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.

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

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PRELIMINARY STATEMENT

This appeal follows from a May 17, 2004 order of the Court for the Sixth Judicial Circuit granting Summary Final Judgment in favor of Appellee Michael Schiavo, finding Ch. 2003-418, Laws of Florida, unconstitutional and finding Executive Order No. 03-201 void and of no legal effect. Throughout this Brief, Appellant Jeb Bush, Governor of the State of Florida, shall be referred to as "the Governor," or "Appellant," and Appellee, Michael Schiavo, Guardian of the Person of Theresa Marie Schiavo, shall be referred to as " Schiavo" or "Appellee." The ward, Theresa Marie Schiavo, shall be referred to as "Terri," and references to the record will be cited as "(R. ____)."

STATEMENT OF THE STANDARD OF REVIEW

The standard of review for an order granting summary judgment is de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Further, because the order at issue has determined that a legislative enactment is unconstitutional, unlike other final orders, it does not arrive at this Court cloaked with a presumption of correctness. To the contrary, this Court must presume Ch. 2003-418 to be constitutional. *Larsen v. Lesser*, 106 So. 2d 188, 191 (Fla. 1958). The standard of review of a finding of unconstitutionality of a statute is de novo. *Caribbean Conservation Corp. v. Florida Fish and Wildlife Conservation Commission*, 838 So. 2d 492, 500 (Fla. 2003); *North Florida*

Women's Health and Counseling Svcs., Inc. v. State, 866 So. 2d 612 (Fla. 2003); *Glendale Federal Savings and Loan v. Dept. of Insurance,* 485 So. 2d 1321, 1323 (Fla. 1st DCA 1986), *rev. denied,* 494 So. 2d 1150 (Fla. 1986).

STATEMENT OF THE CASE

On October 21, 2003, Schiavo filed a Petition for Declaratory Judgment and Request for Temporary Injunction in the Circuit Court of the Sixth Judicial Circuit, Pinellas County. (R. 1-10). Schiavo's action challenges the constitutionality of Chapter 2003-418, Laws of Florida. (R. 2).

On December 22, 2003, the Governor filed a Petition for Writ of *Certiorari* to the Second District Court of Appeal based on the circuit court's grant of Schiavo's motion for protective order precluding the Governor from taking discovery in the underlying cause. *Bush v. Schiavo,* 866 So. 2d 136, 137 (Fla. 2d DCA 2004). The Petition alleged the trial court erred by not requiring Schiavo to establish good cause for the requested relief. *Id.* at 138. Absent the discovery requested, the Governor argued he would be foreclosed from developing and presenting evidence to defend against the claims of unconstitutionality and would be unable to establish a factual record from which an appellate court could review the decisions made by the circuit court. *Id.*

The Second District granted the Petition for Writ of *Certiorari* on February 13, 2004. *Id.* at 140. In granting the Writ, the Second District agreed the circuit court

erred by not requiring Schiavo to demonstrate good cause to prevent the depositions sought by the Governor. *Id.* at 138. The Second District also directed the circuit court to conduct an inquiry into "the parties' legal arguments concerning the status of the adjudicated facts as a subject of further inquiry." *Id.* at 139-140. However, on May 5, 2004, the circuit court again granted Schiavo's motion for a protective order, again precluding discovery. (R. 1347-1351). On the same date, the circuit court also granted Schiavo's Motion for Summary Judgment. (R. 1324-1346). Pursuant to Fla. R. App. P. 9.030(b)(1)(A), the Governor then filed a Notice of Appeal on May 6, 2004. (R. 1352-1376).[1] On June 16, 2004, pursuant to the authority of Fla. R. App. P. 9.030(a)(2)(B), this Court accepted jurisdiction.

STATEMENT OF FACTS

On February 25, 1990, Terri Schiavo had a cardiac arrest and subsequent loss of oxygen to her brain, which led to serious brain damage. (R. 25). The guardianship court determined that she is in a "persistent vegetative state." (R. 1388). Since May of 1998, Schiavo has sought to discontinue the provision of food and water to Terri, presently delivered to her through a tube. (R. 25). It is uncontroverted that removal of this tube will inevitably kill her by starvation and dehydration. *Id.* Schiavo's efforts to deny basic sustenance to his estranged wife

[1] On May 12, 2004, the Second District found the May 5, 2004 order not sufficiently final and relinquished jurisdiction for entry of a final order. On May 14, 2004, the circuit court entered a Summary Final Judgment. (R.1377-1399). The Governor filed a Notice of Appeal as to that order on May 17, 2004.

have sparked substantial legal controversy. *See Bush v. Schiavo,* 866 So. 2d at 138 n.1.

It is undisputed that Terri had no written advance directive. (R. 574; 607). It is also undisputed that her parents have vigorously resisted Schiavo's efforts to end their daughter's life through starvation or dehydration. (R. 606-608; 1220-1232); *See also, Schindler v. Schiavo,* 780 So. 2d 176 (Fla. 2d DCA 2001) ("*Schiavo I*"); *Schindler v. Schiavo,* 792 So. 2d 551 (Fla. 2d DCA 2001) ("*Schiavo II"*); *Schindler v. Schiavo,* 800 So. 2d 640 (Fla. 2d DCA 2001) ("*Schiavo III"*); and *Schindler v. Schiavo,* 851 So. 2d 182 (Fla. 2d DCA 2003) ("*Schiavo IV"*). Her parents continue to vigorously contest the continued appropriateness of Schiavo to serve as Terri's guardian and on April 26, 2004, successfully petitioned the guardianship court for a Writ of *Quo Warranto* seeking to have Schiavo establish the lawfulness of his actions as Terri's guardian.[2] Her parents also contend that Terri, while admittedly disabled due to brain damage, is able to recognize her parents, track with her eyes and is a candidate for swallowing therapy which, if successful, may eliminate the need for a feeding tube at all. (R. 1009-1013); *Schiavo I* at 178.; *Schiavo III* at 643-644.

[2] The Petition is attached as an exhibit to the Governor's Motion to Stay Appeal Proceedings Pending Resolution of Writ of *Quo Warranto* Directed to Michael Schiavo, filed in this appeal proceeding with the Second District on June 1, 2004.

Terri does not have a terminal illness and her death is not imminent. *Schiavo I* at 180. Notwithstanding the foregoing, Pinellas County Circuit Judge George W. Greer found that Terri was in a persistent vegetative state and on February 11, 2000, authorized removal of the tube providing her with food and water. (R. 67-76); *Schiavo II* at 554-555. Further, despite the fact that her husband had an admitted conflict of interest when he sought permission to end her life (he was the sole beneficiary of her estate), at the time the order was entered authorizing her starvation and dehydration, Terri had no independent advocate. (R. 67-70). On October 15, 2003, Terri's feeding tube was withdrawn. (R. 1388-1389).

On October 21, 2003, the Florida Legislature, apprehending the irrevocable harm likely to result from the withdrawal of food and water to disabled people unable to express their healthcare choices, enacted Ch. 2003-418, a narrowly tailored law authorizing the Governor to issue a one time stay preventing withholding of food and water from an individual if, as of October 15, 2003:

a) The patient has no written advance directive;
b) The court has found the patient to be in a persistent vegetative state;
c) The patient has had nutrition and hydration withheld; and
d) A member of the patient's family has challenged the withholding of nutrition and hydration.

Ch. 2003-418, Sec. 1 and 2. The Act also provides that "upon issuance of a stay, the chief judge of the Circuit shall appoint a guardian *ad litem* for the patient to make recommendations to the Governor and the court." Ch. 2003-418, Sec. 3.

On October 21, 2003, Governor Bush, pursuant to the authority of the Act, issued a stay to prevent the withholding of nutrition and hydration from Terri. (R. 587-588). After enduring six days with no food or water, Terri was once again provided with basic sustenance. (R. 479, 600). Schiavo then filed his Petition seeking to have the Act declared unconstitutional. In opposition, the Governor filed a number of affidavits and made numerous attempts at obtaining discovery. (R. 669-811; 909-945; 948-976; 981-1116; 1123-1165; 1214-1215; 1296-1298; 1315-1316; 1320-1321; 1493).

On May 6, 2004, the circuit court held the Act unconstitutional. (R. 1324-1346). Notwithstanding the Governor's contention that Terri's wishes were in dispute, the Governor was not afforded the benefit of discovery, an evidentiary hearing, or the jury trial he emphatically and repeatedly demanded. (R. 152-154; 337-340; 400-402; 483-485; 571-572; 574-579; 580-584; 901-908; 1170-1199; 1214-1215; 1296-1314).

SUMMARY OF ARGUMENT

Florida's legislative, executive and judicial branches play co-equal roles in protecting the lives and health care choices of persons who, by disability, are especially vulnerable to the consequences of abuse, exploitation or mistake. The circuit court erred in ignoring this co-equal role and entering summary judgment

declaring the Act unconstitutional without permitting the Governor discovery or a jury trial to determine disputed material facts.

Instead of adhering to such fundamental procedural safeguards, the circuit court erroneously substituted "judicial notice" of orders entered in cases to which the Governor was not a party and which involved factual issues not identical to those in this case. In so doing, the court misapplied concepts of *res judicata* and collateral estoppel to recognize as adjudicated "facts" found in guardianship proceedings not involving the Governor.

A finding of an infringement on the "right to privacy" requires adjudication of facts. The trial court erred in failing to require Schiavo to establish by competent, substantial evidence that the Act infringed upon Terri's right to privacy. Such proof required, at a minimum, that Schiavo submit admissible evidence that under the present circumstances Terri wants to be deprived of food and water. This, he did not do. Moreover, even assuming such proof, the Act serves compelling state interests in the least restrictive means possible.

In re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990), does not dictate the outcome of this case. Subsequent to the legislature's enactment of Chapter 765, Florida Statutes, its limited holding establishes only that the right to privacy encompasses end of life decisions for incapacitated persons. Any extension of that holding to the instant case rests on mere dictum. Because *Browning* does not

preordain the result in this case, the legislature acted well within its constitutional authority in promulgating the Act. As a further refinement of the guardianship and end of life provisions of Chapters 765 and 744, Florida Statutes, the Act in no way impermissibly interferes with judicial authority. Nor does it encroach on an existing judicial order. Of necessity, such orders are inherently executory and never "final" in the traditional sense.

The Act was a valid delegation of power to the Governor. Although some discretion was vested in the Governor, the legislature made the ultimate policy decision by promulgating the Act. The Act provided definitive guidelines for its implementation by the Executive.

This Court should reverse the summary judgment of the trial court, permit the Governor to take discovery and require a jury trial on all disputed material facts. Any other result violates due process under the Florida and federal constitutions.

ARGUMENT

I. The Circuit Court Misused And Misapplied Judicial Notice To Bypass The Elements Required For Application Of Collateral Estoppel And *Res Judicata* And Thereby Denied The Governor The Due Process Necessary To Defend The Constitutionality Of The Act.

A. Summary Judgment Must Be Denied Where Issues Of Material Fact Remain For Resolution.

The question of the constitutionality of a statute "is an issue of law, or of mixed fact and law, depending upon the nature of the statute brought into question and the scope of its threatened operation as against the party attacking the statute." *Lykes Bros., Inc. v. Board of Com'rs of Everglades Drainage Dist*., 41 So. 2d 898 (Fla. 1949); *North Florida*, 866 So. 2d at 626 (Fla. 2003). Factual questions precluded entry of summary judgment, because, in this case, the constitutionality of the statute is a mixed question of law and fact. *Glendale Federal Savings and Loan Association v. Department of Insurance,* 485 So. 2d 1321, 1324-25 (Fla. 1st DCA 1986). As such, there must be an adequate record developed in the lower court before a fact-finder. *State Employees Attorneys' Guild v. State,* 653 So. 2d 487 (Fla. 1st DCA 1995) ("Such a proceeding will permit the development of a record which this court properly may review to decide the issues raised in this case"). As this Court stated in *Department of Health and Rehabilitative Services v. Privette,* 617 So. 2d 305, 309 (Fla. 1993):

> However, a compelling interest does not come into existence in the abstract but must be based on adequate factual allegations and a record establishing that the test itself is in the child's best interests.

As the party moving for summary judgment, Schiavo was required to prove the absence of dispute on genuine issues of material fact. *See Holl v. Talcott*, 191 So.2d 40, 43 (Fla. 1966) (movant must conclusively prove that no genuine issues of material fact exist). Moreover, "[t]he proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party." *Id. See also Medina v. Yoder Auto Sales, Inc.*, 743 So.2d 621 (Fla. 2d DCA 1999) ("[i]f the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist summary judgment is improper"). The record, such as it is, and viewed in a light most favorable to the Governor, is replete with genuine issues of material fact and thus bars the entry of summary judgment.

B. Summary Judgment Must Be Denied Where The Circuit Court Erred In Depriving The Governor Of His Due Process Rights To Conduct Discovery And To Present His Case To A Jury.

As in the case of any other party to civil litigation, the Governor has both procedural and substantive due process rights guaranteed under both Florida 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.

The fact that the issues in the underlying cause were raised in the form of a declaratory judgment action challenging the constitutionality of a statute does not strip the Governor of fundamental due process rights, nor deprive him of his right to a jury trial. The right to jury trial is expressly preserved in the declaratory judgment statute:

> When an action under this chapter concerns the determination of an issue of fact, the issue may be tried as issues of fact are tried in other civil actions in the court in which the proceeding is pending. To settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury. When a declaration of right or the granting of further relief based thereon concerns the determination of issues of fact triable by a jury, the issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict is required or not.

FLA. STAT. § 86.07(1); *See also Olins, Inc. v. Avis Rent-A-Car System*, 131 So. 2d 20, 21 (Fla. 3d DCA 1961) (The right of trial by jury exists as to those issues which were triable before a jury at common law, regardless of the form of proceeding which may be used for their solution.). If a jury found, for example, that it was not Terri's wish to be denied food and water and so informed the court in an interrogatory verdict, the court could then find that her right to privacy was not being infringed, an absolute prerequisite to determining the constitutionality of

the Act. It is the trial court's attempt to circumvent this fact-finding obligation through judicial notice that gives rise to reversible error in this case.

C. The Circuit Court Erred In Improperly Using Judicial Notice As A Means Of Determining Adjudicative Facts.

At the case management conference the circuit court took judicial notice of several orders entered in the guardianship case pertaining to Terri. (R. 600-604). The Governor did not oppose taking notice that such orders existed, but he contended that taking judicial notice of the orders was not equivalent to having the facts recited therein become adjudicated facts in the instant matter.[3] (R. 602-604; 1180-1184). *See Lee v. Gadasa Corporation*, 680 So. 2d 1107 (Fla. 1st DCA 1996).

Under the Florida Evidence Code, the circuit court could take judicial notice of its own records or those of another court if the records of the other court were properly submitted. § 90.202, FLA. STAT. (2003). Such notice appropriately includes "the identity of the parties and their counsel, the lower tribunal from which an appeal was taken and the provisions of the order on appeal, issues presented in the briefs, the status of a file within the court, and the dates of orders of the trial and appellate courts." *Gulf Coast Home Health Services of Florida, Inc.*

[3] In the Second District's opinion in *Bush v. Schiavo*, 866 So. 2d at 139 n.2, the court noted that certain stipulations not in that record were agreed to by the Governor and Schiavo in the matter below. These stipulations are a part of this record. (R. 1387-1389).

v. Dept. of Health and Rehabilitative Services, 503 So. 2d 415 (Fla. 1st DCA 1987). Judicial notice, however, may never be used as a vehicle to admit otherwise inadmissible hearsay. *State v. Ramirez*, 850 So. 2d 620 (Fla. 2d DCA 2003). Even if an entire court file is judicially noticed, all documents contained in that court file are still subject to the same rules of evidence to which all evidence must adhere. *Burgess v. State*, 831 So. 2d 137 (Fla. 2002). As this Court has warned, "the practice of taking judicial notice of adjudicative facts should be exercised with great caution" as "the taking of evidence, subject to established safeguards, is the best way to resolve disputes concerning adjudicative facts." *Makos v. Prince*, 64 So. 2d 670, 673 (Fla. 1953). Judicial notice may not be used to dispense with proof of essential facts not otherwise judicially cognizable. *Amos v. Moseley*, 77 So. 619, 623 (Fla. 1917).

In *Huff v. State*, 495 So. 2d 145 (Fla. 1986), this Court considered the appropriateness of a trial court's use of findings from an earlier criminal trial:

> In the supplemental findings, the trial court judge stated that he took judicial notice of the *Huff I* proceedings "in fairness to the defendant as well as the state." This interest in fairness is unquestionably laudable and represents perhaps the ultimate goal of our system of justice. However, we find that in a situation such as is presented here, where, upon appellate review an accused has been granted a new trial, the utilization by judicial notice of evidence produced at the first trial constitutes a process which would make facts conclusive against an opposing party although these facts were unsupported by the evidence introduced in the new trial, **and were therefore not subject to refutation by the party against whom they were offered.** The concept of judicial notice is essentially premised on notions of

> convenience to the court and to the parties; some facts need not be proved because knowledge of the facts judicially noticed is so notorious that everyone is assumed to possess it. As we held over a half-century ago, ... the courts should not exclude from their knowledge matters of general and common knowledge which they are presumed to share with the public generally. . . . It has been well said, however that "This power is to be exercised by courts with caution. . . .The courts of the land which are charged with the great responsibility of determining matters **upon which the life and death of a human being may depend,** can well be trusted to exercise the proper caution in determining what matters it will take judicial notice of. It is upon the wisdom and discretion of the judges of our courts, that the doctrine of judicial notice must rest." *Amos v. Mosley*, 74 Fla. 555, 567-68, 77 So. 619, 623 (1917) (emphasis added).

Id. at 151. By improperly accepting as fact selected portions of matters in the guardianship file, the circuit court constructed Schiavo's entire case for him. By precluding discovery and a jury trial on the disputed facts, the circuit court effectively stripped the Governor of any means of challenging Schiavo's case, thereby creating an irrebuttable presumption of unconstitutionality.

The Governor expressly pointed out to the court the limits of judicial notice and argued that the circuit court could not properly rely on evidence from the guardianship case in ruling on the motion for summary judgment. (R. 610-613; 1180-1187); *United States v. Jones*, 29 F.3d 1549 (11th Cir. 1994) (a court may take notice of another court's order only for the limited purpose of recognizing the "judicial act" that the order represents or the subject matter of the litigation). In *Kostecos v. Johnson*, 85 So. 2d 594 (Fla. 1956), this Court explained the common sense rationale of this requirement:

> The judgment recites that the trial judge took judicial notice of the entire contents of the records in the two delinquent tax cases. Undoubtedly he could conveniently call upon the office of the clerk of the court to bring the records before him and make them available for his examination in arriving at a judgment. Upon appeal, however, this court is not similarly situated and we are, therefore, obviously without the information contained in the two records in the circuit court of Sarasota County which may or may not have properly constituted the basis of the summary judgment that was entered because these records do not constitute a part of the record on appeal unless they were appropriately introduced in evidence either in the original or by certified copy and then included in the record sent to this court for consideration.

Kostecos, 85 So. 2d at 595.

Finally, the discovery sought by the Governor in the circuit court is not an attempt to merely revisit matters considered in the guardianship case. The issue in this case is not what Terri's wishes were in the past, but, rather, what her wishes would be now, in light of the present circumstances. The issue of Terri's wishes under the **present** circumstances has never been adjudicated and that is the pivotal issue underlying the question of the constitutionality of the Act. Determination of the constitutionality of the statute here first requires a finding as to whether the Act infringes on Terri's privacy rights. The Governor has a right to conduct discovery and have an evidentiary hearing at a bare minimum on this issue.

The record in this appeal, as scarce as it is, provides examples of some of the factual issues ripe for discovery. At the hearing on Schiavo's Motion for Summary

Judgment, the Governor's counsel proffered a number of questions he wished to ask Schiavo, including:

1) Why wasn't Terri's purported desire to die discussed with the jury in the malpractice case that gave rise to a seven-figure settlement?

2) Why did Schiavo present evidence regarding the cost of a life-care plan during that malpractice case when he knew that Terri wouldn't want to live under those circumstances?

3) Why were nurses' notes which documented Terri's rehabilitation potential deleted from her chart at the Palm Gardens Nursing Home?

4) Why were observations of the nursing assistants regarding Terri's level of function and responsiveness deleted from her chart?

5) What did Schiavo mean when he purportedly said at Palm Gardens Nursing Home: "When is she going to die?" "Has she died yet?" When is that bitch going to die?" "Can't you do anything to accelerate her death?" "Won't she ever die?"

6) What does Schiavo know about the multiple traumatic injuries of relatively recent origin which were found to be present in the bone scan conducted by Dr. Campbell Walker in March of 1991?

7) Was Terri miserable in her marriage and was Schiavo controlling, as was attested to in Robert Schindler, Jr.'s affidavit?

8) What would Terri's desires be regarding who should make end-of-life decisions for her if she, knew that her husband was living with another woman with whom he conceived two children?

9) Did Terri recant her Catholic faith, which teaches that removing her feeding tube because of her quality of life has been diminished, or to intentionally cause her death would be improper?

(R. 1493-1496; 679; 684-686; 713-716; 726-728; 788-789; 791-792; 799; 806-807; 814-881; 886; 987-989; 1001-1002; 1099-1101; 1014-1045; 1132-1133).

Just days prior to the summary judgment hearing the Governor urged Jay Wolfson, Ph.D., the guardian *ad litem* appointed for Terri pursuant to the authority of the Act, to investigate a number of additional issues, (all of which remain unanswered) including:

1) What would Terri experience in the process of dying by starvation?

2) Why was the previous guardian *ad litem* discharged?

3) What specific statements did Terri make regarding her wishes if she was found to be in a persistent vegetative state?

4) Are there conflicts of interest between Terri and her guardian, Michael Schiavo?

The most important question was this: "Is there sufficient clear and convincing evidence remaining to determine her wishes in these specific circumstances?" (R. 1204-1206).

D. The Circuit Court Erred In Applying *Res Judicata* And Collateral Estoppel To Bar Discovery And Trial.

By misapplying judicial notice in entering summary judgment, the circuit court relied upon legal conclusions and borrowed facts gleaned from legal

proceedings to which the Governor was not a party and thus had no opportunity to cross examine witnesses or otherwise participate. As such, *res judicata* and collateral estoppel do not apply here. *Jones v. The Upjohn Company*, 661 So. 2d 356 (Fla. 2d DCA 1995) ("strangers to a prior litigation--those who were neither parties nor in privity with a party--are not bound by the results of that litigation). The trial court could not properly rely on testimony given in another proceeding as a substitute for competent evidence in the current proceeding. Without question, these borrowed assertions of fact are improper hearsay. *Abreu v. State,* 837 So. 2d 400 (Fla. 2003).

Further, mere naked allegations of fact are insufficient to support an "as applied" constitutional challenge. In *Cox v. Fla. Dept. of Health and Rehabilitative Services*, 656 So. 2d 902 (Fla. 1995), this Court held that even in a case where the parties waived an evidentiary hearing and allowed the case to proceed to resolution with the parties simply submitting briefs, the record was insufficient to determine whether a statute could be sustained against a constitutional attack.

For collateral estoppel to apply to bar relitigation of an issue, five factors must be present:

> (1) an identical issue must have been presented in the prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two

> proceedings must be identical; and (5) the issues must have been actually litigated.

Holt v. Brown's Repair Serv. Inc., 780 So. 2d 180, 181-182 (Fla. 2d DCA 2001).

Further, for the preclusive effect of *res judicata* to apply, the two actions must share both identity of the matter sued for and identity of the cause of action. *The Florida Bar v. Clement*, 662 So. 2d 690 (Fla. 1995). The party claiming benefit of collateral estoppel bears the burden to show that an issue common to both causes of action was previously determined with sufficient certainty. *DeCancino v. Eastern Airlines, Inc.*, 283 So. 2d 97, 99 (Fla. 1973). Schiavo has offered nothing to meet this burden.

In *Stogniew v. McQueen*, 656 So. 2d 917 (Fla. 1995), this Court addressed the issue of collateral estoppel and the requirement of mutuality of parties. In that case, the State of Florida brought an administrative action against a therapist for unprofessional behavior. *Id*. at 918. Later, the patient also filed a negligence action against the therapist. While both actions were pending, the disciplinary body found that the therapist had acted inappropriately. *Id.* at 918-919. The patient then moved for a partial summary judgment in the negligence action claiming that the matter had been foreclosed, the disciplinary body having found that the therapist acted in an inappropriate manner. *Id.* at 919. The Court refused to accept that argument, and held:

> Florida has traditionally required that there be a mutuality of parties in order for the doctrine to apply. Thus unless both parties are bound by the prior judgment, neither may use it in a subsequent action. … Further, we are unwilling to follow the lead of certain other states and of the federal courts in abandoning the requirement of mutuality in the application of collateral estoppel.

Id. at 919-920. *See also, Southern Bell Telephone and Telegraph Company v. Robinson*, 389 So. 2d 1084 (Fla. 3d DCA 1980) (estoppel requires judgment between adversaries); *E.C. v. Katz*, 731 So. 2d 1268 (Fla. 1999) (estoppel did not bar relitigation of alleged abuse where defendant was not party to previous proceeding).

Accordingly, neither *res judicata* nor collateral estoppel apply. Of the prior orders and judgments that may have been issued in matters to which the Governor was not a party, the Governor had no opportunity to take discovery, cross-examine witnesses, or put on evidence. The issue in this case is the constitutionality of the Act – a question never at issue in any of the previous matters litigated between the Schindlers and Schiavo. Indeed, the actions of the legislature and the Governor did not even arise until October 21, 2003, well after the orders in the prior proceedings were rendered. It is the Governor who has been brought into court by Schiavo and accused of violating Terri's rights. The Governor is entitled to probe and to test Schiavo as to what Terri's wishes are under these **present circumstances**. Here, the circuit court foreclosed such discovery and improperly used judicial notice of

prior cases and orders to accomplish collateral estoppel and *res judicata* without the elements of either having been met independently.

Finally, application of *res judicata* and collateral estoppel, particularly under the present circumstances, simply makes no sense. In *Schiavo II*, the Second District recognized that guardianship orders are non-final orders and may be challenged right up until the moment of death. *Schiavo II* at 559. In practice, that means that if Terri can speak or can swallow foods, thus obviating the need for the tubes providing nutrition and hydration, the issues presented here will be moot. In the context of guardianship proceedings, orders are not final until the death or discharge of the ward for the obvious reason that the facts surrounding the care and wishes of a ward are likely to change over time as circumstances evolve. As such, *res judicata* and collateral estoppel are especially inappropriate. Resolution of the question of whether the Act violates Terri's right to privacy thus requires a factual inquiry and a determination by a trier of fact.

E. Because Of The Circuit Court's Denial Of The Governor's Due Process Rights, This Court Does Not Have A Competent Factual Record For Review.

As noted earlier, the question of whether a law infringes upon an asserted right to privacy is a mixed question of law and fact. In this case, the factual question is, "what are Terri's wishes under the present circumstances." Absent a factual record established and subjected to the

rigors of discovery and cross examination there was no competent basis on which the trial court could find any asserted right of privacy. The circuit court's failure to provide the opportunity to develop this record is clear reversible error.

II. The Circuit Court Erred In Shifting The Burden Of Proof To The Governor To Establish The Constitutionality Of The Act.

A. Legislative Enactments Come To The Courts Cloaked With A Strong Presumption Of Constitutionality.

Courts must follow well-established rules when faced with an inquiry into the constitutionality of a challenged statute. This Court repeated these canons earlier this year in *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004):

> We are also obligated to construe statutes in a manner that avoids a holding that a statute may be unconstitutional. In *Gray v. Central Florida Lumber Co.*, 104 Fla. 446, 140 So. 320 (1932), this Court listed several canons of construction to be followed in interpreting statutory acts: (1) On its face every act of the Legislature is presumed to be constitutional; (2) every doubt as to its constitutionality must be resolved in its favor; (3) if the act admits of two interpretations, one of which would lead to its constitutionality and the other to its unconstitutionality, the former rather than the latter must be adopted.... *Id.* at 323.

Giorgetti, 868 So. 2d at 518. *See also, Bush v. Holmes*, 764 So. 2d 668, 673 (Fla. 1st DCA 2000) ("[w]hen a legislative enactment is challenged the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid, unless clearly unconstitutional beyond a reasonable doubt") (citing *Taylor v. Dorsey*, 190 So. 2d

876, 882 (Fla. 1944)). Thus, unless and until the Act at issue is determined to violate Terri's right to privacy (a factual finding which must consider her wishes under present circumstances), the Act remains presumptively constitutional.

In addition to carrying a strong presumption of constitutionality, legislative enactments also travel with a rebuttable presumption that the provisions of the statute are supported by any necessary facts. *State v. Bales*, 343 So. 2d 9 (Fla. 1977). As this Court explained in *Bales*: "If any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends." *Id.* at 11. Clearly, the importance of the factual record in challenges to constitutionality of statutes is a critical consideration for any appellate court.

With these canons in mind, the Governor urges this Court to construe the statute in a manner which recognizes that the Act, rather than violating the right to privacy, actually protects the health care decisions of an incompetent patient who has not memorialized her health care choices in writing. Although the burden was on Schiavo to establish an infringement of Terri's constitutional rights, it was the Governor who sought basic discovery in the underlying case to establish facts from which a jury could decide whether or not Terri's right to privacy was infringed. Again, notwithstanding that the burden remained on Schiavo, the Governor also sought to establish facts from which a jury could find, even in the face of an

infringement of privacy, that the statute at issue served compelling state interests and was narrowly tailored to effect those interests.

In a case such as Terri's, where there is no competent evidence concerning her present intent, where her family strongly disagrees with Schiavo's bare assertions of Terri's wishes, where Schiavo's own conflict of interest in living with another woman and bearing children with her may persuade a jury to discount his statements as to Terri's wishes, where the risks of mistake, abuse or exploitation are high, and where the consequences of a mistake would be undeniably fatal, the legislature, by ensuring an independent evaluation of the patient's wishes under a discrete set of circumstances, has *advanced*, rather than inhibited, the privacy rights of the individuals sought to be protected. An undeniable dispute exists over Terri's wishes. In defending this action, the Governor sought to bring all available facts regarding her wishes to the surface. In contrast, Schiavo's goal has been to avoid such a fact-finding process at all costs.

B. Schiavo Bears The Burden Of Proving That The Actions Of The Legislature And The Governor Infringed Upon The Privacy Rights Of Terri Schiavo.

The circuit court found that the Act is unconstitutional because it infringes on the right of privacy under Art. I, § 23, FLA. CONST., of those affected by it, including Terri. However, the mere incantation of privacy is insufficient to shift the burden to the Governor to establish a compelling state interest justifying an

alleged infringement. *See Shaktman v. State*, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlich, C.J., concurring) ("whether 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"). Should there be a finding that the Act and its implementation violate Terri's right to privacy, the burden then shifts to the Governor to justify the action by identifying compelling state interests which warrant a narrowly tailored response through legislative means. *North Florida Women's Health and Counseling Service v. State*, 866 So. 2d 612 (Fla. 2003).

In *North Florida*, this Court found the Parental Notice of Abortion Act unconstitutional. The Court applied the "compelling state interest" standard after finding that the act imposed a significant restriction on a minor's right of privacy. *Id.* at 631. Before finding that privacy rights were violated, this Court had the benefit of an extensive competent record from the circuit court, including depositions, testimony at a two and a half day evidentiary hearing, and a five-day bench trial. *Id.* at 616. This Court noted that all witnesses "were subjected to the crucible of cross-examination," and that all "the proceedings comported with the legal requirements of the Florida Rules of Civil Procedure, and all evidence met the formal requirements of the Florida Evidence Code." *Id.* at 630. Even after the oral argument to this Court, the record was supplemented with fifteen additional

volumes of supplemental material and two lengthy documentary exhibits. *Id.* at 616.

Significantly, the first question this Court focused on was whether the act at issue implicated a minor's right of privacy. This focus was appropriate because, "before the right of privacy attaches 'a reasonable expectation of privacy must exist." *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547. This Court employed the same analytical framework to hold that a rule precluding state funding of abortions did not infringe on the right to privacy and thus did not require the strict scrutiny analysis. *Renee B. v. Florida Agency for Health Care Administration*, 790 So. 2d 1036 (Fla. 2001) ("The strict scrutiny standard, however, would only be necessary in the instant case if it is first determined that the challenged rules violate the petitioners' right of privacy.").

The court below, however, jumped immediately to the second question, finding from incompetent evidence that the first question had already been answered in different proceedings to which the Governor was not a party and which occurred prior to the enactment of the Act. In doing so, the circuit court not only relieved Schiavo of his burden to prove his case but also precluded the Governor from making a record to defend the Act**.**

The importance of the disputed facts in this case cannot be overemphasized. Very simply, the facts make all the difference and they have yet to be developed.

This Court spoke directly to the inherently context-based nature of privacy rights analysis in *J.A.S. v. State*, 705 So. 2d 1381, 1387 (Fla. 1998):

> [While] it would simplify [the] privacy analysis if we could fashion a precise equation by which all could easily determine which interest should prevail in whatever context a privacy right is asserted…the human experience is not so easily categorized or quantified and no single formula can be crafted for deciding issues which implicate the most personal and intimate forms of conduct and privacy,…If we blinded ourselves to the unique facts of each case, we would render decisions in a vacuum with no thought to the serious consequences of our decisions for the affected parties and society in general.

The circuit court permitted Schiavo to do that which is never appropriate in contested civil proceedings, i.e., to prove his case on mere presumptions.

III. The Circuit Court Erred In Entering Summary Final Judgment In Favor Of Schiavo Because The Statute At Issue Is Constitutional On Its Face And As Applied To The Known Facts Of This Case.

A. The Circuit Court Erred In Finding The Act Facially Unconstitutional Where At Least One Construction of The Act Would Render It Constitutional.

A facial challenge must show that a legislative enactment is invalid under all possible applications. A facial challenge can succeed only if the law in question cannot operate constitutionally under any set of circumstances. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) ("The fact that [a legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid"). Therefore, if a law has a single constitutional application, it will survive the challenge. *State v.*

Giamanco, 682 So. 2d 1193 (Fla. 4th DCA 1996). This heavy burden makes such an attack the most difficult challenge to mount successfully against an enactment. *Bush v. Holmes*, 767 So. 2d at 677 (Fla. 1st DCA 2000).

During the hearing on Schiavo's Motion for Summary Judgment, counsel for the Governor clearly explained at least one set of circumstances under which the law would without question be constitutional:

> But if, for example, you took a young wife and mother who was found to be in a persistent vegetative state, she had no previous advanced written directive, her only oral declaration was that she would not want to be deprived of food and water, but she had a husband who stood to gain from her death through ignorance or lack of scruples and who was able to convince the hospital or healthcare provider to remove the feeding tube, and the family contested the removal, clearly under those circumstances one could not be deemed to say that the constitutional right to privacy was being infringed.

(R. 1490). Because there is at least one set of facts under which the Act is constitutional, the facial challenge must fail.

B. The Act Is Constitutional As Applied To Terri Schiavo Because It Does Not Violate Her Privacy Rights.

1. The Circuit Court Erred In Not Requiring Schiavo To Meet His Burden Of Showing The Act Violated Terri Schiavo's Right To Privacy.

An "as-applied" challenge agrees that a law has a constitutional application, but argues that it is unconstitutional as applied to the party bringing the challenge. Again, the burden remains on Schiavo to establish the unconstitutionality.

To do so, Schiavo first had to prove that Terri's right to privacy was infringed. *Shaktman v. State*, 553 So. 2d at 153 (Fla. 1989). Schiavo alleged that he proved this essential fact in the prior guardianship case, and the circuit court improperly took judicial notice of that prior finding as an adjudicated fact in this case. Because the circuit court did not require Schiavo to meet his burden in this case and under the present circumstances, the privacy analysis was never triggered.

2. The Circuit Court's Order Needlessly Expands The *Browning* Decision.

Notwithstanding the lack of competent and substantial evidence of Terri's wishes, the circuit court incorrectly assumed that the outcome of this case is dictated by this Court's decision and reasoning in *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990). *Browning* stands for a simple proposition, i.e. that under Art. I, § 23 of the Florida Constitution (Florida's explicit right to privacy) a person has the constitutionally protected right to choose or reject medical treatment, which right may be exercised by his or her surrogate in the event that the person is unable to exercise her right because of her medical condition. *Browning*, 568 So. 2d at 7-8. In exercising this right, the surrogate must make the decision which the patient would personally choose (the concept of substituted judgment). However, in overemphasizing the importance of *Browning*, the order below provides a tortured interpretation and expansion of that decision which goes far beyond the holding.

3. *Browning* Does Not Control Because The Facts Of This Case Are Distinguishable From The Facts In *Browning*.

The facts in the case at bar are dramatically different from those in *Browning*. In *Browning*, the eighty-eight year old patient had expressed her desires regarding health care in writing on two separate occasions prior to the time she became incompetent from a stroke and before her guardian petitioned for approval to withdraw sustenance. *Browning*, 568 So. 2d at 8. Those written desires included a specific stipulation that she not be afforded "nutrition and hydration provided by gastric tube or intravenously" where the application of life prolonging procedures served only to prolong the dying process. *Id*. In stark contrast, the much younger Terri had no written expression of any kind regarding her desires for future medical care under the circumstances at hand. Mrs. Browning's life expectancy was only one year at the most at the time of the hearing on her guardian's petition. *Id*. at 9. Terri's life expectancy is substantially longer. *See Schiavo I* at 180.

In *Browning*, there was no other family member who challenged the withholding of food and water. Here, the parents raise just such a challenge. In *Browning*, there was no evidence of a conflict of interest between the guardian and the ward. In this case, her parents have complained repeatedly that Schiavo has a financial interest in Terri's death and is otherwise conflicted such that he cannot

adequately or credibly represent Terri's desires or best interests. (R. 606-608; 1220-1232); *See also Schiavo I; Schiavo II*; *Schiavo III*; and *Schiavo IV*. In light of the material differences between *Browning* and Terri's case (and in all cases in the class protected by the Act), it is clear that *Browning* does not control here.

4. The *Browning* Language Relied Upon By the Court Is Not Applicable Because The Legislature Has Amended The Life Prolonging Procedures Act.

Browning stands for only the constitutional mandate that an incompetent person has a right to refuse medical treatment. *Browning*, 568 So. 2d at 7. The remainder of the *Browning* language simply sets up a procedural framework for implementing that right. This framework is now unnecessary because the legislature has acted to provide a statutory framework that did not exist prior to *Browning*. Ch. 92-199, Laws of Fla. To the extent the Court set up a procedural framework for implementing the right to privacy of incompetent persons, the legislature replaced that framework with Chapter 765. *Schiavo II* at 557.

C. While The Act Does Not Violate Privacy Rights, The Act Furthers Compelling State Interests.

Even if Schiavo had succeeded in proving Terri's privacy interest (which he did not), courts have long recognized that the rights of individuals are not absolute and have balanced them against other state interests. *Browning*, 568 So. 2d at 14; *Salerno*, 481 U.S. at 748, 750-51. In Florida, when a legislative enactment is

found to impinge on a fundamental right, courts apply a strict scrutiny test which demands that the "compelling state interest standard" be met. *North Florida v. State*, 866 So. 2d 612 (Fla. 2003); *Krischer v. McIver*, 697 So. 2d 97, 104 (Fla. 1997) (Overton J. concurring) ("…once a privacy right has been implicated, the government must show a compelling interest to justify the intrusion.") *See also Winfield*, 477 So. 2d 544. The compelling interest test shifts the burden of proof to the State to justify an intrusion on privacy. *North Florida*, 866 So. 2d at 625, n.16. The Act passes the test.

By passing the Act, the legislature added to the existing provisions of Chapter 765 and provided needed safeguards to assure that a discrete category of patients who were particularly vulnerable to abuse, exploitation or mistake had their health care choices respected. The Act was passed because of the legislature's concerns that the rights of certain disabled citizens were imperiled due to a gap in the Life-Prolonging Procedures Act permitting the withdrawal of food and nutrition from such persons. (R. 950-952; 1115; 1067; 1005-1006; 1125-1129; 1136-1137; 1140-1143; 1146-1147). In his affidavit filed in this case, Representative John Stargel explained that "HB-35E prospectively adds protections to the lives of certain incompetent residents of Florida reflecting the Legislature's dissatisfaction with the effect of the previous law," and that:

> Nothing on the face of HB-35E questions the propriety or authority of the determination of how chapter 765 and the constitutional right to

> privacy applied to Terri Schiavo's situation at the time of prior court orders authorizing withholding of nutrition and hydration.[4]

(R. 950-952).

Thus, the Act facially applies only in instances when no written advance directive exists, where a family member has disputed the withholding of nutrition and hydration, where a court has found the patient to be in a persistent vegetative state, and where a family member has challenged the withdrawal of nutrition and hydration. That is, the Act only applies when life is at its most vulnerable. Under such circumstances, the State has an especially compelling interest in providing a process which will ascertain as certainly as possible, prior to actions which will cause the irreversible demise of the patient, what the individual's desires were so as to preclude the termination of life in a manner which would be against the patient's wishes.

Even under the circuit court's tortured view of *Browning,* i.e., that Terri's fundamental constitutional right to privacy is implicated by the Act, further

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[4] Representative Johnnie Byrd expressed similar concerns in his affidavit:

> HB 35-E was passed because the procedures provided by Chapter 765 and as interpreted by the *Browning* decision, had, as applied in Terri Schiavo's case, threatened to cause her judicially-ordered starvation or dehydration without safeguards deemed adequate to the Legislature in which is vested the responsibility to regulate such matters.

(R. 1136-1137).

analysis is still required. The fact that a statute may impinge on a fundamental right, is not the end of the discussion regarding the statute's constitutionality - - it is merely the beginning of the analysis.

1. The State Of Florida Has A Compelling Interest In Protecting And Preserving Human Life And In Ensuring That Its Residents' Right To Life Is Protected.

The Florida Constitution recognizes the fundamental nature of the right to life: "All natural persons, female and male alike, … have inalienable rights, among which are the right to enjoy and defend life…." Art. 1, § 2, FLA. CONST., The Florida Supreme Court in *Browning* and the U.S. Supreme Court in *Cruzan* acknowledged the compelling nature of this interest. *Browning*, 568 So. 2d at 14; *Cruzan v. Missouri Dept of Public Health*, 497 U.S. 261, 271-280, 110 S.Ct. 2841, 2854, 111 L.Ed.2d 224, 283 (1990).

The right to life is that right without which no other right can exist. All other rights, no matter how fundamental, derive from and depend upon the right to life. The right to speak freely, to worship according to one's conscience, or to vote for the candidate of one's choice – all are rights reserved for the living. The right to privacy, so heavily relied on by the circuit court in this case, means nothing to a corpse. No doubt this is why Florida's Second District Court of Appeal declared: that the "court's default position [when balancing the state's interest in protecting life and an individual's right to privacy] must favor life." *Schiavo I* at 179.

Because of the fundamental nature of this right, the State has not only a compelling interest in protecting and preserving human life, but also an absolute duty to do so. Governments were instituted to secure unalienable rights. The Declaration of Independence, Para. 1. Since the right to life is, indisputably, a compelling state interest, it must be protected by agencies of state government:

> A constitution would be a meaningless instrument without some responsible agency of the government having authority to enforce it… When the people have spoken through their organic law concerning their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights…

Satz v. Perlmutter, 397 So. 2d 359, 361 (Fla. 1980).

In this case, the State has a particularly compelling interest where end of life decisions involve an incompetent or disabled person who cannot speak for herself. As the U.S. Supreme Court reasoned in *Cruzan:*

> Not all incompetent patients will have loved ones available to serve as surrogate decision makers. And even where family members are present "there will of course be some unfortunate situations in which family members will not act to protect a patient." *In re Jobes*, 529 A.2d 434, 447 (N.J. 1987). A state is entitled to guard against potential abuses in such situations.

Cruzan, 497 U.S. at 281.

Another reason to require heightened protections for persons like Terri is apparent: an erroneous decision not to terminate the withdrawal of sustenance results merely in maintenance of the status quo, but "an erroneous decision to withdraw life-sustaining treatment, however is not subject to correction." *Id.* at

283. The Florida Legislature recognized that the withdrawal of nutrition and hydration from an individual is certain to kill her, that death is final, and that there is precious little margin for error. The legislature, therefore, provided a much needed extra layer of protection for patients who were deemed by a court to be in a persistent vegetative state, who had no written advance directives, who were denied sustenance, and whose family member contests the withdrawal of food and water. The Act serves particularly compelling state interests in this context to protect life without unduly encroaching on the right to privacy. When balancing two fundamental rights, the courts must err on the side of life. *Cruzan*, 497 U.S. at 283.

2. The State Of Florida Has A Compelling Interest In Protecting The Rights Of Third Parties And In Maintaining The Ethical Integrity Of The Medical Profession.

In the context of privacy cases, the protection of innocent third parties and the maintenance of the ethical integrity of the medical profession are compelling state interests. *Krischer*, 697 So. 2d at 102-103. Justice Overton's concurring opinion in *Krischer* quoted Justice Stevens, "The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life." *Id*. at 105. There is no question that Terri's parents have gone to great lengths to show the courts and the

public the value they place on their daughter's life. Significantly, in the *Browning* case there were no such third party interests at issue. *Browning*, 568 So. 2d at 14.

The court in *Browning* suggested that the last and least significant state interest in a privacy case regarding the withdrawal of sustenance is the maintenance of the ethical integrity of the medical profession. *Id*. This interest is extremely significant in a state home to more senior citizens than any other state and who, increasingly, are being threatened by the cultural shift from a "sanctity of life" ethic to a "quality of life" ethic. Evidence of this shift can even be found in the Second District's opinion in *Schiavo III* which expressed a belief that Terri might only choose to live if her "quality of life" were improved. *Schiavo III* at 645. More and more, the net worth of the handicapped and the frail elderly is being computed by quality of life calculus, cost benefit ratios and functional capacity studies. In this environment, the State clearly has a compelling interest in preserving the integrity of the medical profession by preventing it from falling into this utilitarian trap.[5]

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[5] *See "Waking from the Dead,"* Wesley Smith, First Things 136 (October 2003): *21-23:* "Under the doctrine known as 'futile-care theory,' many bioethicists urge that doctors be given the power to refuse wanted life-sustaining treatment based on their views about the lack of quality of their patients' lives. This would include not only tube-supplied food and fluids but potentially other medical interventions such as antibiotics, fever reduction, and respirators. Among the first—but certainly not the only—patients that are being targeted for unilateral withholding of wanted treatment are profoundly cognitively disabled people . . .—that is, patients suffering from long-term unconsciousness.

Unlike Estelle Browning, Terri authored no written advance directive memorializing her wishes. Unlike *Browning*, Terri's case involves disputes about the *bona fides* of the guardian and conflicting interests between the guardian and the ward. (R. 606-608; 1220-1232). In the absence of a written advance directive, members of the medical profession can be manipulated by healthcare surrogates who stand to gain from the death of a ward. Protecting the medical profession from becoming witting or unwitting dupes of those who would exploit an incompetent patient and protecting vulnerable patients from the unscrupulous in the medical community are compelling state interests served by the Act.

3. The State Of Florida Has A Compelling Interest In Protecting People With Disabilities From Violations Of Their Rights Because Of Their Disabilities.

People with incapacitating disabilities are vulnerable to all manner of abuse, exploitation or mistake, because they cannot speak for themselves or defend themselves. Unable to communicate their needs and wishes, they must rely on others to act as substitute decision-makers. The range of decisions a substitute may be called upon to make may be as routine as selecting a physician or as extraordinary and grave as deciding when and under what circumstances to terminate the provision of food and water to a ward. The laws of this state endeavor to provide rules and procedures to ensure that the wishes of the ward are

respected. Terri's case, however, exposed a distressing gap in the protections afforded under the law, i.e., the lack of an independent advocate for the ward where the ward's wishes are not in writing and where the evidence of her oral statements comes from a conflicted source. Recognizing this gap, the legislature crafted the additional protections provided in the Act.

The Florida Constitution guarantees that "[N]o person shall be deprived of any right because of race, religion, national origin, or physical disability." Art. I, § 2, FLA. CONST. This provision makes it clear that the State has a compelling interest in ensuring that people with disabilities are not deprived of basic human rights because of their disabilities. In a case involving the legality of Florida's law prohibiting assisted suicide and an asserted right of privacy, this Court recognized that the State 'has a legitimate competing interest in protecting society against abuses." *Krischer*, 697 So. 2d at 101. The *Krischer* court also noted a number of abuses pointed out by advocacy groups and recounted state interests in limiting the vulnerability of socially marginalized groups, preventing the devaluation of the lives of the disabled, and minimizing financial incentives to limit care. *Id.* at 101. The Act serves these compelling state interests as well.

D. The Act Is Narrowly Tailored To Effect Compelling State Interests In The Least Intrusive Way Possible.

Plainly, the Act had to create a mechanism by which hydration and nutrition could be resumed or the operation of time would result in the patient's death before

any activities of the guardian *ad litem* could commence. Thus the Act's provision for an indefinite "stay" was not only the least intrusive means to accomplish the Act's purposes, but it was the only means to do so. The Act allowed the Governor to preserve Terri's life until a guardian *ad litem* could be appointed, review the evidence, investigate, and make recommendations to the Governor and the court. The Act creates no burden upon the privacy rights of an individual, but rather, seeks to accurately determine what the person's wishes were and to effectuate those desires.

IV. The Act Is Consistent With And Does Not Violate The Doctrine Of Separation Of Powers.

The Florida Constitution provides that the three branches of state government have certain inherent powers, which are divided among them to avoid the concentration of power that leads to tyranny. *See Chiles v. Children*, 589 So. 2d 260, 263 (Fla. 1991). The wisdom of this separation is without dispute. Further, in contrast to the U.S. Constitution, which operates as a delegation of powers to the government, the Florida Constitution operates as a limitation on governmental powers, in order to protect the rights of citizens secured by it. *See Taylor v. Dorsey*, 19 So. 2d 876, 881 (Fla. 1944) (" 'Our state constitution is a limitation upon power, and, unless legislation duly passed be clearly contrary to some express or implied prohibition contained therein, the courts have no authority

to pronounce it invalid.' ") (quoting *Chapman v. Reddick*, 25 So. 673, 677 (Fla. 1899)).

Article I, § 2 of the Florida constitution thus operates to secure and limit the powers of government, further providing that "no person shall be deprived of any right because of physical disability." This includes the right to life. The State has a duty and the power to actively defend life, as well as a duty to avoid exercising its powers in a manner that deprives a person of life because of physical disability. No branch of government has a monopoly on protecting these rights, and each of the three branches of government have discrete roles to play. *Coalition for Adequacy and Fairness v. Chiles*, 680 So. 2d 400, 407 (Fla. 1996).

A. The Act Is A Valid Exercise Of Inherent Legislative Powers In Areas Undeniably Subject To Legislative Authority And Is Not An Encroachment On Judicial Authority.

The mandate to remove Terri's feeding tube took place in the context of two areas of law in which the legislature unquestionably has authority to act: guardianship and the termination of life-prolonging procedures. If every act done pursuant to these statues automatically infringes on privacy, every statute here would always be subject to strict scrutiny analysis – a ridiculous position. Although court jurisdiction over guardianship cases arose from equitable powers of chancery, under the Florida Constitution, the rules of equity in this area have been superseded by the imposition of statutory standards codified in Chapter 744,

Florida Statutes. *Schiavo II*, 792 So. 2d at 558. For example, the legislature defines the terms used in guardianship, imposes procedural requirements, and delineates the rights of the ward and duties of the guardian. *See* FLA. STAT. § 744.102; FLA. STAT. § 744.391; FLA. STAT. § 744.3215; FLA. STAT. § 744.361; FLA. STAT. § 744.367. Here, the legislature merely acted to amend the laws governing guardianship of a ward by providing an additional process: authorizing a stay of the termination of the ward's life-prolonging procedures and requiring the appointment of a guardian *ad litem*. Ch. 2003-418. The power to regulate guardianships rests with the legislature, and the legislature's amendment to these laws does not encroach on judicial powers.

Similarly, while the order authorizing removal of Terri's feeding tube was a judicial act, that order took place within the context of established statutory provisions regarding termination of life-prolonging procedures. FLA. STAT. Ch. 765. In these provisions, the Florida Legislature acted in response to the problems identified by cases such as *Cruzan* and *Browning* and attempted to provide an extensive framework for resolution of these issues. The legislature defined the terms used in end-of-life decision making, imposed procedural requirements, and delineated the ability of surrogates and proxies to act to remove life-prolonging procedures. *See* FLA. STAT. § 765.101; FLA. STAT. § 765.404; FLA. STAT. § 765.302; FLA. STAT. § 765.303; FLA. STAT., § 765.304; FLA. STAT. § 765.202; FLA.

STAT. § 765.401. The legislature also delegated to the courts the power to determine and enforce certain end-of-life decisions, and set the standards for the courts to use in so acting. *See* FLA. STAT. § 765.105 (providing for judicial review of a surrogate's decision); FLA. STAT. § 765.304 (requiring findings in reviewing a disputed decision); FLA. STAT. § 765.401 (permitting substituted judgment and requiring "clear and convincing evidence" of an incapacitated person's wishes).

The legislature has superseded the elements of the *Browning* decision relied upon by the circuit court. It is the role of the courts to interpret the constitution and thereby identify the rights protected therein. The *Browning* Court identified two mandates arising out of the right to privacy in the Florida Constitution: that persons have the right to choose or refuse medical care; and that this right extends to incapacitated persons. *Browning*, So. 2d at 11-12. This privacy right is not self-executing in the context of incapacitated persons. Therefore, the Court went on to impose a method for the exercise of the right, defining how the State was to identify and implement the wishes of such persons, which method was not part of the constitutional mandate. *Id.* at 13-17. However, once identified, it is the peculiar province of the legislature to determine how to protect constitutional rights. Thus, while the courts may properly find that an act affecting end of life decisions is subject to the right of privacy, it remains the province of the legislature to define methods, such as the Life-Prolonging Procedures Act, to give effect to the

privacy right. When the elected representatives of the people of Florida enacted Chapter 765, Florida Statutes, the court-imposed method became unnecessary and inapplicable. The legislature continued to refine its statutory framework with the Act. Because the legislature's amendment of the life-prolonging procedures laws does not encroach on judicial powers, neither does the Act. *Browning* now stands only for the two constitutional mandates cited above.

B. The Legislature May Properly Act To Affect Prior Court Decisions.

The circuit court found that the Act encroaches on the role of the judiciary by "nullifying the final" court judgment authorizing removal of Terri's feeding tube. (R. 1389-1392). However, that order is not a final, dispositive decision by the court, because guardianship cases remain open until terminated by the death or recovered capacity of the ward. In a guardianship case, the judicial goal is not "finality," but the proper administration of the person and her estate, according to the ward's wishes. *Schiavo II*, 792 So. 2d at 559. Thus, as the Second District Court explained, such orders are not final, and may be challenged at any time:

> The order requiring the termination of life-prolonging procedures is not a standard legal judgment but an order in the nature of a mandatory injunction compelling certain actions by the guardian and, indirectly, by the health care providers. Until the life-prolonging procedures are discontinued, **such an order is entirely executory**, and the ward and guardian continue to be under the jurisdiction and supervision of the guardianship court.

Id. (emphasis added). The fact that the legislature acted to change the laws that govern guardianship and termination of life-prolonging procedures during the pendency of an open guardianship case is not a nullification of prior court orders in that case.

Even if the order authorizing removal of the feeding tube was final, courts have long recognized the legislature's ability to affect final orders and legislate in response to court rulings. In 2001, for example, the Florida Legislature enacted FLA. STAT. § 925.11, permitting post-sentencing DNA testing for convicted criminals. The act provided for an additional procedure for previously adjudicated cases, many of which had no further appeals pending or possible. This Court approved the actions of the legislature in *Wilson v. State of Florida*, 857 So. 2d 190 (Fla. 2003).

The legislature has also enacted statutes explicitly stating that a particular court decision was in error and should be nullified. *See* FLA. STAT. § 810.015(1)(a). The legislature has even enacted language in statutes to effectively overrule court decisions construing statutory provisions without changing the terms of the existing law. *See* FLA. STAT. § 893.135(7) (providing that two appellate court decisions correctly interpreted the legislature's intent); FLA. STAT. § 893.101(1) (finding a decision of the Florida Supreme Court contrary to legislative intent). On numerous occasions the legislature has announced its intent in enacting a statute by

including discussions of court cases in the "whereas" clauses accompanying the law. *See* Ch. 88-225, 89-41, 89-91, 97-39, 98-3, and 98-22, Laws of Fla. (R. 951).

The United States Supreme Court recognizes that legislatures have authority to alter the effect of previously entered executory judgments authorizing injunctive relief. *Plaut v. Spendthrift Farms, Inc.*,514 U.S. 211, 115 S. Ct. 1447, 1456-1457, 131 L.Ed.2d 328 (1995). Similarly, the legislature here agreed with the court in *Schiavo IV* that the available statutory framework was inadequate protection and acted to increase that level of protection. (R. 950-952; 962-963; 1066-1068; 1005-1006; 1125-1129; 1136-1137; 1140-1143; 1146-1147). As the court lamented in *Schiavo IV*:

> It may be unfortunate that when families cannot agree, the best forum we can offer for this private, personal decision is a public courtroom and the best decision-maker we can provide is a judge with no prior knowledge of the ward, but the law currently provides no better solution that adequately protects the interests of promoting the value of life.

Schiavo IV, 851 So. 2d at 187. Because the order in the guardianship case was not final, and because the ward's wishes in such a case must be reconsidered as circumstances change, the effect of the Act is prospective only and does not infringe on vested rights.

Even the circuit court recognized that nothing about the Act affects the earlier mandate of the court, as that mandate was already carried out before the Act

was passed. (R. 1388). Thus, there was no outstanding order thwarted by the actions of the legislature.

C. The Act Is A Valid Delegation Of Legislative Powers.

1. The Act Must Be Construed In *Pari Materia* With Chapter 765, Florida Statutes.

Construed in *pari materia* with Chapter 765, Florida Statutes, the Act does not constitute an unconstitutional delegation of powers by the legislature. *See Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. 2d DCA 1986). 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. This provision was not available at the time of the decisions and orders in the guardianship case.

In *Browning* this Court acknowledged that it "cannot ignore the possibility that a surrogate might act contrary to the wishes of the patient." *Browning*, 568 So. 2d at 15. That concern is heightened in the circumstances of individuals who fall within the class protected by the Act. In such cases, it is easy to see how a person with no written advance directive could be exploited -- especially in a case where the surrogate decision maker stands to gain from the patient's demise or may be motivated to act by something other than the desires of the patient. The

Florida Legislature, therefore, in a statute narrowly drawn to protect a discrete class of extraordinarily vulnerable people, authorized a stay and mandated the appointment of a guardian *ad litem* upon the issuance of a stay. Ch. 2003-418.

By requiring the appointment of a guardian *ad litem*, the legislature indicated its intent that the Governor ascertain Terri's wishes. Ch. 2003-418. Further, the Governor is required to do so based on the present circumstances, which may be different than the circumstances at the time of the guardianship decisions. These circumstances include the facts that Schiavo has essentially abandoned his marital relationship, and also that the Pope, the highest human authority pursuant to Terri's Catholic faith, has recently issued the following statement:

> I should like particularly to underline how the administration of water and food, even when provided by artificial means, always represents a natural means of preserving life, not a medical act. Its use, furthermore, should be considered, in principle, ordinary and proportionate, and as such morally obligatory, insofar as and until it is seen to have attained its proper finality, which in the present case consists in providing nourishment to the patient and alleviation of his suffering.

Address of John Paul II to the Participants in the International Congress on "Life Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas," March 20, 2004.

2. Simply Because The Act Gives Some Discretion To The Governor In Implementation Does Not Render The Act An Unconstitutional Delegation.

The Act itself constitutes the legislative policy decision that certain vulnerable adults require additional protection. (R. 948-954; 960-973; 1003-1006; 1064-1068; 1110-1116; 1123-1129; 1134-1147; 1153-1156). Having made this fundamental policy decision, the legislature enacted a law with all the necessary guidelines for its implementation by the executive. Before the Governor may issue a stay, all four of the criteria specified in the Act must be present. Ch. 2003-418. Thus, in contrast to the legal issue in *Askew v. Cross Keys Waterways, Inc.*, 371 So. 2d 913 (Fla. 1979), the Act contains sufficient guidelines such that both the Governor and the trial courts can determine whether the Governor is carrying out the intent of the legislature. *Id*. at 918-919. The Act specifically provides for a guardian *ad litem* to make recommendations to the Governor addressing Terri's wishes, in conjunction with the provisions of Chapter 744, Florida Statutes. The fact that some authority, discretion, or judgment is necessarily required to be exercised in carrying out the Act does not invalidate it. *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209 (Fla. 1968).

Neither the Life Prolonging Procedures Act nor the Act at issue can be viewed in a vacuum. Further, the Act must be construed liberally in a manner to effectuate its constitutionality if it reasonably can be the case. The construction

adopted below, in concert with the impermissible presumption-based short circuit procedures employed by the circuit court, is a construction calculated to produce the unconstitutionality of the Act. However, the Governor has offered a construction of the Act that comports with constitutional requirements in that it provides an additional layer of protection for the most vulnerable disabled citizens.

CONCLUSION

Based on the foregoing arguments and authorities, Appellant Jeb Bush, Governor of the State of Florida, hereby 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 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 **David Cortman**, ACLJ, 1000 Hurricane Shoals Road, Suite D-600, Lawrenceville, GA 30043, on this ____ day of July 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.

_____
KENNETH L. CONNOR
CAMILLE GODWIN