IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEB BUSH,
Governor of the State of Florida,

Appellant,

CASE NO.: SC04-925

v.

MICHAEL SCHIAVO, as Guardian of the Person of THERESA MARIE SCHIAVO,

Appellee.

BRIEF FILED BY LEAVE OF COURT* OF AMICUS CURIAE, THE CENTER FOR HUMAN LIFE AND BIOETHICS AT THE FAMILY RESEARCH COUNCIL, IN SUPPORT OF APPELLANT, GOVERNOR JEB BUSH

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*if granted.

STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE AND ITS INTEREST IN THE CASE

The Center for Human Life and Bioethics at the Family Research Council (FRC), based in Washington, D.C., strives to participate in public policy and debate so that the inherent dignity of the human person is respected in law and society. To that end, the Center publishes papers, sponsors lectures, and develops public policies that embrace a culture of life. The Center for Human Life and Bioethics was established at the Family Research Council in January 2003.

Founded in 1983, the Family Research Council is a nonprofit research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing research and analysis for the legislative, executive, and judicial branches of the federal government, the council seeks to inform the news media, the academic community, business leaders, and the public about family issues that affect the nation. FRC employs approximately fifty full-time staff members at its Washington, D.C., headquarters and also hosts a select group of college students as interns through the Witherspoon Fellowship, a civic and cultural leadership program. FRC is actively involved with family policy organizations on the state level nationwide and also coordinates with other national pro-family organizations. The FRC publishes its newsletter "Family Policy" as

well as produces regular television and radio broadcasts, special lecture programs, books, and pamphlets. FRC has filed amicus briefs in numerous cases.

The interest in this case of the Center for Human Life and Bioethics at the Family Research Council is in support of Appellant, Governor Jeb Bush.

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SUMMARY OF ARGUMENT

Guardianship historically derived from the King's *parens patriae* powers, which were executed by the King's chancellor. The *parens patriae* powers were exerted to protect classes of people under the King's authority who could not act to protect themselves. Such classes invariably included children, mentally incompetent adults, and disabled people. In the United States, the *parens patriae* powers have been recognized as passing to the people and to their most direct political representatives, the state legislatures. Fontain v. Ravenel, 58 U.S. 369 (1855); Wheeler v. Smith, 50 U.S. 55 (1850). Thus, Chapter 2003-418, Laws of Florida represents a valid mechanism by which the governor of Florida can execute the *parens patriae* power of the Florida legislature for the protection of incapacitated persons such as Terri Schiavo.

ARGUMENT

I. The Florida Legislature Has Protected Defenseless Persons Through Guardianship Laws.

Issues surrounding guardianship have been extensively addressed by the Florida legislature. Florida's statutory scheme provides for the appointment of guardians, § 744.312, FLA. STAT.; provides the parameters of the guardian's role relating to advance health care directives by the ward, § 744.3115, FLA. STAT.; defines the rights of a person deemed incapacitated, § 744.3215, FLA. STAT.; and requires that an incapacitated person "be protected against abuse, neglect, and exploitation." § 744.3215, FLA. STAT. Placing guardianship in the context of a fiduciary relationship, § 744.446 forbids conflicts of interest with the guardian. § 744.446, FLA. STAT. See also § 744.101, FLA. STAT., et seq.

The instant case involves HB 35-E, a bill signed into law (Chapter 2003-418, Laws of Florida, hereinafter referred to as the "Act") on October 21, 2003, by Appellant, Governor Jeb Bush, and amending Florida's guardianship law. Pursuant to the authority conferred on him by the legislature, the Governor issued a one-time stay to prevent the withholding of nutrition and hydration from Terri Schiavo.

The instant appeal arises from a summary judgment determining "the Act," Ch. 2003-418, to be unconstitutional. Schiavo v. Bush, No. 03-008212-CV-20 (Fla. 6th Cir. Ct. May 17, 2004) (order granting summary judgment). Upon

appeal, the Act must be presumed to be constitutional. Fla. Bar v. Rapoport, 845 So. 2d 874, 877 (Fla. 2003); State v. Ocean Highway and Port Auth., 217 So. 2d 103, 105 (Fla. 1968). A proper understanding of the history and nature of guardianship law supports the Act's constitutionality.

II. The Laws Of Guardianship Are Derived From The Legislative Power To Protect The Defenseless.

Guardianship authority derived from the king's *parens patriae* powers. *Parens patriae* literally means "father of his country." BLACK'S LAW DICTIONARY 1269 (4th ed. 1968). Derived from feudalism and the English constitutional system, *parens patriae* granted to the king duties and powers called "the 'royal prerogative.'" Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972). The traditional power of the king was to serve as "guardian of persons under legal disabilities to act for themselves." Id. Whether called the "royal prerogative" or the "parens patriae function," the power itself passed to the individual states in the United States. Standard Oil, 405 U.S. at 257. Accordingly, guardianship has historically been a legislative function, deriving from the king's chancellor. In re Beverly, 342 So. 2d 481, 485 (Fla. 1977); In re Estate of Piech, 254 N.E.2d 565, 567 (Ill. App. Ct. 1969).

While US courts recognized *parens patriae* early in American history, the concept was understood to be a "legislative prerogative." Alfred L. Snapp & Son v. P.R., 458 U.S. 592, 600 (1982). The Snapp Court found:

> "This prerogative of parens patriae is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function… often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." Id. (quoting Late Corp. of Church of Jesus Christ v. United States, 136 U.S. 1, 57 (1890)).

Protecting vulnerable classes of citizens under *parens patriae* was, thus, a state power to be exercised by legislative bodies. "The exercise of this power has been most conspicuous in that class of cases in which the legislature has been called upon to act as parens patriae on behalf of lunatics, minors, and other incapacitated persons." Hoyt v. Sprague, 103 U.S. 613, 634 (1881).

Historically, while *parens patriae* has always been a legislative prerogative, some confusion was occasioned by the fact that sometimes this power was exercised by the judiciary. Such judicial action, however, was legitimate because, in doing so, the chancery court was acting as the representative of the king's power and the king's chancellor. Trs. of the Phila. Baptist Ass'n v. Hart's Ex'rs, 17 U.S. (4 Wheat.) 1, 47-50 (1819). Nonetheless, the jurisdiction of chancery courts became "mixed in practice," with "chancery courts" exercising both ordinary equitable jurisdiction as well as chancery powers.

> It [was] not always easy to ascertain in what cases he [the king's chancellor and/or the chancery court] acts as a judge, administering the common duties of a court of equity, and in what cases he acts as a mere delegate of the crown, administering its peculiar duties and prerogatives. Fontain v. Ravenel, 58 U.S. 369, 385 (1855) (quoting 2 Story's Eq. § 1189).

The Supreme Court clarified matters in Fontain. American courts could only exercise equity powers if those powers had been granted to them by Congress or were the equity powers (not the chancery powers) exercised by English courts of chancery at the time of the formation of the United States Constitution. Fontain, 58 U.S. at 384. "Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king's prerogative as parens patriae, are not possessed by the circuit courts." Id. "The prerogatives of the crown devolved upon the people of the States. And this power still remains with them… The sovereign will is made known to us by legislative enactment. The State, as a sovereign, is the parens patriae." Id. (citing Wheeler v. Smith, 50 U.S. 55 (1850)). See also Fontain, 58 U.S. at 392 (Taney, J., dissenting) (Taney dissents but provides a comprehensive support of the parens patriae power and its historical transfer from the king and his chancellor to the states and their legislatures). Parens patriae actions on behalf of incapacitated people then is a legislative function. Hoyt, 103 U.S. at 634-35. See, e.g., Hoadly v. Chase, 126 F. 818, 819-21 (C.C.D.Ind. 1904); In re Turner, 145 P. 871, 872-73 (Kan. 1915); State ex rel. City of Minot v. Gronna, 59 N.W.2d 514, 536-39 (N.D. 1953); In re Estate of Piech, 254 N.E.2d 565, 567 (Ill. App. Ct. 1969).

The Turner court in particular emphasized how fundamental the legislative parens patriae power was in guardianship cases. Turner, 145 P. at 872-73.

> It is an assertion upon the part of the state of its right to exercise its power as parens patriae for the welfare of such of its minor citizens as are deprived of proper parental control and oversight, and are disposed to go wrong. These words, meaning "father of his country," were applied originally to the king, and are used to designate the state, referring to its sovereign power of guardianship over persons under disability. When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states. Id. at 872.

The Kansas Supreme Court in Turner joined the Wisconsin Supreme Court in underscoring the basis and beneficial purpose of legislative power under parens patriae for defenseless persons:

> "Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered." Id. at 873 (quoting Wisconsin Industrial School for Girls v. Clark County, 79 N.W. 422, 427 (Wis. 1899)).

The Wisconsin Supreme Court considered the state's role of protecting those who could not protect themselves to be a duty "for the common good." Wisconsin Industrial School, 79 N.W. at 425. "Now the persons liable to be placed under guardianship under the statutes in question belong to the classes of helpless unfortunates that the state is in duty bound, through some proper agency, to protect and care for." Id.

Like the Kansas Supreme Court in Turner and the Wisconsin Supreme Court in Wisconsin Industrial School, the Illinois Supreme Court, in reviewing provisions of a state law, also emphasized the power and the duty to protect the unprotected. County of McLean v. Humphreys, 104 Ill. 378, 383-84 (Ill. 1882).

> It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise. Id. at 383 (quoted in Wisconsin Industrial School, 79 N.W. at 428).

The Humphreys court concluded: "We perceive no force in the objection that the act in question is an infringement upon the personal liberty of the citizen, as guaranteed by the constitution." Humphreys, 104 Ill. at 383.

Because the Florida legislature has specifically expressed its desires regarding situations like the unfortunate one of Terri Schiavo, the Court should recognize the legislature's historical dominion in the area of guardianship law. When acting pursuant to an Act of the Florida legislature, the governor of Florida should be able to advance a disabled ward's due process interest in life.

CONCLUSION

Guardianship law should be understood in the context of the doctrine of *parens patriae.* Under *parens patriae,* the sovereign protected the interests of those unable to do so for themselves. Sometimes the sovereign, or king, did so by acting through his chancellor. The chancellor himself acted through courts of chancery. When the chancery courts acted to protect the traditional wards of the king, they exercised the power of the sovereign, not a separate judicial function.

In the United States, the sovereign is the people. The people's direct representatives are their representatives in the state assemblies. In the United States, the *parens patriae* power resides in the legislature. In this case, the Florida legislature passed – and the Governor acted pursuant to – a law protecting the interests of citizens facing imminent death.

In this case, the lower court held that the Act was unconstitutional. However, if the Act is understood properly as an exercise of the *parens patriae* power, the Act is not unconstitutional but a traditional action of the sovereign to protect the interests of those who cannot protect themselves.

Accordingly, we respectfully request this Court to vacate and remand the Summary Judgment of the Circuit Court for the Sixth Judicial Circuit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express overnight delivery to **Kenneth L. Connor/Camille Godwin,** Wilkes and McHugh, P.A., One North Dale Mabry, Suite 800, Tampa, Florida 33609; to **George J. Felos**, Felos & Felos, P.A., 595 Main Street, Dunedin, Florida 34698; to **Thomas Perrelli/Robert M. Portman/ Nicole G. Berner,** Jenner & Block, LLC, 601 13th Street, NW, Suite 1200, Washington, DC; to **Randall C. Marshall**, Legal Director, American Civil Liberties Union of Florida, 4500 Biscayne Blvd., Suite 340, Miami, Florida, 33137; to **Jay Vail**, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399; and to **David Cortman**, American Center for Law and Justice, 1000 Hurricane Shoals Road, Suite D-600, Lawrenceville, GA 30043; on this _____ day of July, 2004.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the foregoing complies with the Florida Rules of Appellate Procedure 9.210 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.

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