IN THE SUPREME COURT
OF FLORIDA

CASE NO. 64,725

MIAMI DAILY NEWS, INC., and THOMAS H. DUBOCQ

Petitioners,

vs.

ALICE P., et al., and MORTON LAITNER, as attorney for HEALTH AND REHABILITATIVE SERVICES

Respondents.

DISCRETIONARY REVIEW OF A DECISION OF
THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC.

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TABLE OF CONTENTS

TABLE OF CITATIONS

CONSTITUTION, STATUTES, AND RULES:

OTHER AUTHORITIES:

Citation to other authorities has been made. They are mainly to sociological data and are confined to the first 14 pages of this brief. All are well footnoted and most are indexed in the Appendix filed with this brief.

STATEMENT OF THE CASE AND OF THE FACTS

AMICUS - AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC. (ACLU), has no major disagreement with Petitioner's characterization of the case and facts as set forth in that section. However, other portions of their brief contain assumptions, generalizations, and conclusions crucial to their argument which we submit are without factual foundation. The ACLU will present documented information here concerning these areas of disagreement but reserves the right to make further use of the facts in the Argument portion of this Brief.

In our society, the birth of a child is generally considered one of the most joyous events of a couple's personal experiences. It is one of the few individual events in a person's existence that our system of government considers significant enough to require that it be officially recorded. It is a normal and necessary human activity for the continuation of mankind. In addition, it is inevitable, unless natural or medical intervention occurs, that a pregnancy will eventually lead to birth. No one can stop or delay for very long, the emergence of a child into the world at the conclusion of a pregnancy.

Fortunately, the vast majority of babies are born healthy. But, childbirth does have risks for both mother and child. It is universally accepted as desireable in our civilization to decrease these risks and to optimize

the chances for the birth of a healthy baby and the conditions which will preserve the health and safety of both baby and mother.

It seems to be a strong instinct to give birth in private. Out pets even seek out quiet, dark corners or closets or retreat under beds to give birth. Historically, in our American culture, women have given birth in the privacy of their homes, attended by a midwife or doctor.[1] As late as 1920, in Florida, roughly 25% of births occurred outside hospitals.[2]

Petitioners contend that it is necessary for midwife consumers to have detailed information from the State to make a safe and wise choice in selecting a midwife. They do not request availability of comparably detailed information on births attended by doctors. There is a distinct implication in this contention that choice of midwife is a far riskier choice than selection of a doctor. Of course, health and safety are the main concern of all involved in this action. There is, however, no evidence to support the proposition that home births and/or births attended by midwives are less safe than doctor attended hospital births.

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[1] Yagerman, Legitimacy for the Florida Midwife: The Midwifery Practice Act, 37 U. Miami L. Rev., 123, 125-129 (1982).

[2] Report "Sunset Review of Chapter 467, Florida Statutes - Midwifery Practice Act" prepared pursuant to the Regulatory Sunset Act, Chapter 81-318, Laws of Florida by the staff of the House of Representatives Committee on Regulatory Reform, p p. 6, 7 (March, 1984) ***Footnote 2 Cont.***

The Florida Legislative Committee on Regulatory Reform, recently reported:

> ... In this regard, it needs to be noted that closely tied to the concept of the lay midwife as a competent birth attendant is the concept of home birth and the safety of this setting. The fact is that there has never been a study completed which compares the physical and psychological benefits of the various birth settings selected currently.
>
> A study has been conducted by the Board on Maternal, Child, and Family Health Research of the Commission on Life Sciences of the National Research Council (NRC), in collaboration with the Institute of Medicine (IOM) of the National Academy of Sciences to determine methodologies needed to evaluate current childbirth settings in the United States. This study highlighted the fact that scientifically determined data about the safety of all birth settings has not been gathered. Supposition about the relative safety of one birth setting compared with another is conjecture at this point.[3]

Though this is accurate, studies have been made in other countries and infant mortality data is available which can be useful in making comparisons with a few caveats.

Even in 1931, when Florida passed its first Midwifery Act (Fla. Laws ch. 14760), midwives were considered

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Footnote 2 Continued -

A graph showing the members of out-of-hospital births attended by licensed midwives in Florida from 1920 through 1982 can be found at page 1 of ACLU's Appendix. It generally shows that no significant decline occurred until 1960. It also shows a new increase from 1978 to 1982. According to the report referred to above, the number of deliveries reported by licensed lay midwives increased from 249 in 1982 to 478 in 1983. Report, supra at 62.

[3] Report, supra at 72.

a menace, despite health statistics showing their relative safety.[4] The infant mortality rate in the United States of 1977 was 14.0 per 1,000 live births.[5] The infant mortality rate for Florida in 1977 was 15.5 per 1,000 live births, but, by 1982, that figure had declined to 12.9.[6] International studies have shown that there is no direct correlation between greater numbers of doctors per capita and lower perinatal mortality rates in Western countries.[7]

A comparison of overall infant mortality rates with those of midwife attended home births must be made with care. For example, in Florida, a patient cannot be served by a

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[4] Despite the positive aspects of these programs, the attitude of public health officials toward the midwife was one of condescension, rooted in the belief exhibited by most officials that the majority of midwives, especially the "problem" midwives, were black. One influential Florida physician wrote, "Their (the 'black mammies') elimination as midwives must come..." Others urged less severe objectives. Recognizing the impossibility of immediately replacing midwives with physicians and hospital services, the "control" and education of midwives became central themes, although the long-term goal of elimination was implicit in their views. At least one state health official articulated a goal of replacing "the old illiterate midwife by (sic) the 'nurse mid-wife'..." Nevertheless, midwives were deemed a "problem" and a "menace", and were held responsible for Florida's high infant and maternal death rates, despite health officials' admissions that, statistically, midwives experienced fewer incidents of maternal and infantdeaths than did physicians." (Emphasis added. Footnotes ommitted.) Yagerman, supra n. 1, at 130, 131.

[5] The World Almanac and Book of Facts, 1983, p. 575.

[6] 1983 Florida Statistical Abstract, Bureau of Economic and Business Research, College of Business Administration, University of Florida, Frances W. Terhume, Ed., p. 89. See, ACLU Appendix, p. 2.

[7] Sheila Kitzinger, Birth at Home, p p. 45, 53. (Penguin Books, 1979). See, ACLU Appendix p. 3.

midwife if the patient's condition exceeds a certain risk factor (to be initially determined by a physican and monitored throughout the duration of the pregnancy by the midwife). Fla. Admin. Code Rule 10D-36.42[8]. If the risk factor is exceeded, the midwife must consult with a physican and may not continue seeing the patient unless there is a joint determination between doctor and midwife that the risk is acceptable. Fla. Admin. Code Rule 10D-36.42(2). In addition, the Rules require that the midwife develop a written plan for dealing with emergencies including appropriate names and telephone numbers and transportation available. Fla. Admin. Code Rule 10D-36.45(6). According to the Florida House Committee on Regulatory Reform's staff report on Sunset Review of the Midwifery Practice Act, p. 49 (March, 1984) cited above:

> The agency reports compliance with the law and rules by the 33 licensed lay midwives. The agency reports that in almost all instances, transfers of responsibility of care of clients from licensed lay midwives to physicians before delivery have been made based on the risk assessment requirement of Section 467, F.S., and rules related to risk assessment which have been promulgated.[9]

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[8] See, ACLU Appendix p.p. 3-5 for listing of risk factor determination criteria.

[9] See also, ACLU Appendix p.p. 6-8 for complaints and sanctions.

One would expect the infant mortality rate of licensed lay midwives to be lower than the rate for all births since they generally do not attend the births of babies to high risk mothers. But, even including the mothers and babies who were transferred out due to labor or delivery difficulty, the licensed lay midwives' health and safety records are excellent. The summary for 1983 follows:

> Of the 478 births attended, 34 mothers were transferred for medical care. This represents 7% of all licensed lay midwife attended births. Twenty-two maternal transfers were made for prolonged labor, while other reasons given ranged from fetal distress, footling or breech presentation to premature rupture of the membranes with meconium staining (an indication of fetal distress).
>
> Infant transfers were for low Apgar scores and myelomengocele (spino bifida). One infant died subsequent to maternal transfer for decelerated fetal heartbeat. One undiagnosed set of twins was delivered with no complications to mother or infants.[10]

There is only one infant death in this summary of 478 midwife attended births. This is a rough infant mortality rate of 2 per 1,000. While the sample is probably too small to be considered statistically significant, it certainly compares exceedingly well with an overall Florida infant mortality rate of 12.9 per 1,000 in 1982.[11]

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[10] Report, surpa at 52.

[11] See, ACLU Appendix p. 9 for detailed statistics from a Tennessee study of 1,000 midwife home births on a communual farm.

To obtain a more statistically sound comparison of licensed midwife attended home birth mortality rates with overall rates, one author studied the Netherlands. There, midwives are required to have 3-years of midwife education. The home birth rate in the Netherlands is nearly 50%. Their perinatal mortality rate for home births includes patients transferred to the hospital during labor. In the mid '70's, the infant mortality rate for Netherlands' home births was 4.5 per 1,000, while their rate for all births was 16 per 1,000.[12] England and Wales do not include transferred mothers in determining their home birth infant mortality rate. Keeping this in mind, those countries reported a home birth infant mortality rate of 4 per 1,000 in 1970, when the overall infant mortality rate was 17 per 1,000.[13]

The laws of the various states differ widely concerning midwives. The spectrum varies from recognizing that lay midwives practice is clearly legal to clearly prohibiting lay midwife practice. Very few states prohibit lay midwife practice.[14]

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[12] Kitzinger, supra n. 7, at 46, 48, 52.

[13] Id. at 28,29.

[14] See, ACLU Appendix p p. 10-13. There are two surveys included here. Due to the poor duplicating quality of the first, the second has been included for easier reference.

In a study of home births made as partial fulfillment for a master's degree in anthropology at California State University, the following observations were made:

> There are a number of points to ponder when it comes to trying to relate the home birth set to the wider society. At one level the home birth set is simply re-implementing what has long been a standard way of birth for much of mankind for a long time. Hospital birth attended by a physican is a recent innovation even in western society and is a rarity in much of the world today. It is possible that the cultural use of the hospital for birth does not necessarily meet all the needs generated by the event of birth. The benefits of hospital birth have not been fully assessed yet, and even though the perinatal death rate for mothers and babies has improved since the inception of hospital birth and especially since World War II, the other factors that occurred concurrently, such as the introduction of antibiotics, have not been separated out. The people experiencing home birth in our study appear to have better statistics than those having hospital births, but again, there are other factors beclouding that issue, such as excellent health to begin with, self-selection, etc.[15]

Although the data may be inconclusive, the bottom line is that there is no support for an assumption that midwife attended home births entail greater risks than hospital birth. Amicus for Petitioners, the Miami Herald, states

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[15]Lester, Dessez, Mazell, Birth Goes Home: A Study of Couples Electing Home Births, p. 40 (National Assoc. of Parents & Professionals for Safe Alternatives in Childbirth, Marble Hill, Missouri, 1974).

at page 14 of its brief, that even one incompetent midwife would be of legitimate concern to the to the community. This is most assuredly true. However, even one incompetent obstetrician would also be of legitimate concern to the community, but the Miami Herald does not complain of a free press access violation due to the confidentiality of obstetricians' records under §455.241 of the Florida Statutes.

Amicus - the Miami Herald, would also lead this Court to believe that "... it is overwhelmingly the less fortunate who must depend upon midwives and who would be victimized by midwives those (sic) incompetence goes undetected." Brief p. 25. It is not clear whether this means only the economically less fortunate. The Miami Herald's brief provides no explanation or documentation.

According to statistics provided by Florida's Department of Health and Rehabilitative Services, consumers of midwife services for home births are definitely not educationally less fortunate. The average number of years of education for both, father and mother is thirteen.[16] There is no economic data available for Florida. The California study of 300 home births cited above found that consumer/patients also had at least some college education.[17] The

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[16] Report, supra at 51. See ACLU Appendix, p. 14 for complete statistical report.

[17] Lester, supra n. 15, at 35.

following characteristics were also found:

> The home birth set in the San Francisco Bay Area is composed of quite average people. About nine tenths of the informants lived in stereotypic American fashion: single family duelling, father gainfully employed, one or two cars, not a member of an ethnic minority, not on welfare, no household servants.[18]

Cost was only one factor the Legislaure considered in enacting the 1982 Midwife Practice Act, §§467, Fla. Stat. (Supp. 1982). §467.002, Fla. Stat. recognizes "the need for parents' freedom of choice in the manner of, cost of, and setting for their childrens' births".

The California study found, "Home birth as here studied does not appear to be a phenomenon of poverty and ignorance, but one of conviction that there is a better way to have a baby than that prescribed by the greater society."[19] These researchers did not find that the parents were economically motivated. They had made a conscious, philosophical choice:

> In the case of home birth set, it would appear that these people have evolved to a state of mind in which they question some very basic societal assumptions: that <u>normal</u> delivery of babies necessarily belongs under the immediate purview of the medical profession, although all of those studied had secondary medical back-up

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[18] <u>Id.</u>, at 8.

[19] <u>Id.</u>, at V.

in case of need in the same way that the rest of society can call upon the medical profession for illness that doesn't cure itself. Further, they challenge the general assumption that the hospital is necessarily the safest place for normal birth. A corollary to this is the conviction expressed by home-birthers that birth is an event that should be marked as a rite of passage with all the social supports that the mother and father desire. This is not too different from the society as a whole which approves the welcoming of a new member through such rites as baptism and circumcision. However, the home birth set expresses the idea that the birth itself is the significant event, rather than a party structured at some later date. Underlying all this is the opinion on the part of home birthers that the most important part of birth is the joy and transcendental experience of it all, and they assume that good health is a normal part of birth, just as it is in life as a whole. Physical problems are considered rare and to be handled if they arise, but the norm is seen as a happy, uncomplicated birth.

This is in contrast to the prevailing wider societal birth customs which place birth in the hospital just in case a problem arises and which downplay both the potential sexual aspects of birth and births as a total family experience.[20]

The Florida experience appears to be similar:

It is clear that for some parents, the physician or certified - nurse midwife attended labor and delivery in an in-hospital setting, is not a viable alternative. The motivations vary.

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[20] Id., at 39

> Some prefer an in-home or other alternative birth setting and attendant for philosophical reasons, while for others the reasons are economic. Still others have religious preferences which lead them to seek an attendant who will provide care and assistance for a labor and delivery experience in the home.[21]

Amicus - ACLU in no way concedes that a balancing test is appropriate in this case. But, in order to provide some substance to the type of harm that might be occasioned to Respondents should their names and detailed birth records be opened to the public, the following information is provided. Because of the view held by some that home birth is too risky and shows disregard for the health and safety of the newborn:

> In some states, the growing popularity of home births has triggered accusations of, and even some prosecutions for, child abuse.[22]

In the California study, the researchers observed:

> Because of the very private nature of birth and because people having their babies at home are in a very unclear position with regard to law, anyone wishing to be present must be accorded a high level of personal trust.
>
> * * *
>
> The decreasing accessibility of people for study has been documented (Deloria 1970: Bennett 1969) and is certainly true of the home birth set. Every month I receive requests from scientists or potential midwives desiring to be present at a home birth for purposes of observation. Thus far I have not found a

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[21] Report, supra at 57.

[22] "The Fetus and the Law - Whose Life is it Anyways?," Ms., September, 1984, p. 62 at 134.

> couple willing to be observed by someone who has nothing direct to offer them. In one instance known to the writer, a social scientist was willing to pay a couple an informant's fee of $100.00, and he was unable to find a willing couple.[23]

Merely releasing the names of mothers who have chosen to deliver their babies at home could subject the mothers to public criticism. To release detailed records of their child births would expose them in ways we would not tolerate this state expose private citizens in any other context. The Third District Court of Appeal listing information contained in birth records which would be open to public inspection or publication by Petitioners and their Amicus if the record are released:

> (1) Type of delivery - Whether C-Section or vaginal.
>
> (2) Significant laboratory findings, e.g., venereal disease.
>
> (3) Cervical or vaginal lacerations.
>
> (4) Whether enema was used.
>
> (5) Delivery of placenta and firmness of uterus.
>
> (6) Medical opinion as to condition of mother and child.

Alice P. v. Miami Daily News, Inc., 440 So.2d 1300, 1301 (Fla. 3d DCA 1983)[24]

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[23] Lester, supra n. 15, at 2, 45.

[24] Pleadings alleging that this information was contained in the records requested by Petitioners can be found in Appendix to Petitioners' Initial Brief on the Merits, p.p. 16 and 17. Though they were reviewed in camera in the trial court, they have not been released.

Clearly, descriptions of cervical or vaginal lacerations, if nothing else, are descriptions of body parts generally not displayed to the public. In fact, if these body parts were voluntarily exposed to the public, the person would likely subject herself to an indecent exposure charge. In effect, Petitioners are requesting to attend these births vicariously by reading written descriptions.[25]

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[25]Examples of two birth record forms available for use by midwives at home births can be found in ACLU Appendix p p. 15-19 for a more complete picture of what information may be recorded.

"Birth, and copulation, and death.
That's all the facts when you come
to brass tacks."

T.S. ELIOT,
Sweeney Agonistes

ARGUMENT

I. THE RECORDS REQUESTED ARE PROTECTED FROM PUBLIC DISCLOSURE BY THE FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY

It is abundantly clear that this case deals with many competing rights, obligations, and privileges. One of these, the right of the free press, is crucial to the effective functioning of our democracy. An informed, enlightened citizenry is necessary or our government of, by, and for the people could easily become a government by the few. The aspect of this right that is involved here is not so much a restriction or what a newspaper may print as the paper's necessary, concomitant right to access to information.

> It is now well established that the Constition protects the right to receive information and ideas. "This freedom (of speech and press)... necessarily protects the right to receive..." Martin v. City of Struthers, 319 U.S. 141, 143 (1943). As cited in Stanley v. Georgia, 394 U.S. 575 at 564,89 S.Ct. 1243, 22 L.Ed 2d 542 (1969).

Press access to information for purposes of educating consumers has also been recognized by the United States Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Coucil, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed. 2d 346 (1976).

Unfortunately, another fundamental Constitutional right has come into direct conflict. The right of privacy has been described in many ways and has many aspects:

> They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting). (Emphasis added) As cited in the majority opnion in Stanley, Id.
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> The Fourth and Fifth Amendment were described in Boyd v. United States, 116 U.S. 616, 630, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' (Footnote ommitted). Griswold v. Conneticut, 381 U.S. 479 at 484, 85 U.S. 1678, 14 L.Ed. 2d 510 (1965).
>
> In Union Pacific R. Co. v. Botsford, 141 U.S. 250, 252, the Court said, "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow". As cited in Doe v. Bolton, 410 U.S. 179 at 214, 93 S.Ct. 737, 35 L.Ed. 2d 201 (1973).
>
> To some extent, the Fifth Amendment too "reflects the Constitution's concern for...'...the right of each individual "to a private enclave where he may lead a private life"'" Tehan v. Shott, 382 U.S. 416. As cited in Katz v. United States, 389 U.S. 347 at 350 n. 5, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967).

These cases all deal with the aspect of the right of privacy that prohibits intrusion into people's private spheres, their homes. The Respondents in this case seek to maintain the confidentiality of records of their private body parts and private activities (as explained below) conducted within the privacy of their homes. If their activities were private in and of themselves, they should be doubly protected since they occurred, by choice, in places where privacy is both expected and warranted. Release of the records in question

is tantamount to permitting intrusion by the public into Respondent's homes.

A second aspect of the right of privacy concerns protection for self-determination in very personal matters. It blends well with the first aspect discussed:

> This intrusion into "the sacred precincts of marital bedrooms" made that statute particularly "repulsive". Id., at 485-486, 14 L.Ed. 2d 510, 85 S.Ct. 1678. But subsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on that element. Eisenstadt v. Baird, holding that the protection is not limited to married couples, characterized the protected right as the "decision whether to bear or beget a child". 405 U.S., at 453, 31 L.Ed. 2d 349, 92 S.Ct. 1029 (emphasis added). Similarly, Roe v. Wade, held that the Contitution protects "a woman's decision whether or not to terminate her pregnancy." 410 U.S., at 153, 35 L.Ed. 2d 147, 93 S.Ct. 705 (emphasis added). See also Whalen v. Roe, supra, at 599-600, 51 L.Ed. 2d 64, 97 S.Ct. 869, and n. 26. These decisions put Griswold in proper perspective. Griswold may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State. Carey v. Population Services International, 431 U.S. 678 at 687, 97 S. Ct. 2010, 52 L.Ed. 2d 675 (1978).

In discussing what aspects of familial decisional privacy had already been established (when confronted with the question of whether a grandparent and grandchild family unit should be included), the United States Supreme Court stated:

> To be sure, these cases did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to childbearing, e.g., LaFleur, Roe v. Wade, Griswold, supra, or with the rights of parents to the custody and companionship of their own children, Stanley v. Illinois... Moore v. East Cleveland, 431 U.S. 494 at 500, 501, 97 S.Ct. 1932, 52 L.Ed. 531 (1977).

The magnitude of the privacy protection accorded to childbearing was described as follows:

> 'Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in Pierce v. Society of Sisters, 268 U.S. 510 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, 262 U.S. 390 (1923).' Abele v. Markle, 351 F.Supp. 224, 227 (Conn. 1972). As cited in concurring opinion of Justice Stewart in Roe v. Wade , 410 U.S. 113 at 170, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973).

The conditions under which one chooses to conclude (terminate) a pregnancy by giving birth to a child may be regulated for health and safety reasons only. The State may not influence decisions concerning childbearing and custody by regulations not directly related to health and safety such as the disputed requirement here that information concerning that choice and process be disclosed to the public.

Which brings us to the third aspect of privacy. This concerns the right to be free from governmental disclosure of private information. The United States Supreme Court gives us some assistance in defining this aspect by telling us what it is not:

> He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private', but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this and we decline to enlarge them in this manner. Paul v. Davis, 424 U.S. 693 at 713, 96 S.Ct. 1155, 47 L.Ed. 2d 405 (1976).

A description of the inevitable happening of the birth of a child can in no way be characterized as "the record of an official act such as an arrest" but fits squarely into "a sphere contended to be 'private'."

But, can a state require disclosure to it of private information? Yes, it can, but only if done for the right reasons and with proper protection against further disclosure. In the cases that follow which explain these limitations on disclosure, it becomes clear that the United States Supreme Court has weighed the competing rights discussed at the beginning of this argument and did what it had to do:

> It is emphatically the province and duty of the judicial department to say what the law is... If two laws conflict with each other, the courts must decide on the operation of each... This is the very essence of judicial duty. Marbury v. Madison, 1 Cranch 137 (1803).

It hardly bears repeating that when statutory law (such as §119, Fla. Stat.) conflicts with constitutional law, it is not difficult to select the winner. We are dealing here with a more complex choice, however, since two constitutional rights are at odds.

In most of the cases dealing with private information, the information was required to be kept confidential once collected by the state. Generally, the courts note this fact but do not speculate on the outcome if confidentiality were not required. For example in Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed. 2d 64 (1977), the Court was considering the validity of the registration of information concerning legal prescriptions written for drugs that are also subject to illegal abuse. The information was kept confidential:

> Even without public disclosure, it is, of course, true that private information must be disclosed to the authorized employees of theNew York Department of Health. Such disclosures, however, are not significantly different from those that were required under the prior law. Nor are they meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care. Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy. Whalen, supra at U.S. 602.

In his concurring opinion, Justice Brennan clarifies the importance of the confidentiality requirement:

> Broad dissemination by state officials of such information, however would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests. See, e.g., Roe v. Wade, 410 U.S. 113, 155-156 (1973). Whalen, supra, at U.S. 606.

Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed. 2d 231 (1960), is one of the few cases available which deals with protected information (here all associational ties) which was collected and not kept confidential by a governmental agency. The Court decries this breach and makes much of the potential harm that public exposure might bring. Shelton, at U.S. 486.

Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed. 2d 788 (1976), describes what measures of confidentiality is necessary to keep recording of information by the state within its limits of protecting helath and safety.

> Recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible. This surely is so forthe period after the first stage of pregnancy, for them the State may enact substantive as well as recordkeeping regulations that are reasonable means of protecting maternal health. As to the first stage, one may argue forcefully as the appellants do, that the State should not be able to impose any recordkeeping requirements that significantly differ from those imposed with respect to other, and comparable, medical or surgical procedures. We conclude, however, that the provisions of §§10 and 11, while perhaps approaching impermissible limits, are not constitutionally offensive in themselves. Recordkeeping of this kind, if not abused or overdone, can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment. The added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits. Planned Parenthood, supra at U.S. 80, 81.

One method the courts have used to determine if the state is validly acting within its authority to protect the health and safety of preganant women is to compare the requirements imposed for other medical procedures with those imposed for procedures related to childbearing. For example:

> The question then becomes whether the state interests advanced to justify this abridgment can survive the "particularly careful scrutiny" that the Fourteenth Amendment here requires.
>
> The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures... Roe, supra at U.S. 170.
>
> Saying all this, however, does not settle the issue of the constitutional propriety of the committee requirement. Viewing the Georgia statute as a whole, we see no constitutionally justifiable pertinence in the structure for the advance approval by the abortion committee. With regard to the protection of potential life, the medical judgment is already completed prior to the committee stage, and review by a committee once removed from diagnosis is basically redundant. We are not cited to any other surgical procedure made subject to committee approval as a matter of state criminal law. Doe, supra at U.S. 197.
>
> We deal with fundamental rights and liberties, which, as already noted, can be contained or controlled only by discretely drawn legislation that preserves the "liberty" and regulates only those phases of the problem of compelling legislative concern. The imposition by the State of group controls over the physician-patient relationship is not made on any medical procedure apart from abortion, no matter how dangerous the medical step may be. The oversight imposed on the physician and patient in abortion cases denies them their "liberty", viz., their right of privacy, without any compelling, discernible state interest. Concurring opinion of Justice Douglas, in Doe, supra at U.S. 220.

In this case, the compulsion to disclose records collected in the course of approving a lay midwife license application is unique. Only mothers giving birth at home attended by a midwife-trainee under the supervision of a physican are subject to exposure. This disadvantages only those wishing to give birth at home who also wish to select an individual of their choice to attend and wish to assist that individual, under doctor's supervision, to gain the experience necessary to qualify for a license. An odd class, indeed!

> ...'the Equal Protection Clause of the amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co, v. Virginia, 253 U.S. 412, 415 (1920).' As cited in Eisensta dt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972)

It is difficult to conceive what the compelling interest in requiring this information to be available to the public might be. It does not appear to be for health and safety of the specific women involved. Information concerning them can be reviewed by state health workers or vital statistics workers (as are comparable records) to protect their health and safety. Public view would add little. If it is to protect the health and safety of future clients of a particular midwife, then are the persons issuing licenses not sufficiently trained? They should deny

licenses to incompetent applicants. If it is to allow the public to determine if the state is doing a good job in making licensing decisions ? If this is the interest being protected, the ACLU submits that it is only tangentially related to health and safety. There are also less drastic means available to accomplish this goal than depriving mothers of their privacy rights.

> The 'liberty' of the mother, though rooted as it is in the Constitution, may be qualified by the State for the reasons we have stated. But where fundamental personal rights and liberties are involved, the corrective legislation must be 'narrowly drawn to prevent the supposed evil,' Cantwell v. Conneticut, 310 U.S. 296, 307, and not be dealth with in an 'unlimited and indiscriminate' manner. Shelton v. Tucker, 364 U.S. 479, 490. And see Talley v. California, 362 U.S. 60. Unless regulatory measures are so confined and are addressed to the specific areas of compelling legislative concern, the police power would become the great leveler of constitutional rights and liberties. Doe, supra at U.S. 216.
>
> Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom', NAACP v. Alabama, 377 U.S. 288, 307. As cited in Griswold, supra at U.S. 485.

Having alternate means to achieve the same ends, is sufficient reason to prohibit the means which infringe a protected right. For example, with regard to the committee of bar examiners' questions concerning associational ties of applicants (questions 7 and 13), the four member

plurality of the Court stated:

> The committee also argues it needs answers to questions 7 and 13 (in order to locate persons) who could supply information relevant to (petitioner's) qualifications. Undoubtedly, Ohio has a legitimate interest in determining whether an applicant has 'the qualities of character and the professional competence requisite to the practice of law.' But (petitioner), already a member in good standing of the New York Bar, supplied the Ohio committee with extensive personal and professional information as well as numerous character references to enable it to make the necessary investigation and determination. In re Stolar, 401 U.S. 23, 91 S.Ct. 713, 27 L.Ed. 2d 657 (1971).

More recently in a Florida case, our Circuit Court of Appeal explained the standard to be applied:

> The Supreme Court has characterized the autonomy branch of privacy as involving "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the State's power to substantively regulate conduct." Pual v. Davis, 1976, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed. 2d 405. See also Paris Adult Theatre I v. Slaton, 1973, 413 U.S. 49, 65-66, 93 S.Ct. 2628, 37 L.Ed. 2d 446. When the Supreme Court has applied this analysis, it has carefully examined the state actions to determine whether they were the least restrictive means to reach a compelling goal. Plante v. Gonzalez, 575 F.2d 1119 at 1128 (5th Cir. 1978).

Even more recently, the Fifth Circuit dealt with a case where a private citizen was investigated by the State and provided information concerning six insurance policies for which he was the named beneficiary shortly after the disappearance of the insured. This information was, in turn, provided by the State investigator to the insurance companies' private investigators. Fadjo, the object of

he investigations, alleged he has been promised absolute privilege under Florida law for his testimony. The Court described the factors to be considered in deciding Fadjo's 42 U.S.C. §1983 claim for abridgement of his constitutional right to privacy:

> In deciding upon the merits of Fadjo's case, the district court must balance the invasion of privacy alleged by Fadjo against any legitimate interests proven by the state. This court noted in Plante, supra that where the privacy right is invoked to protect confidentiality, a balancing standard is appropriate as opposed to the compelling state interest analysis involved when autonomy of decisionmaking is at issue. 575 F.2d at 1134. The court pointed out, however, that because a constitutional right is at stake, 'more than mere rationality must be demonstrated' to justify a state intrusion. Id. Both the Supreme Court and this circuit have upheld state actions impinging on individual interests in confidentialiry only after careful analysis. In Nixon, supra, the Court balanced the ex-president's privacy interest in some of his presidential papers against the public interest in the archival materials. The Court noted the limited nature of the intrusion, Nixon's satus as a public figure, the impossibility of segregating personal papers from the mass of public documents by any other means; and the magnitude of the public interest and found that the right to privacy was not violated. 433 U.S. at 465, 97 S.Ct. at 2801. Similarly, in Whalen, supra, in analyzing New York's prescription reporting requirements, the Court distinguished the disclosure to state employees under a duty of confidentialiry from disclosure to the public and found that in view of extensive security requirements chances of public disclosure were minimal. This Court, in Plante and DuPlantier, supra, upheld financial disclosure laws for elected officials and judges only after surveying the variety of public interest involved and after noting that public figures have a reduced expectation of privacy. An intrusion into the interest in avoiding disclosure of personal information will

> thus only be upheld when the government demonstrates a legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest. Fadjo v. Coon, 633 F.2d 1172 at 1176 (5th Cir. 1981).

Respondents in this case have no characteristics which would help tip the balance toward the State's compelling need to intrude on their privacy. They are mothers. They are not public figures, public officials, or public employees. In addition, they seek nothing from the government. They are not welfare applicants or applicants for licenses. They do not seek to be future employees of the government. They are not objects of prosecution. They are not even the objects of this regulation. The midwife - applicant is. Respondents are wholly private citizens who engaged in the entirely legal act of giving birth which is one of the most private acts one can engage in, particularly in the privacy of one's own home.

The final paragraph of the Court's opinion in Griswold describes this well:

> We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. supra, at U.S. 486.

As a final note on the Federal Constitutional issues involved in this case, the ACLU will respond to Petitioners' argument that Respondents waived their privacy rights. Most rights can, of course, be waived. Petitioners claim that Respondents waived their rights to privacy by allowing the midwife to file their birth records with her application. On the other hand, Petitioners

contend that if the records were submitted without the mothers' permission the midwife is the proper target of a tort action. In either case, they say the State must release the records.

ACLU contends that if the Respondents knew they had waived such precious rights as their privacy rights, they would not have intervened in the Circuit Court action to prevent their release and would not have appealed the order releasing them. There is no evidence before this Court to support the contention that there was ever an informed consent to release or any knowing, intelligent, voluntary waiver of privacy rights.

In a case dealing with privacy rights of students selected for a drug abuse prevention program where names of the participants were not held strictly confidential, the court applied the following standard:

> Before dwelling on the question of 'informed consent', it should be noted that the case before the Court is a civil case. The Supreme Court has indicated that in civil cases as well as criminal cases the Court should indulge every reasonable presumption against waiver of procedural due process and an individual's Constitutional rights. See Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1971); Ohio Bell Telephone Co. v. The Public Utilities Comm., 301 U.S. 292, 307, 57 S.Ct. 724, 81 L.Ed.2d 1093 (1936); and Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 81 L.Ed.2d 1177 (1936). The standards stated in Brady v. U.S., supra, are applicable in this case, as the Supreme Court stated at 748 of 397 U.S. at 1469 of 90 S.Ct.:
>
> 'Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent and done with sufficient awareness of the relevant circumstances and likely consequences.' Merriken v. Cressman, 364 F.Supp. 913 at 919 (E.D. Pa. 1973).

Although the reasons and authority used in this section of the argument differ substantially from those used by the Third District Court of Appeal in refusing to release the records in question, the outcome was quite correct. It is also the only outcome which comports with Federal Constitutional standards.

II. FLORIDA CONSTITUTIONAL PROVISIONS PROHIBIT DISCLOSURE OF THE RECORDS REQUESTED

A close reading of Laird v. State, 342 So.2d 962 (Fla. 1977), will reveal what this Court believed the impact of a State Constitutional privacy provision could be;

> It is urged upon us that appellants enjoy the constitutional right to smoke marajuana in the privacy of Laird's domicile. . . . Appellants argue that a decision of the Supreme Court of Alaska, Ravin v. State, 537 P.2d 494 (Alaska 1975), provides persuasive authority for the position which they advance.
>
> * * *
>
> Thus we are not persuaded by the Alaska Supreme Court's resolution of this issue in Ravin v. State. We note further that the Ravin court in part based its decision on state constitutional provisions which have no analogue in Florida.[2] 537 P.2d at 500-504.

[2]Art. I, §22, Alas. Const. reads: 'The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.' See also Justice Boochever's concurring opinion in Ravin, supra, at 513--516.
Laird, supra, at 962, 963, 965. See also, dissenting opinion of Justice Adkins at 966.

Also before Article I, §23, of the Florida Constitution, The Privacy Amendment, became effective in 1980, this Court recognized a constitutional "privacy right" to choose to die. Satz v. Perlmutter, 379 So.2d 359 (Fla. 1980). This completes the cycle of basic, intimate events alluded to in the quote beginning the argument section of this brief. With the federal cases cited in the first portion of the argument, Florida has added "death" to the "birth, and copulation, and death" trilogy that T. S. Eliot considered the "brass tacks" of human existence.

Since the Florida Privacy Amendment was added to the Constitution in 1980, however, little substance has been given to it. Cases arising seem either to be criminal cases with poor fact situations or cases where privacy and public records overlap.

The ACLU's position is that Florida's Privacy Amendment protects Respondents from disclosure of their birth records by the State. It reads, in full:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law. Art.I, §23, Fla. Const.

The law which provides for the public's right of access to all public records is §119.01, Fla. Stat., The Public Records Act. It provides an exception:

> All public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, are exempt from the provisions of subsection (1). §119.07(3)(a), Fla. Stat.

Constitutional protections against disclosure of private information must be included in the category of "records provided by law to be confidential or which are prohibited from being inspected...by general...law." The Federal and Florida Constitutions are the basis for, and prevailing, general law. Despite its inclusion by reference into the Florida Constitution, Chapter 119, cannot be given greater force than other Florida Constitutional provisions. It clearly cannot

supercede Federal Constitutional requirements. Construing §119.07 (3)(a), Fla. Stat., in this way would allow Respondents' records to remain confidential and save the constitutionality of the Public Records Act. Other constructions would lead to some difficult and untenable Florida Constitutional law problems.

Assuming that §485, Fla. Stat., and the Rules promulgated under it validly required the midwife applicant to submit detailed birth records specific enough to identify the mothers* and that no exemption from the Public Records Act applied to these records, the mothers have a Florida Equal Protection claim under Art. I, §2, Fla. Const. Classification of these mothers as the only ones subject to having their birth records revealed to the public has no rational basis. The set of facts on which the requirements that these records were not exempt from public disclosure was probably based, if the Legislature considered this at all, concerned alleged danger to the public of either home birth, use of lay midwives, or potential for licensing of unqualified lay midwives. The facts presented in the Statement at the beginning of this brief contradict these assumed dangers.

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* Department of Health and Rehabilitative Services v. McTigue, 387 So.2d 454 (Fla. 1st DCA 1980), held that Fla. Admin. Code Rule 100-36.22(a)(a)2 requiring submission of mothers' names was invalid because it was not required by the statute. While this helps preserve a mother's confidentiality, it is still possible that other detailed information required could identify them.

> ...we are also aware of the settled principle of constitutional law that a statute which depends upon the existence of a certain set of facts for its validity may cease to be constitutionally valid when that certain set of facts ceases to exist. Chastleton Corp. v. Sinclair,2646 S. 543, 44 S.Ct.405,68 L.Ed.841 (1924). As ci ted in Conner v. Cone, 235 So.2d 492, 498 (Fla. 1970). (See also, Pinellas County Veterinary Medical Society, Inc. v. Chapman, 224 So.2d 307 (Fla. 1969).)

On the other hand, if the midwife needed to submit these records in order to be licensed to practice her profession but was prohibited from disclosing these records either because it would violate the mothers' constitutional privacy rights or the prohibition from disclosure of medical records in §455.241(2), Fla. Stat., then there is a Florida Constitutional claim under Art. I, §2's provisions guaranteeing the rights to "be rewarded for industry, and to acquire, possess and protect property."

> We have consistently upheld the individual's right to pursue a lawful occupation and also have held that this is a property right protected by the constitution and the courts. The power to regulate is not synonymous with the power to prohibit absolutely. (Footnotes omitted.) World Fair Freaks and Attractions, Inc. v. Hodges, 267 So.2d 817, 819 (Fla. 1972)

If, however, the mothers gave per mission to the midwife to use their records to file her application but for no other disclosure, assuming further disclosure would result in an actionable invasion of their privacy under Cason v. Baskin, 155 Fla. 198, 20 So.2d 243 (1944), and if the agency were required to disclose to the public once the information was filed, the mothers have a claim of denial of their right to access the courts under Art. I, §21, Fla. Const.

They waived their rights against the midwife. They have no rights against the agency acting under legal compulsion. And, chances are good that they would have no claim against a newspaper for the publication of information classified as public record.

> The constitutional guaranty of a 'redress of any injury (Article I, Section 21, Florida Constitution) bars the statutory abolition of an existing remedy without providing an alternative protection to the injured party. Faulkner v. Allstate Insurance Co., 367 So.2d 214, 216 (Fla. 1979).

Once the cow has left the barn must we require that the gates in the fence be opened so the cow can stray even farther from the farm? And, if the agency refused to assist in creating the potential tort of invasion of these mothers' privacy, would those requesting the records have not only a mandamus action but also an action in tort for failure to comply with a statutory duty under Jesus v. Seaboard Coastline R.Co., 281 So.2d 198 (Fla. 1973)?

Two fundamental points to be considered in construing Florida's Privacy Amendment in conjunction with the Public Records Act are the type of privacy asserted and the characteristics of the person asserting them. As argued in the Federal constitutional portion of this brief, Respondents are seeking to protect their personal, bodily privacy in the context of childbearing. This type of privacy is the one most vigorously protected by the United States Constitution. The persons seeking this protection, again, are private third parties seeking nothing from the government and from whom the government seeks nothing. For a well reasoned discussion of the import of these factors, see special concurring opinion of Justice Overton in Forsberg v. Housing Authority of Miami Beach, 9 Fla. L.

Weekly 335, August 31, 1983 (Fla.S.Ct. Case No. 54,623 decided August 30, 1984).

Should there be any question about whether any of these issues are properly before the Court, the ACLU contends all matters raised fall within the ambit of those which may be raised for the first time on appeal. For example:

> The facial validity of a statute, including an assertion that the statute is infirm because of overbreadth, can be raised for the first time on appeal even though prudence dictates that it be presented at the trial court level to assure that it will not be considered waived. Trushin v. State, 425 So.2d 1126, 1129 (Fla. 1983).

III. PRINCIPLES OF STATUTORY CONSTRUCTION REQUIRE THAT THE RECORDS REMAIN CONFIDENTIAL

It is clear that judicially created exceptions to the Public Records Act are not permitted. News-Press Publishing Co. v. Wisher, 345 So.2d 646 (Fla. 1977). However, even assuming arguendo that constitutional considerations do not mandate the confidentiality of these records, it is not necessary for this Court to engraft an exception. The principles of statutory construction and other State law prohibits the release of these records.

> Almost any governmental restriction on action could be "clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the Whie House diminishes the citizen's opportunities to gather information...." 38] U.S. at 17, 85 S.Ct. at 1281, 14 L.ed 2d at 190." Morgan v. State, 337 So.2d 95],954 (Fla. 1976).

There are many other avenues that Petitioners could use to obtain the information or kind of information they seek without obtaining these records. They could advertize in their newspaper for mothers who wished to volunteer information. They could request the cooperation of physicians and midwives to ask their patients if they wished to be interviewed. They could ask for volunteers at La Maze or other natural childbirth classes. They could review information on complaints received about midwives or search for lawsuits against midwives and/or obstetricians. Injured people generally complain and would likely volunteer to provide the type of information Petitioners seek. The agency (Health and Rehabilitative Services) which has custody of these records is not the only

source available.

In construing a statute, it is important to look to the legislative intent:

> In the case of Scarborough v. Newsome, 150 Fla. 220, 7 So.2d 321, we held that this Court, in construing a statute, will consider its history, the evil to be corrected, the intention of the legislature, the subject to be regulated, and objects to be obtained. In statutory construction the legislative intent is the polar star by which the court must be guided, and such intent must be given effect though apparently it may contradict the strict letter of the statute. Singleton v. Larson, 46 So.2d 186 (Fla. 1950).

The Midwife Practice Act, §467, Fla. Stat. (Supp.1982), expresses the intent of legislature to provide for "the need for parents' freedom of choice in the manner of, cost of, and setting for their children's birth." Its main goals were expansive in nature not regulatory. Even the regulatory aspect has a very restrictive intent:

> It was the intent of the Legislature in enacting "the Regulatory Sunset Act": "that no profession, occupation, business, industry, or other endeavor be subject to regulation by the state unless such regulation is necessary to protect the public health, safety or welfare from significant and discernable harm or damage and that the police power of the state be exercised only to the extent necessary for that purpose,..."[26]

Requiring the release of confidential material as part of the regulation of the profession of midwifery is not necessary to achieve these ends.

One must also read statutes on like subjects together in order to discern the true and accurate meaning of a statute.

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[26] Report, supra at 21.

> It is a recognized rule of statutory construction that statutes which relate to the same person or thing or to the same class of persons or things, or to the same or a closely allied subject or object, may be regarded as in pari materia. Statutes which have a common purpose or the same common purpose, or are parts of the same general scheme or plan or aimed at accomplishing the same results, may be regarded as in pari materia. On the other hand, statutes which have no common aim or purpose and scope and which do not relate to the same subject, object, thing or person are not in pari materia. Southerland on Statutory Construction, Vol.2 (3rd ed.) 535-539, par. 5202; 50 Am.Jur. 347, par.350. Singleton, supra at 190.

Several other statutes deal either directly or indirectly with the confidentialiry of the kind of records Petitioners seek to have disclosed. All of the following Florida Statutes exempt information from the Public Records Acts' disclosure requirements: §382.35 (birth records), §390.002(3) (abortion records), and §455,241(2) (patient records). Many other exemptions exist, but these are the ones most pertinent to this case. Information contained in the records in dispute falls clearly within the descriptions of the records exempted by these statutes.

The last of these listed exemptions, patient records, includes a list of types of health care practitioners (not including midwives) who may not release patient records without consent. Petitioners argue that the principle of "express mention is implied exclusion" makes it clear that midwives are not covered by this exemption. However, the midwife applicant here was acting under the supervision of a physician. She was required to do so in order to gain certification. Attending the birth of a baby is considered part of practicing medicine. Without either a license or supervision, the

applicant would be practicing without a license. These records were part of the doctor's treatment of his patient with the midwife under his supervision. As his records they are clearly exempted from the Public Records Act.

Alternatively, if these were the records of a midwife or midwife-applicant, the principle of ejusdem generis, the counterpart of expressio unius est exclusio alterius should apply. The Legislature listed numerous medical practitioners in an effort to show that all were included so that citizens would not be concerned about having records of any medical treatment they received released to anyone without their consent. The principle of ejusdem generis is that legislation is presumed to include all similar things within a listing of covered subjects so as to fulfill the legislative intent unless the statute expressly provides that the things listed are the only ones covered and no others. State ex rel. Wedgeworth Farms, Inc. v. Thompson, 101 So.2d 381 (Fla. 1958).

It is not logical to attribute to the Legislature an intent to be inconsistent in giving confidentiality to information in one setting or when received by a particular agency but then requiring disclosure of precisely the same sort of information when received by another. This creates a legislative game of hide and seek with information that, in at least one context, the legislature has already deemed merits confidential treatment. See Foley v. State, 50 So.2d 179, 184 (Fla. 1951); and Yeste v. Miami Herald Publishing, Co., 451 So.2d 491 (Fla. 3d DCA 1984).

In dealing with interpreting the Public Records Act, this Court has not yet been confronted with facts similar to this case:

> It was unnecessary for the court to concern itself with these difficult matters, however, since the document originally sought by petitioner was not provided by a private source who had been promised confidentiality. The document was authorized by a public body acting in an open public meeting. To be sure the document may have been embarrassing to the employee, but not for the policy reasons which concerned the district court, such as those which suggest a need for confidentiality of health records, psychiatric records, or the records of past indiscretions. No policy of the state protects a public employee from the embarrassment which results from his or her employer's discussion or action on the employee's failure to perform his or her duties properly. Wisher, supra at 647.

There is also some question about whether anything received by an agency is a public record. §119.011(1), Fla. Stat., defines these as "documents, ...made or received pursuant to law...or in connection with the transaction of official business." Tigue, supra, held that the portion of the Rule requiring that names of mothers whose births were attended by midwife-trainees could not be required by the agency because there was no statutory authorization. The names submitted by this midwife were, through no fault of her own, not received by the agency pursuant to law. It was not the official business of the agency to collect these names.

Based on the above authorities, it would be improper to automatically require release of these birth records. Sound principles of statutory construction require that many things be taken into account in construing a statute. Here the construction should result in finding the records confidential and exempt from the Public Records Act.

CONCLUSION

Based on the foregoing argument and authorities, Amicus ACLU requests this Court to uphold the decision of Third District Court of Appeal, precluding the release of the records herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered this 13th day of September, 1984, to: Joseph Averill, Esquire, Attorney for Petitioners, 25 West Flagler Street, Miami, Florida 33130, and mailed this 13th day of September, 1984, to: Paul Levine, Esquire, Attorney for Amicus Curaie, The Miami Herald, 3200 Miami Center, 100 Chopin Plaza, Miami, Florida 33131, and to Morton Laitner, Esquire, Attorney for Department of Health and Rehabilitative Service, 1350 N.W. 14th Street, Miami, Florida 33125, and to Thomas G. Sherman, Esquire, Attorney for Petitioners, 3081 Salzedo Street, Coral Gables, Florida 33134.

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