusual for someone suffering from pain, do not justify seizing all of his medical records from those physicians without his consent. *See* Fla. Stat. § 456.057(5)(a) (a patient's medical "records may

not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care of treatment of the patient, **except upon written authorization of the patient**") (emphasis added).

Millions of Americans, and many Floridians, suffer from painful medical conditions, such as difficult-to-treat back problems. As physicians well know, these patients routinely roam from one doctor to another to obtain second and third opinions, different prescriptions and therapies, and anything else that might relieve their pain. There is nothing unusual about such doctor-shopping, and it does not justify a search warrant for all of a patient's medical records. The acquisition of similar drugs from medical sources is even one of the "behaviors" considered to be a primary indication of the **undertreatment** of pain. To hold that seeing multiple doctors and obtaining multiple prescriptions justify State access to all of one's medical records would be a dreadful and unconstitutional precedent.

Sections 395.3025 and 456.057 should be construed in light of federal and state laws that likewise protect the confidentiality of medical records. Under federal law, the "need for security in [Fourth Amendment] 'papers and effects' underscores the importance of protecting information about the

person, contained in sources such as … medical records." 65 Fed. Reg. 82464 (the Privacy Rule under the Health Insurance Portability and Accountability Act). The federal courts of appeals uniformly protect medical record privacy. "This Court has interpreted [*Whalen v. Roe*] to confer a right to protect from disclosure confidential or sensitive information held by the government." *Sherman v. United States Dep't of the Army*, 244 F.3d 357, 361 n.5 (5th Cir. 2001) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981)). Other Circuits have held likewise. *See Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995) (Posner, J.) (reaffirming a "constitutional right to conceal one's medical history"); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980); *see also Crawford v. Trustee (In re Rausch)*, 194 F.3d 954, 958-59 (9th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000); *Flanagan v. Munger*, 890 F.2d 1557, 1570-71 (10th Cir. 1989); *cf. Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (denying enforceability to a waiver of this right).

Sections 395.3025 and 456.057 codify the confidentiality protections of the Florida Constitution. 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 part of the government to obtain such

records must first meet constitutional muster." *State v. Johnson*, 814 So.2d 390, 393 (2002). That requisite showing is lacking for the warrants executed on the various doctors who served patient Limbaugh. The Supreme Court of Florida has emphasized that the Florida statutory framework "creates a broad and express privilege of confidentiality as to the medical records and medical condition of a patient," preventing disclosure of a patient's medical information except in very narrow circumstances. *Acosta v. Richter,* 671 So.2d 149, 150 (Fla. 1996) (citing Fla. Stat. § 456.057(5)(a)).

The *Fadjo* precedent is particularly illustrative. There an assistant State Attorney for Florida's Eleventh Judicial Circuit, Michael Coon, had subpoenaed the plaintiff to testify and produce documents concerning the disappearance of another individual. Fadjo provided highly private information only after Coon assured him that it would not be disclosed to others. But apparently it was. Fadjo alleged that Coon allowed a private investigator to examine his testimony, who then reported it to life insurance companies obligated on policies naming Fadjo as the beneficiary. Fadjo sued under 42 U.S.C. § 1983 based on infringement of his constitutional rights to privacy and freedom of speech in disclosing this information, and the federal court of appeals concluded that he had properly alleged a violation of a federal constitutional right. *Fadjo v. Coon*, 633 F.2d

at 1175; *see also Whalen v. Roe*, 429 U.S. 589, 598 n. 23 (1977) (recognizing a federal right of privacy in medical records).

In *Fadjo*, as here, the issue was "the revelation of intimate information obtained under a pledge of confidentiality. …" 633 F.2d at 1176. Patient Limbaugh saw his doctors in reliance on the traditional and statutory confidentiality that all patients enjoy for palliative care. The *Fadjo* precedent implies that a state official may not obtain intimate personal information unless there is a compelling need AND there are safeguards against improper disclosure. No such need or safeguards exist here. Overzealous application of possible violation of an expansive law – the "doctor shopping" statute – is insufficient basis for allowing all-encompassing access to patient Limbaugh's medical records. Patient Limbaugh has a statutory and constitutional right of privacy in those records, and unfettered access by the State would infringe on that right. *See State v. Johnson*, 814 So.2d at 393 (citations omitted) ("[T]he state attorney's subpoena power … cannot override the notice requirement of section 395.3025(4)(d). To hold otherwise would render the statute meaningless."); *Soto v. City of Conford*, 162 F.R.D. 603, 618 (N.D. Cal. 1995) ("The Supreme Court has recognized a limited privacy interest in the

confidentiality of one's medical records, derived implicitly from the United States Constitution.").

There were simply inadequate safeguards in place for the prosecutor to enjoy limitless access to patient Limbaugh's records. The Supreme Court in *Whalen* relied on the following safeguards before allowing disclosure of patient prescription information:

> [T]he [medical records] are returned to the receiving room to be retained in a vault for a five-year period and then destroyed as required by the statute. The receiving room is surrounded by a locked wire fence and protected by an alarm system. The computer tapes containing the prescription data are kept in a locked cabinet. When the tapes are used, the computer is run "off-line," which means that no terminal outside of the computer room can read or record any information. Public disclosure of the identity of patients is expressly prohibited by the statute and by a Department of Health regulation. Willful violation of these prohibitions is a crime punishable by up to one year in prison and a $2,000 fine. At the time of trial there were 17 Department of Health employees with access to the files; in addition, there were 24 investigators with authority to investigate cases of overdispensing which might be identified by the computer.

429 U.S. at 593-95 (footnotes deleted). Here, in sharp contrast, the State has already released confidential settlement information about patient Limbaugh to the press, which then published it to his detriment. The State also granted immunity to patient Limbaugh's maid, which allowed her to embarrass patient Limbaugh further by selling a story to a tabloid. This alarming lack of safeguards is unconstitutional. *Id.* at 606-07 (Brennan, J., concurring). ("[A]s the example of the Fourth Amendment shows, the Constitution puts

limits not only on the type of information the State may gather, but also on **the means it may use to gather it**.") (emphasis added).

The State violated Florida law in its sweeping seizure of patient Limbaugh's medical records. The search warrants should be quashed and the medical records should be returned to the physicians' offices.

II. THE STATE'S UNCONSTITUTIONALLY BROAD APPLICATION OF THE "DOCTOR SHOPPING" STATUTE HERE ILLUSTRATES WHY *EX PARTE* ORDERS TO SEIZE MEDICAL RECORDS ARE IMPROPER.

When proceeding on an *ex parte* basis, the State has no restraint on its overly broad interpretations of criminal statutes. Here the State adopted an unconstitutionally expansive view of the "doctor shopping" statute to criminalize what patient Limbaugh told his physicians in receiving treatment for pain. Even worse, this unconstitutional application of the statute will inevitably result in the State interrogating patient Limbaugh's physicians about what he told them, and thereby force them to breach their duty of confidentiality to the patient. This highly unusual prosecution of patient Limbaugh based on what he allegedly failed to tell his physician could set a dreadful precedent for a police state in medicine.

The U.S. Supreme Court has repeatedly held against statutes and prosecutions that chill speech. *See, e.g.*, *Meese v. Keene*, 481 U.S. 465, 474-75 (1987). The Court has emphasized the need to strike down statutes that have a censoring effect, like the "doctor shopping" statute. *See also R. A. V. v. St. Paul*, 505 U.S. 377, 395, 414 (1992) (Justice Scalia, for the Court, deploring the "'danger of censorship,'" *Leathers v. Medlock*, 499 U.S. 439, 448 (1991), and invalidating an ordinance the concurrence described as

"fatally overbroad and invalid on its face"). Here, the speech that is chilled is the dialog between patients and physicians essential to optimize the medical care. The ability of patients and physicians to communicate freely and confidentially can mean the difference between life and death, and there is an overriding public policy in favor of protecting those communications against unwelcome intrusion by the State.

It is essential to protect the confidentiality of patient-physician communications, just as other privileges are repeatedly defended against interference by prosecutors. The U.S. Supreme Court found confidentiality in the legal context to be so strong that it extends beyond even death. *See Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998) ("Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime."). There the U.S. Supreme Court turned back a prosecutor's attempt to obtain access to

communications by a client to his attorney, and this Court should likewise quash the search warrants that gave the State access to Petitioner Limbaugh's medical records.

The U.S. Supreme Court has elevated the patient-physician relationship to that of attorney-client and priest-penitent. "These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." *Trammel v. United States*, 445 U.S. 40, 51 (1980). *See also Jaffee v. Redmond*, 518 U.S. 1, 5 (1996) ("By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests."). The Oath of Hippocrates, quoted *supra*, likewise protects patient confidentiality.

Patients in Florida, with its large elderly population, are already undertreated for pain. But many Florida physicians are afraid to subject themselves and their records to heightened scrutiny. No doctor wants to be forced to breach his Oath of Hippocrates and testify against his patient, and the easiest way out is simply to refuse to prescribe opioids like oxycodone, morphine and methadone, even when indicated to treat the pain. Authorizing the State to seize personal medical records without prior notice heightens the fear of patients and inevitably increases their suffering.

Allowing unauthorized access to medical records without patient consent will frighten patients and cause them to withhold information. This infringes on their constitutional right to obtain confidential advice, a First Amendment right. *See Lamont v. Postmaster Gen'l*, 381 U.S. 301 (1965) (upholding a First Amendment right to receive information); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom [of speech and press] ... necessarily protects the right to receive ...."). This First Amendment right extends to commercial speech in the context of drug prescriptions, and should fully protect and preserve the confidentiality of the communications between patient and physician that relate to prescriptions. *See Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 757 (1976);

cf. Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 92 (1977). If the State were allowed to seize and inspect a patient's medical records without providing the patient prior notice and an opportunity to object, then this would impermissibly chill the protected First Amendment speech between patient and physician.

III. CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative.

Dated: January 26, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 27, 2005, the foregoing was sent via overnight delivery to **James L. Martz, Esq.,** Assistant State Attorney, 15th Judicial Circuit of Florida, 401 N. Dixie Highway, West Palm Beach, FL 33401-4209; **Roy Black, Esq.,** Black, Srebnick, Kornspan & Stumpf, 201 S. Biscayne Boulevard, Suite 1300, Miami, FL 33131-4311; and **Robert C. Buschel**, Esq. Buschel, Carter, Schwartzreich & Yates, P.A., 1225 S.E. 2nd Avenue, Fort Lauderdale, FL 33316-1807.

By:_____
Andrew Schlafly, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

By:_____
Andrew Schlafly, Esq.