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.

REPLY BRIEF OF APPELLANT JEB BUSH, GOVERNOR OF THE STATE OF FLORIDA

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I. SCHIAVO=S ANSWER BRIEF HIGHLIGHTS THE NEED FOR DEVELOPMENT OF A COMPETENT FACTUAL RECORD IN THE LOWER COURT.

In his brief[1], Schiavo repeatedly argues that no discovery or trial is necessary in this case because the facts are irrelevant. (AB, pp. 5, 14). Notwithstanding this assertion, he also repeatedly makes explicit Afactual@ assertions as components of his arguments. Examples of these unsubstantiated and outside the record declarations are found throughout the Answer Brief.

The first such allegation appears in the statement of the case and facts, where Schiavo asserts, supported only by reference to two newspaper editorials, that Akey legislators@ now regret their vote on the Act. (AB, p. 2). In the same paragraph, Schiavo also alleges that these Akey legislators@ were pressured to vote as they did by Aphysical and political threats@ from persons who are part of a Awell-organized national campaign.@ Although cited in Schiavo=s ATable of Authorities,@ these editorial columns were not provided in an appendix nor was any attempt made to bring the accusations contained therein properly into the record before this Court. [2] In fact, the statements attributed to the only two legislators named are nothing less than rank hearsay and point out the need in this case for competent evidence. In contrast, although not considered by the lower court, the Governor submitted numerous affidavits signed by legislators, describing their concerns and intent in proposing and in voting for the Act. (R. 950-952; 1115; 1067; 1005-1006; 1125-1129; 1136-1137; 1140-1143; 1146-1147).

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[1] Reference to the Answer Brief of the Appellee will be noted as (AB, page number)

[2] Schiavo also never advises the Court that the sources are not even newspaper articles, but rather, opinion columns.

Additional allegations in the Answer Brief include unsupported assertions that the Governor's allegations about Schiavo are false and Ascurrilous@ (AB, pp. 5, 7); that Terri is in a persistent vegetative state, and her cerebrum has mostly been replaced by spinal fluid (AB, p. 5); that denial of feeding Adoes not result in death by starvation@ (AB, p. 6 n.5); that such a death is Apainless@ (AB, p. 6 n.5); that Terri's current life entails "never ending physical torture" (AB, p. 19 n.17); that "Opponents to removal of artificial life support routinely charge family members with alleged financial 'conflicts' to impugn their motives." (AB, p. 7); and, that Terri would want to refuse food and fluids. (AB, p. 11 n.7, pp. 30, 50).

The last contention, that Terri would want to refuse food and fluids, is crucial because it is the very question the Governor has been repeatedly precluded from investigating in this case. Clearly, Schiavo seeks to have this Court accept his incompetent, extra-record allegations as fact, while depriving the Governor of the opportunity to rebut the extra-record claims and prove or disprove the truth of his claims. Schiavo=s mere naked allegations of fact are wholly inadequate to support his attack on the constitutionality of the statute. *Cox v. Fla. Dept. of Health and Rehabilitative Services*, 656 So. 2d 902 (Fla. 1995) (insufficient factual record to attack constitutionality where no evidence adduced). Further, his reliance on such assertions underscores the need to afford the Governor procedural due process so that a competent factual record can be established.

II. SCHIAVO AND THE LOWER COURT FAILED TO RECOGNIZE THE CRITICAL DISTINCTION BETWEEN AN IMPLICATION OF PRIVACY RIGHTS AND AN INFRINGEMENT OF PRIVACY RIGHTS.

The lower court found the Act unconstitutional as an infringement on the right of privacy under Art. I, ' 23, FLA. CONST. (R. 1383). In so doing, the court made the incorrect assumption that any act that affects or touches upon privacy

rights is necessarily an infringement or violation of those rights. Florida cases discussing the right to privacy often use the terms Aimplicate,@ Ainfringe,@ and Aimpinge.@ *See, North Florida Women=s Health and Counseling Service v. State*, 866 So. 2d 612 (Fla. 2003); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989). Although these terms are sometimes used interchangeably, reference to their dictionary definitions reveals important distinctions.[3] AImplicate@ is a neutral term meaning: 1) Ato show to be also involved;@ 2) Ato imply as a necessary circumstance, or as something to be inferred or understood;@ 3) Ato connect or relate to intimately; affect as a consequence.@ An act may Aimplicate the right to privacy either negatively or positively. On the other hand, Ainfringe@ has a negative connotation and means Ato commit a breach or infraction of; violate or transgress;@ 2) Ato encroach or trespass.@ Similarly, Aimpinge@ is defined as Ato make an impression; have an effect or impact; 2) to encroach or infringe; 3) to strike, dash, collide; 4) to come into violent contact.@ *Random House Webster=s Unabridged Dictionary*, 961, 980 (2d ed. 2000). These definitions support the Governor=s contention that there is a pivotal distinction between an action which infringes or violates the right to privacy and an action which merely affects or implicates the right to privacy. For the Act to be unconstitutional, it must violate privacy rights, not merely implicate them.

Certainly, all manner of legislative enactments implicate, involve, or touch upon the right to privacy without necessarily infringing upon or violating that right. Legislation affecting any acts may arguably implicate privacy concerns. However, this Court has held that the strict scrutiny standard is only necessary if the challenged enactment was found to violate the right of privacy. *Renee B. v. Florida*

[3] Courts may utilize dictionaries to determine the plain and ordinary meaning of words. *Advisory Opinion to the Attorney General re: Florida Minimum Wage Amendment*, 2004 WL 1574232 (Fla. 2004).

Agency for Health Care Administration, 790 So. 2d 1036 (Fla. 2001) (rule precluding state funding of abortions did not infringe on the right to privacy and thus did not require the strict scrutiny analysis). In *Renee B.*, the challenged rules certainly affected personal and private decision-making regarding abortion, but the mere implication of the right to privacy did not amount to a violation of that right. *Id.*

Although this Court, in *North Florida*, at times uses the terms Aimplicate@ and Ainfringe@ interchangeably, the substance of the opinion clearly shows that the Court first determined that the Parental Notice of Abortion Act implicated a minor=s right of privacy prior to finding that the act infringed upon that right. To do so, this Court reviewed a substantial factual record developed in the lower court via the adversary process. *North Florida*,866 So. 2d at 616, 630-631. In this case, before finding an infringement on or violation of Terri=s right to privacy, there must be an adjudication of facts **B** particularly adjudication of the factual issue of her wishes under the present circumstances. *See, Shaktman v. State*, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlich, C.J., concurring) (Awhether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation@). Unless and until the Act is determined to violate Terri=s right to privacy, the Act should be viewed as presumptively constitutional.

III. BY ENTERING SUMMARY FINAL JUDGMENT FOR SCHIAVO, THE LOWER COURT VIOLATED THE GOVERNOR=S FEDERAL DUE PROCESS RIGHTS.

The Governor has procedural and substantive due process rights guaranteed

under both state and federal law. These rights include the right to discovery, the right to cross-examine witnesses, and the right to a jury trial or an evidentiary hearing with respect to factual matters. *See, e.g.*, Art. 1, ' 22, FLA. CONST.; U.S. CONST. amend. VII; U.S. CONST. amend. XIV, ' 1; and Rules 1.430 and 1.280, Fla. R. Civ. P. Although Schiavo asks this Court to decide this case only on state constitutional grounds (AB, p. 4 fn.4), the Court certainly cannot ignore the obvious violations of the Governor=s due process rights under the federal constitution. *See, Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1996) (violates the due process clause of the Fourteenth Amendment to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented) (citing *Hansberry v. Lee,* 311 U.S. 32 (1940)).

The purpose of due process is to ensure adequate safeguards for constitutional rights. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In this case, as explained in detail in the Initial Brief, the Governor has been wholly deprived of these safeguards. He has been denied the opportunity to examine or cross-examine any witnesses and denied the opportunity to conduct any discovery whatsoever. Rather, he has been forced to accept as Afacts@ incompetent allegations and hearsay which have just as little probative value as the newspaper editorials Schiavo relies upon for his statement of facts in this appeal.

IV. THE ACT DOES NOT ENDOW THE GOVERNOR WITH THE ABILITY TO NULLIFY FINAL ORDERS NOR PROVIDE HIM STANDARDLESS DISCRETION TO IGNORE HEALTH CARE CHOICES.

Although Schiavo argues, in unnecessarily dramatic language, that the Act essentially renders court orders inoperative, (AB, p. 31), he patently ignores the fact that in *Schiavo II*, the Second District invited the guardianship court to modify its

prior judgment if circumstances warranted such a change. *Schindler v. Schiavo,* 792 So. 2d 551, 559 (Fla. 2d DCA 2001). As the Second District Court explained, orders such as the order granting Schiavo authority to remove Terri=s feeding tube are not final, and may be challenged at any time. *Id*. This fact is apparently irrelevant to Schiavo, who makes the stunning (and wholly unsubstantiated) claim that "determining Mrs. Schiavo's intent (again) is not material" and that even if a "hundred juries" determined that Terri wanted food and fluids, that would be constitutionally irrelevant! (AB, p. 9, 16).

Schiavo also protests that if the Governor can conduct discovery on the facts pertinent to this case, "no judicial judgment is ever final because strangers . . . can always refuse to acknowledge that judgment." (AB, p. 47). This simply makes no sense. Strangers are not bound by judgments between other parties. *Gentile v. Bauder,* 718 So. 2d 781, 783 (Fla. 1998). Moreover, "strangers" normally will not have standing, or colorable arguments, upon which they can challenge judgments affecting another person. On those rare occasions that such standing exists, it would violate due process to say such strangers are bound by a decision in which they had no representation.

Properly construed in *pari materia* with other laws, including Chapter 765, Florida Statutes, the Act does not provide the Governor with standardless discretion. Specifically, ' 765.401, FLA. STAT., refers to various proxies who may enter proceedings and act in circumstances where a patient has not previously executed an advanced directive. By passing the Act, the legislature determined that the Governor should be permitted to act as a proxy in a very narrow set of circumstances. Further, there is a vast difference between a privy and a person who is merely authorized to act as a proxy. A Aproxy@ is Aone who is authorized to act as a substitute for another.@ *Black=s Law Dictionary,* 1241 (7th ed. 1999). In

contrast, a Aprivy@ is Aa person having a legal interest of privity in any action, matter, or property.@ *Id*. at 1218. A finding of privity requires determination that two parties have a legally cognizable interest in the same proceeding. *Id*. at 1217. Determination of a person=s status as a Aprivy@ requires examination into the circumstances of each case. *Thompson v. Haynes*, 294 So. 2d 69, 71-72 (Fla. 1st DCA 1971). *See also, C.L. Whiteside and Associates Construction Company, Inc. v. The Landings Joint Venture, Inc.*, 626 So. 2d 1051 (Fla. 4th DCA 1993) (questions of privity and common interest are factual in nature). This is yet another factual issue undecided by the lower court.

V. THIS COURT SHOULD DECLINE TO ADDRESS SCHIAVO=S ALTERNATIVE GROUNDS FOR FINDING THE ACT UNCONSTITUTIONAL.

Schiavo=s Answer Brief posits additional alternative grounds for affirmance of the lower court order entering summary final judgment. (AB, pp. 10, 40-44). As Schiavo concedes, the lower court did not reach these issues, and in fact, expressly reserved the opportunity to address them at a later date if the Act was found constitutional by a reviewing court. (AB, p. 40). Just as with the other issues in this case, no competent factual record was developed from which to formulate arguments. As such, this Court should decline Schiavo=s invitation to short-circuit the litigation process by attempting to address such matters at this time. However, in the interest of caution, the Governor will briefly address why these alternative arguments are without merit, particularly in the absence of a record.[4]

A. The Act Does Not Violate Equal Protection.

[4] Although only briefly addressed herein, these arguments and others were presented at length in the lower court and can be found in the Governor=s Corrected Brief, filed in the lower court on November 20, 2003. The Corrected Brief is found in the Record of this Appeal at R. 465-530.

The analysis applied to the Act for purposes of determining whether it violates Florida and federal constitutional guarantees of equal protection is functionally equivalent to that utilized when testing the Act for validity under Florida=s right to privacy. Just as the Act passed muster under that challenge it also meets constitutional strictures under an equal protection analysis.

Classifications drawn by the legislative branch, which are intended as a response for perceived ills, need be drawn no broader than necessary in order to remedy those ills. *State v. Peters*, 534 So. 2d 760, 763 (Fla. 3rd DCA 1988) citing *Sembler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610, 55 S. Ct. 570, 571 (1935). The limited scope of the Act is plainly tailored to the legislature=s response to a particularly egregious problem and is structured to address that problem. Here the legislature has determined that in order to protect and preserve life and to protect the disabled it must permit the Governor to reinstate nutrition and hydration to a person who has actually been determined to be in a persistent vegetative state and who has had those necessities withdrawn in the context of a dispute over the patient=s condition and wishes. Such a limited intrusion and narrowly drawn class is fully in concert with the constitutional standards imposed upon statutes such as the Act.

B. The Act Is Not An Unlawful Bill Of Attainder.

Schiavo claims that the Act is unconstitutional as an unlawful bill of attainder and thus is in violation of Article I, Section 10, Florida Constitution. Schiavo claims further that the Act by its terms necessarily Asingles out@ Terri and imposes a Apunishment@ upon her without benefit of a judicial trial. The Act could apply to any person who meets the conditions set out in Section (1)(a)-(d). None of these conditions is so limiting that only Terri can fall within them. Second, nothing in the Act evidences any determination on the part of the legislature that a person who

falls within its ambit has had his or her Aguilt [determined] for prior conduct@ or that the Act Ainflicts punishment.@ Both of these effects are required for the Act to be a bill of attainder. *Mayes v. Moore*, 827 So. 2d 967, 972 (Fla. 2002); *Plaut v. Spendthrift Farm*, 115 S. Ct 1447, 1463 n.9 (1995).

Far from a legislative determination of Aguilt,@ the Act operates to ensure that a person=s wishes are determined and carried out. There is simply no conduct of Terri for which the law could assert retribution or deter. Schiavo=s claim that the Act Apunished@ Terri by depriving her of her constitutional rights presupposes that those rights were violated. If they were not, as the Governor argues, then the Act cannot be a punishment.

C. The Act Is Not An Invalid Special Law.

A general law is operates Auniformly within the state, uniformly upon subjects as they exist within the state, or uniformly within a permissible classification.@ *Schrader v. Florida Keys Aqueduct Auth.*, 840 So. 2d 1050, 1055 (Fla. 2003). Further, a Ageneral law operates uniformly, not because it operates upon every person in the state, but because every person brought under the law is affected by it in a uniform fashion.@ *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club*, 434 So. 2d 879, 881 (Fla. 1983). It is irrelevant from a constitutional standpoint that the Act may only impact one person so long as it treats all persons within its ambit equally and operates uniformly throughout the state. See *Cesary v. Nat'l Bank of N. Miami*, 369 So. 2d 917, 921-922 (Fla. 1979) for an example of just such a situation. (AIt might be that the railroad of the complainant is the only property affected by the act. Such a state of affairs would not make it a special law.@)

The Act operates universally throughout the state so long as a person meets the prerequisites set forth in Section (1)(a)-(d). These conditions were discussed in the Governor=s initial brief, but it is important to emphasize that each condition was

capable of replication throughout the state on October 15, 2003. Further, none of the conditions is limited to a particular region or portion of the state and none is based either explicitly or implicitly upon conditions peculiar to a particular region. Thus, the Act is easily distinguishable from the law declared invalid in *City of Miami v. McGrath*, 824 So. 2d 143 (Fla. 2002) (law invalid since it only applied to cities that had reached a certain population on a particular date prior to the law=s enactment thus limiting the reach of the law to specific cities). The fact that the Act operates upon a temporally closed class of persons, *i.e.*, those who met its conditions on October 15, 2003, is of no constitutional importance when the Act operates uniformly and universally upon those persons covered by it throughout the state. Moreover, while not required due to its universal application, the Act is constitutional since it addresses issues substantially affecting the people of the state as a whole in advancing compelling state interests in the preservation of life, the protection of persons with disabilities, and the protection of the integrity of the medical profession.

In his brief, Schiavo makes the unsupported assertion that the Act "is indisputably targeted at Mrs. Schiavo and no one else." (AB, p. 3, 21, 31, 40, 41, 42, 44). At the same time, he makes the contradictory concession that the Act applies to a set of patients, thus undercutting his own argument that Act could only be applied to Terri. (AB, p. 8) ("all patients to whom it applies"); (AB, p. 13) ("every person who conceivably falls within its terms"). Thus, while Terri may be the only person ultimately affected by the Act, that happenstance is constitutionally irrelevant, as is whether the members of the legislature were aware of that fact when they passed it. *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club*, 434 So. 2d at 882.

CONCLUSION

This Court should recall Schiavo=s argument that even if a Ahundred juries@ determined that Terri Schiavo wanted to be provided food and water under the present circumstances, such judgments would be constitutionally irrelevant. (AB, p. 9, 16). This is an astounding admission and certainly leads to the inference that Schiavo=s opposition to a valid fact-finding process which adheres to the requirements of due process is rooted in a fear that such a process may very likely reveal that Terri=s wishes differ from his own.

Nevertheless, this Court should not be faced with the task of sorting out the truth of the various allegations underlying the constitutional issues in this case **B** that is the task of a trial court operating within the confines of due process. The Governor therefore urges this Court to recognize that Ch. 2003-418, Laws of Florida, rather than violating Terri Schiavo=s right to privacy, in fact provides a much needed additional layer of protection for the health care decisions of an incompetent patient who did not memorialize her health care choices in writing.

Accordingly, the Governor requests this honorable Court to vacate the Summary Final Judgment and remand this matter to the Circuit Court for the Sixth Judicial Circuit to permit the development of a competent factual record through discovery and trial by jury. In the alternative, the Governor requests this Court find Chapter 2003-418, Laws of Florida and the Governor=s actions pursuant thereto to be constitutional.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express Overnight Delivery to **George J. Felos**, Felos &

Felos, P.A., 595 Main Street, Dunedin, Florida 34698; to **Thomas J. 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 **James Alan Sekulow, James M. Henderson, Sr., Walter M. Weber, David Cortman**, ACLJ, 1000 Hurricane Shoals Road, Suite D-600, Lawrenceville, GA 30043; to **Patricia Fields Anderson,** 447 Third Avenue North, Suite 405, St. Petersburg, Florida 33701; to **Max Lapertosa, Kenneth M. Walden, Aliza Kaliski,** Access Living, 614 West Roosevelt Road, Chicago, Illinois 60607; to **George K. Rahdert,** Rahdert, Steele, Bryan & Bole, P.A., 535 Central Avenue, St. Petersburg, Florida 33701; to **William L. Sanders, Jr.**, Center for Human Life and Bioethics at The Family Research Council, 801 G Street, NW, Washington, DC 20001; to **Jan G. Halisky,** 507 S. Prospect Avenue, Clearwater, Florida 33756; to **Mary L. Wakeman, Lauchlin T. Waldoch, Scott M. Solkoff,** The Elder Law Section of the Florida Bar, 101 N. Monroe Street, Suite 900, Tallahassee, Florida 32302-0229; to **Mary L. Wakeman, Russell E. Carlisle, Lauchlin T. Waldoch, Edwin M. Boyer,** AFELA, 101 N. Monroe Street, Suite 900, Tallahassee, Florida 32302-0229; to **David S. Ettinger, Jon B. Eisenberg,** Horvitz & Levy, LLP, 15760 Ventura Blvd., 18th Floor, Encino, California 91436; to **Bruce G. Howie,** 5720 Central Avenue, St. Petersburg, Florida 33707; to **Gordon Wayne Watts,** 821 Alicia Road, Lakeland, Florida 33801-2113, on this 5th day of August 2004.

_____
KENNETH L. CONNOR
CAMILLE GODWIN

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with Florida Rule 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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KENNETH L. CONNOR
CAMILLE GODWIN