

**IN THE SUPREME COURT  
IN AND FOR THE STATE OF FLORIDA**

**JEB BUSH, GOVERNOR OF THE  
STATE OF FLORIDA,**

**Appellant,**

**v.**

**CASE NUMBER: SCO04-925**

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

**Appellee.**

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**ON APPEAL FROM THE CIRCUIT COURT FOR  
THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA**

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**AMICUS BRIEF OF THE  
THE ELDER LAW SECTION OF THE FLORIDA BAR**

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## **PRELIMINARY STATEMENT**

This is an appeal by Jeb Bush, as Governor of the State of Florida, from an Order of the Honorable W. Douglas Baird granting Appellee's Motion for Summary Judgment first entered on May 5, 2004 and re-entered on May 17, 2004. That order declared Chapter 2003-418, Laws of Florida unconstitutional, declared Executive Order 03-201 void and enjoined the Governor from exercising any authority or ordering any conduct under the provisions of Chapter 2003-418, Laws of Florida.

Throughout this brief Jeb Bush, Governor of the State of Florida, will be referred to as "Governor" or "Appellant." Michael Schiavo, Guardian of the Person of Theresa Marie Schiavo, will be referred to by name. Theresa Marie Schiavo will be referred to by name. The Elder Law Section of the Florida Bar will be referred to as the "Section."

References to the record on appeal shall be designated by [Vol.\_\_\_\_, p. \_\_\_\_], indicating the Volume of the record followed by the appropriate page citation.

## **STATEMENT OF INTEREST**

This filing was approved by the Executive Committee of the Board of Governors of The Florida Bar on July 27, 2004 consistent with applicable standing board policies, and further premised on the declaration that this appearance is by the Elder Law Section of The Florida Bar, wholly supported by the separate resources of that voluntary organization - not in the name of The Florida Bar - and does not otherwise implicate the membership fees paid by every Florida Bar licensee. The Elder Law Section received the Florida Bar's approval to brief only the separation of powers issue.

The Elder Law Section is comprised of over 1700 Florida lawyers who principally practice in the areas of elder law and disability law and who are dedicated to serving all Florida lawyers and the public in these fields of practice. The Section produces educational materials and seminars, drafts legislation and rules of procedure, provides pro bono services and, on occasion, seeks to file an *amicus* brief on issues related to the Section's fields of practice. The Section is interested in this case because the issue will impact an important aspect of elder and disability law - advising clients on making end of life decisions.

## **SUMMARY OF ARGUMENT**

Chapter 2003-418, Laws of Florida (“the Act”) violates the separation of powers doctrine in several respects. First, it confers on the Governor the power to issue and lift a stay whereas the Florida Constitution confers the power to issue and lift stays to the judicial branch.

Second, the Act allows the Governor to override a final judicial order. Finally, the act contains procedural provisions regarding the judiciary which violate the judicial branch’s rule-making authority.



## **ARGUMENT**

**THE ACT IS UNCONSTITUTIONAL ON ITS FACE AS A VIOLATION OF THE FLORIDA CONSTITUTION SETTING FORTH THE SEPARATION OF POWERS DOCTRINE.**

**STANDARD OF REVIEW:** The finding that a statute is unconstitutional is subject to de novo review. North Florida Women's Health & Counseling Svcs., Inc. v. State, 866 So. 2d 612 (Fla. 2003); Caribbean Conservation Corp. v. Florida Fish & Wildlife Conservation Comm'n., 838 So. 2d 492, 500 (Fla. 2003).

### **A. The Act Usurps Judicial Power.**

Article II, section 3 of the Florida Constitution, provides that

[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The legislature is expressly prohibited from encroaching upon the powers of the other governmental branches. Art. III, §12, Fla. Const. Judicial power is vested solely in the supreme court, district courts of appeal, circuit courts, and county courts of this state. Art. V, §1, Fla. Const. The Act at issue here infringes upon that power by

vesting in the Governor the authority to: (1) issue a stay of a judicial order; and (2) lift the stay, to the exclusion of a judge or other judicial authority.

The legislature is constitutionally prohibited from authorizing the executive branch to exercise powers that are fundamentally judicial in nature. Dep't of Agriculture & Consumer Svcs. v. Bonanno, 568 So. 2d 24, 33 (Fla. 1990). Here, the Act confers upon the Governor the power to grant a stay of a judicial order, which is itself an exercise of judicial power. In so doing, the legislature has attempted to usurp the judiciary's authority. This court has previously advised one of the Governor's predecessors that such a usurpation violates the separation of powers doctrine where it stated:

When a court is created, the judicial power is conferred by the constitution, and not by the act creating the court. It was said at an early period in American law that the judicial power in every well-organized government ought to be coextensive with the legislative power so far, at least, as private rights are to be enforced by judicial proceedings. The rule is now well settled that under the various state governments, the constitution confers on the judicial department all the authority necessary to exercise powers as a coordinate department of the government. Moreover, the independence of the judiciary is the means provided for maintaining the supremacy of the constitution.

In a general way the courts possess the entire body of judicial power. The other departments cannot, as a general rule, properly assume to exercise any part of this power, nor can the constitutional courts be hampered or limited in the discharge of their functions by either of the other two branches.

In re: Advisory Opinion to the Governor, 213 So. 2d 716 (Fla. 1968)(quoting 16 Am Jur §219).

The power to issue stays is a judicial function. Landis v. North American Co., 299 U.S. 248, 254 (1936). Moreover, the Florida Constitution confers upon the courts the exclusive power to issue all writs necessary or proper to the complete exercise of their jurisdiction, including stays. Art. V, §5, Fla. Const. Here, the Act confers judicial stay power to the executive branch, in contravention of the separation of powers doctrine, which renders it unconstitutional

**B. The Act Impermissibly Overrides a Prior Final Judicial Order.**

The Act impermissibly hampers and limits the discharge of the trial court's mandate by empowering the Governor to stay a judicial order. Following hearing, the trial court entered an order in February 2000 mandating that Theresa Schiavo's feeding tube be removed. The Second District Court of Appeal affirmed that final order on appeal. Schindler v. Schiavo, 780 So. 2d 176 (Fla. 2d DCA 2001), cert. denied, 789 So. 2d 248 (Fla. 2001) ("Schiavo I"). The Second District pointed out in Schindler v. Schiavo, 851 So. 2d 182 (Fla. 2d DCA 2003) ("Schiavo IV"), that the final judgment in the Schiavo case was "entered several years ago and has already been affirmed by this court." Id. at 185-186. Moreover, the Florida Supreme Court

declined to review Schiavo I. Id. Thus, there is no question that there was a final judicial order entered disposing of the case on its merits.

The Act impermissibly confers upon the Governor the ability to indefinitely stay the effect of the trial court's final order entered in 2000 which was judicially affirmed in 2001. As the parties had already exhausted judicial review of that final order, the legislative and executive branches were without constitutional authority to interfere with the finality of that judicial mandate through legislative means or executive order. Because the Act allows the Governor to stay a final judicial order, it violates the separation of powers doctrine.

**C. The Act Impermissibly Infringes upon the Judiciary's Rule-Making Authority.**

The judicial branch, not the executive or legislative branches, has the exclusive power to promulgate rules for the practice and procedure in all Florida courts. Art. V, § 2(a), Fla. Const. Where the legislature's enactment is procedural, it infringes upon the judiciary's rule-making authority such that the enactment is unconstitutional. Looney v. State, 803 So. 2d 656, 676 (Fla. 2001); Jackson v. Florida Dep't of Corrections, 790 So. 2d 381 (Fla. 2000); Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000). Here, the Act is unconstitutional on its face as it requires that the chief judge of the circuit court appoint a guardian ad litem for the patient to make

recommendations to the Governor and the court, if the Governor issues a stay. Ch. 2003-418, §1(3), Laws of Fla.

Mandating that the chief judge appoint a guardian ad litem infringes upon the judiciary's power to control its own operating procedures. By dictating an internal operating procedure of the judiciary, the legislative branch has impermissibly encroached upon the province of the supreme court and violated the separation of powers doctrine.

## **CONCLUSION**

For all the foregoing reasons, the Section respectfully requests this court affirm the trial court's order.

Respectfully Submitted,

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**CERTIFICATE OF FONT**

I HEREBY CERTIFY that the size and style of type in this brief is 14 point Times New Roman.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing was served by U.S. Mail on the 28th day of July, 2004 to the following parties: **George J. Felos, Esquire** Felos & Felos, P.A., 595 Main Street, Dunedin, Florida 34698; **Thomas J. Perrelli, Robert M. Portman, Nicole G. Berner**, Jenner & Block, LLC, 601 13<sup>th</sup> Street, NW, Suite 1200, Washington, DC; **Randall C. Marshall**, Legal Director, American Civil Liberties Union of Florida, 4500 Biscayne Blvd, Suite 340, Miami, Florida 33137; **Jay Vail**, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399; **David Cortman**, ACLJ, 1000 Hurricane Shoals Road, Suite D-600, Lawrenceville, GA 30043; and **Kenneth L. Connor and Camille Godwin**, Wilkes & McHugh, P.A., One North Mabry Street, Suite 800, Tampa, Florida 33609

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