IN THE FLORIDA SUPREME COURT
CASE NO.: SC04-925

JEB BUSH, Governor of the
State of Florida,

Appellant,

On certification from the Second
District Court of Appeal
Case No. 2D04-2045

vs.

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

Appellee.
_____/

ANSWER BRIEF

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PRELIMINARY STATEMENT

The Appellee, Michael Schiavo, as guardian of the person of Theresa Marie Schiavo, is sometimes referred to in this brief as "guardian," and as "petitioner," his designation in the trial court. Theresa Marie Schiavo is sometimes referred to as the "ward." Appellant is also referred to as "the Governor." All parties are sometimes referred to by name. The circuit court that issued the decision on certification is referred to as "the trial court," and the circuit court that oversaw six years of litigation concerning Mrs. Schiavo's medical condition and her wishes is referred to as "the guardianship court."

The record on appeal is designated as "R" and references to the record are followed by page number. The materials included in the record by this Court's July 12, 2004 order are also designated as "R", but references to the same are followed by the name and document page number.

The appellate court's reported decisions in this case are all captioned *Bush v. Schiavo* and are reported at 861 So. 2d 506 (Fla. 2d DCA 2003) (prohibition), 866 So. 2d 136 (Fla. 2d DCA 2004) (certiorari), and 871 So. 2d 1012 (Fla. 2d DCA 2004) (jurisdiction/venue). The reported appellate decisions in the guardianship case are *Schindler v. Schiavo (In re Guardianship of Schiavo*), 780 So. 2d 176 (Fla. 2d DCA 2001), *Schindler v. Schiavo (In re Guardianship of Schiavo*), 792 So. 2d 640 (Fla. 2d DCA 2001), *Schindler v. Schiavo* (*In re Guardianship of Schiavo*), 800 So. 2d 640 (Fla. 2d DCA 2001), and *Schindler v. Schiavo* (*In re Guardianship of Schiavo*), 851 So. 2d 182 (Fla. 2d DCA 2003), and

are respectively referred to as *Schiavo I*, *Schiavo II*, *Schiavo III*, and *Schiavo IV*.

As Appellant's statement of the case and facts is replete with inaccurate, unsupported, and irrelevant material, Appellee elects to file his own statement.

STATEMENT OF THE CASE AND OF THE FACTS

Enactment of Ch. 2003-418 and the Governor's Executive Order

After six years of painstaking and transparent litigation, including a week-long trial, a seven-day evidentiary hearing on an action to vacate the final judgment, thirteen applications for appellate review,[1] innumerable motions, petitions, hearings, and proceedings, and three suits filed in federal district court, Theresa Schiavo's feeding tube was removed on October 15, 2003 pursuant to her adjudicated medical treatment wishes (R 82-83). This massive and intensive judicial scrutiny of a patient's medical condition and intent is unprecedented in the annals of American jurisprudence.

Six days later on October 21, 2003, the Legislature in less than twenty-four hours, without committee hearings and contrary to staff warnings of suspect constitutionality,[2] passed chapter 2003-418, Laws of Florida ("Ch. 2003-418" or "the Act"), "effectively overruling the order of the probate division of the circuit

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[1] There have been nine applications to the Second District Court of Appeal: 2D00-1269, plenary appeal; 2D01-1863, appeal from denial of 1.540(b)(2) and (3) motion; 2D01-1891, appeal from circuit civil injunction; 2D00-1269, motion to enforce mandate; 2D01-3626, appeal from August 2001 denial of 1.540(b)(5) motion; 2D02-4317, review of denial of request for additional tests; 2D02-5394, appeal from November 2002 denial of 1.540(b)(5) motion; 2D03-4534, appeal from order scheduling tube removal and denial of October 2003 1.540(b)(5) motion; and, 2D03-4621, petition for writ of prohibition on denial of motion to disqualify trial judge. There have been three applications to this Court for discretionary review, SC01-559, SC01-2678, and SC03-1242, all of which were denied. There has been one application to the United States Supreme Court, application number 00A926, which also was denied.

[2] *See* Fla. S. Comm. on Rules & Calendar, SB 12-E (2003) Staff Analysis 3 (rev. Oct. 21, 2003).

court." *Bush v. Schiavo*, 861 So. 2d at 507. Contrary to Appellant's bald recitation of legislative intent (Gov. Br. 5), key legislators, now expressing regret over their support of the bill, admit that their votes were pressured by "phone calls and emails – and physical and political threats," mostly orchestrated by non-Floridians as "part of a well organized national campaign." St. Petersburg Times, Feb. 10, 2004, section B, at 1, col. 1, and Feb. 20, 2004, section B, at 1, col. 1.

The Act and Executive Order issued thereunder (R 589, 587-588) bear little resemblance to the statute and order described by Appellant. Ch. 2003-418 gives the Governor authority "to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003," the patient "has no written advance directive," "the court has found that patient to be in a persistent vegetative state," "that patient has had nutrition and hydration withheld," and "a member of that patient's family has challenged the withholding of nutrition and hydration" (§ 1). The Act is not a "narrowly tailored law" vesting the Governor with "some discretion" (Gov. Br. at 4, 8). Rather, it confers upon the Governor absolute, unfettered, and unreviewable discretion to "stay" the withdrawal of feeding and hydration (§ 1). Once the stay is issued, the Governor has absolute and unreviewable discretion to lift the stay – or not (§ 2). The Act provides for the appointment of a guardian *ad litem*, but that does not circumscribe the Governor's unbounded discretion because the continuation of the stay is in no way dependent on any action the guardian takes (§ 3).

Ch. 2003-418 also does not direct "that the Governor ascertain Terri's wishes," does not "ensur[e] an independent evaluation of the patient's wishes,"

and does not require anyone to "accurately determine" patient intent (Gov. Br. at 48, 24, 40). Indeed, the Act does not mention patient intent and provides no standard whatsoever under which the Governor is to exercise his discretion.

Ch. 2003-418 is indisputably targeted at Mrs. Schiavo and no one else. By its terms, it applies only to individuals in her precise situation as of October 15, 2003, six days *prior* to the enactment of the law. Moreover, it lapses after 15 days. *Id.* § 2. After October 31, 2003 – although the suspension of Mrs. Schiavo's privacy rights may continue indefinitely into the future – the Governor has no authority to prevent other individuals from exercising their rights to privacy.

On the same day the Act was signed, Governor Bush issued Executive Order 03-201, staying the withholding of artificial nutrition and hydration from Mrs. Schiavo (R 587-88). The order compelled re-insertion of the feeding tube, prohibited any person from interfering, and directed law enforcement officials to serve the order on the facility caring for Mrs. Schiavo. Pursuant to the order, Mrs. Schiavo was removed from her residence at a local hospice on October 21, 2003, and brought to a hospital, without the consent of her husband and duly appointed guardian, to force the surgical reinsertion of a feeding tube (R 1388-89, 1381).

Litigation in the Trial Court

That same day Appellee filed a petition seeking a declaratory judgment and immediate injunction against Ch. 2003-418 (R 1-10). Both in the trial court and the appellate court, the Governor utilized every procedural trick available to avoid an adjudication on the merits, initially arguing that the trial court did not have personal jurisdiction or venue over him and claiming that the trial court could not

enter any order absent a re-trial of Mrs. Schiavo's wishes.

While pursuing a dilatory appeal of the personal jurisdiction and venue defenses, the Governor sought wide-ranging discovery in the trial court. Petitioner moved for a protective order. At the trial court case management conference, the parties entered into an extensive and detailed stipulation of material facts, and matters to be judicially noticed (R 598-608).[3] After this stipulation, the trial court entered a protective order (R 947), and later concluded that no additional facts were required to render summary judgment (R 1511-1512). The appellate court, after noting that it was "unclear" as to the "content of all the stipulations of facts reached by the parties," reversed the protective order and permitted the trial court to reconsider the protective order issue and enter more specific findings. *Bush v. Schiavo*, 866 So. 2d at 138-40 & n.2.

Following the appellate court's rejection of the jurisdiction and venue arguments, *Bush v. Schiavo*, 871 So. 2d 1012, the trial court entered a second protective order (R 1347-1351), along with the Summary Final Judgment (R 1377-1399). The trial court held that Ch. 2003-418 is, on its face, an unconstitutional delegation of legislative power and an interference with the right to privacy, and thus "no facts need be judicially determined" (R 1382, 1348). [4] The court also concluded the statute was unconstitutional as applied to Mrs. Schiavo because it

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[3]These stipulations are fully set forth in the Summary Final Judgment (R 1387-9).

[4]The case was argued and decided in the trial court solely on state constitutional grounds (R 23, n. 1). As explained below, while federal precedents will be drawn upon where useful to illuminate state constitutional guarantees, Appellee requests this Court to decide this case solely on the provisions of the Florida Constitution.

unlawfully encroaches upon judicial power and is impermissibly retroactive, finding that the only material facts needed for such a determination were those to which the parties had stipulated (R 1387-1389, 1391). In rejecting the argument that there were disputed issues of material fact, the trial court explained that the Governor's claim "is misplaced, if not misleading" because "the legal issue in this litigation is the propriety of the Governor's interference with a previously entered final judgment, not the propriety of the guardianship proceedings" (R 1392).

Mischaracterizations in the Governor's Brief

The Governor spends much of his brief mischaracterizing the guardianship proceedings and making false allegations about Mr. Schiavo. None of them are relevant to this case. As the trial court found, the underlying findings of the guardianship court are irrelevant to its finding that the Act is unconstitutional, on its face and as applied to Mrs. Schiavo. Nonetheless, Appellee feels compelled to correct the Governor's gross misstatements.

Theresa Schiavo suffered a cardiac arrest on February 25, 1990. Since that time, she has been in a persistent vegetative state, "robbed . . . of . . . all but the most instinctive of neurological functions"; most of her cerebrum "is simply gone and has been replaced by cerebral spinal fluid." *Schiavo I*, 780 So. 2d at 180, 177. In May 1998, Mr. Schiavo, his wife's guardian, filed a petition to discontinue Mrs. Schiavo's artificial life support. In so doing, he placed the issue before the court for resolution, allowing all parties, including Mrs. Schiavo's parents, to present evidence concerning Mrs. Schiavo's medical condition and what her wishes would have been. *Schiavo I*, 780 So. 2d at 179.

The guardianship court concluded "beyond all doubt that Theresa Marie Schiavo is in a persistent vegetative state" (R 72); *Schiavo I*, 780 So. 2d at 177 (finding "[t]he evidence is overwhelming"); *Schiavo IV*, 851 So. 2d at 185, 187.[5] Judicial findings of clear and convincing evidence of Mrs. Schiavo's intent not to be kept alive artificially were not made upon "Schiavo's bare assertions" (Gov. Br. at 24), but were also based upon two additional witnesses who testified to statements made by Mrs. Schiavo. The guardianship court found those witnesses to be "creditable and reliable with regard to her intention." (R 75); *Schiavo I*, 780 So. 2d at 180. The findings were tested by multiple appeals and repeated efforts to present "new" evidence. *Supra* at 1 & n.1.

Appellant proffers nine questions allegedly relevant to the "issue of Terri's wishes under the **present** circumstances" that he claims have "never been adjudicated" (Gov. Br. at 15-16). Yet, all of the "questions" have been thoroughly litigated for years, have been resolved by the courts in Appellee's favor, and merely represent a transparent attempt by Appellant to slur Mr. Schiavo. *See, e.g.*, *Schiavo I*, at 177-78 (rejecting claim of impropriety because Mr. Schiavo currently shares his life with another woman and finding that "Theresa has been blessed

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[5] Theresa Schiavo's "condition is legally a 'terminal condition,'" *Schiavo II*, 792 So. 2d at 560, contrary to Appellant's unsupported statement (Gov. Br. at 5). She has permanently lost the ability to intake sustenance by mouth – "[a]ttempting oral nutrition would result in aspiration with insufficient nutrition. . . to maintain her," and would "lead to infection, fever, cough and ultimately pneumonia" (R 72, Mar. 2, 2000 order) – and is not "a candidate for swallowing therapy" (Gov. Br. at 4), (R Sept. 17, 2003 order). Discontinuing artificial feeding does not result in death by "starvation" (Gov. Br. at 3, 4, 17), but otherwise occurs in seven to fourteen days and upon "unrebutted medical evidence . . . would be painless" (R 72).

with . . . a loving husband. . . . Michael has continued to care for her and visit her all these years . . . He has been a diligent watch guard of Theresa's care."); *id.* at 178 (rejecting claim of conflict of interest)[6]; (R 896-7, Nov. 22, 2002 order), *Schiavo IV*, 851 So. 2d at 183 n.1 (claim that Mrs. Schiavo had suffered "multiple traumatic injuries" was absolutely refuted by the sworn statements of treating physicians, and dismissed); (R 69, Sept. 17, 2003 order at 5-6) (rejecting claims from disgruntled former nursing home workers as "incredible to say the very least," and further finding it "undisputed" that Mr. Schiavo "was very aggressive with nursing home personnel to make certain that she received the finest of care").

Space limitations prevent a refutation of every scurrilous charge. What is obvious from Appellant's tactic is that he desperately seeks some diversion from the inescapable conclusion that the Act is not only unconstitutional, it is an egregious state-sponsored deprivation of fundamental civil liberties.

SUMMARY OF ARGUMENT

Mrs. Schiavo, like all Florida citizens, has a fundamental constitutional right to refuse unwanted medical treatment. That right was conclusively adjudicated after six years of litigation. That the Legislature and the Governor, through legislation such as Ch. 2003-418, could force Mrs. Schiavo or any other

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[6] Opponents to removal of artificial life support routinely charge family members with alleged financial "conflicts" to impugn their motives. Contrary to Appellant's claim (Gov. Br. at 30, 38), the state made a similar conflict of interest charge in *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990), which, as it is here, was irrelevant to the legal question of the ward's right of privacy. *See* Case No. SC 74,174, and in particular, the State=s appendix to initial brief containing the guardianship accounting used to indicate the size of the prospective inheritance.

Floridian to undergo the surgical re-insertion of a feeding tube after the courts had determined that an individual would wish to forgo such measures, is a shocking abuse of power. It is also blatantly unconstitutional under Florida's Constitution.

By stripping all patients to whom it applies of the right to choose their own medical treatment and giving that right to the State, Ch. 2003-418, on its face, implicates the right to privacy, is presumptively unconstitutional, and compels application of strict scrutiny. The Act, of course, cannot survive such scrutiny. As this Court has repeatedly held, the state's interest in preserving life cannot override the patient's right to discontinue medical treatment. Moreover, Ch. 2003-418, lacking any standards for decision making, procedural safeguards or any judicial review, subjects Mrs. Schiavo (and all others to whom the statute could conceivably apply) to the whim of the Governor. Nothing could be more repugnant to the Florida Constitution. *See* Part I.

Ch. 2003-418 also transgresses every precept of the separation of powers that is central to the Florida Constitution because it gives the Governor unfettered authority to overturn an adjudication of constitutional rights by the Florida courts. In so doing, it grants the Governor truly imperial power: his discretion is unbridled, his decisions are absolute, and no one (including a court) may review his decisions or compel him to explain them. Such an incursion into the power of the Judiciary necessarily violates Florida's strict separation of powers. *See* Part II.

Faced with such an obviously unconstitutional statute, the Governor seeks to distract the Court by misrepresenting the legal standard and propounding a fictionalized version of the statute as one that protects the very person whose

rights it violates. But at the heart of the Governor's brief, in his continuing strategy to delay adjudication of the merits, is his view that he is personally entitled to re-litigate issues related to Mrs. Schiavo's wishes and the exercise of her right to privacy under the Florida Constitution. In his view, this case should be a replay of the litigation, which consumed more than six years in the Florida courts and conclusively determined Mrs. Schiavo's wishes.

In Part V of this brief, Appellee will debunk the Governor's frivolous arguments concerning discovery, judicial notice, collateral estoppel, and trial by jury – each red herrings. Appellant's protestations that genuine issues of material fact remain and his claim that the trial court improperly took judicial notice of facts proven in the guardianship case are both wrong and irrelevant. As the trial court recognized, determining Mrs. Schiavo's intent (again) is not material to this constitutional adjudication. That is because, among other reasons, *under the provisions of the Act*, Mrs. Schiavo's wishes are legally irrelevant. A hundred juries could determine Mrs. Schiavo's wishes, yet in every instance, the Governor is free to ignore those wishes and compel the opposite medical treatment choice. Simply put, the Governor's ability to disregard the patient's wishes and the statute's lack of procedural safeguards exist in every application of the statute, making it facially unconstitutional without any factual inquiry.

The Governor's argument fares no better with respect to the trial court's as-applied determinations. Both – intrusion into Judicial Power and retroactivity (*see* Part III) – were made upon stipulated facts, and no facts other than "the existence of the final judgment in the guardianship" proceeding were judicially noticed. The

trial court correctly held that Ch. 2003-418 unlawfully intrudes upon the judiciary because it nullifies the decisions of the courts of this state and suspends the operation of the Florida Constitution with respect to a single citizen, Mrs. Schiavo. Neither the Legislature nor the Governor has the power under the Florida Constitution to "stay" the court's judgment or to require Mrs. Schiavo or her guardian to prove once again what her wishes are.

Ch. 2003-418 also violates a host of other constitutional provisions that the trial court did not find necessary to address (*see* Part IV).

ARGUMENT

I. THE STATUTE VIOLATES THE RIGHT TO PRIVACY.

A. The Right to Refuse Unwanted Medical Treatment Is Firmly Established in the Florida Constitution and Any Statute that Implicates That Right Must Satisfy Strict Scrutiny.

Under Article I, Section 23, of the Florida Constitution, "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life." To avoid any danger that the strength of the privacy right could be diminished, this constitutional provision, adopted by the citizens of Florida in a statewide referendum, was "intentionally phrased in strong terms" to make the "right as strong as possible" and to provide "more protection from governmental intrusion than that afforded by the United States Constitution." *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985) (internal quotation marks and citation omitted).

"Florida's right of privacy is a fundamental right warranting strict scrutiny." *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d

612, 626 (Fla. 2003). Therefore, once a privacy right has been *implicated*, the act is "presumptively unconstitutional," *id*., and the burden to prove otherwise "shifts . . . to the state." *Winfield*, 477 So. 2d at 547; *see also In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993); *In re T.W.*, 551 So. 2d 1186, 1191-92 (Fla. 1989); *Krischer v. McIver*, 697 So. 2d 97, 102 (Fla. 1997). Once the burden has shifted, the state "must establish a compelling interest to justify intruding into the privacy rights of an individual," 697 So. 2d at 102, and must demonstrate that the statute "accomplishes its goal through the use of the least intrusive means." *Winfield*, 477 So. 2d at 547; *North Florida Women's Health*, 866 So. 2d at 625 n.16.[7]

Ch. 2003-418 implicates the right of privacy, *infra*; therefore this Court must apply strict scrutiny.

1. Chapter 2003-418 implicates the right of privacy.

Chapter 2003-418 implicates the right of privacy because it removes from the patient and gives to the State the power to impose or withhold medical treatment.[8] The Act's burden on the right of privacy appears on its face (and

[7] The cases cited by the Governor to the contrary have no application where the statute infringes a fundamental right. *See State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004) (presuming that legislature could have omitted mens rea requirement, but interpreting statute as not doing so absent clear language); *Bush v. Holmes*, 767 So. 2d 668 (Fla. 1st DCA 2000) (upholding statute because it implicated no express provision of the Florida Constitution); *State v. Bales*, 343 So. 2d 9 (Fla. 1977) (applying rational basis review because statute involved no fundamental right).

[8] That the statute was enacted solely to affect Mrs. Schiavo necessarily blurs the distinction between facial and as-applied challenges. Although the trial court did not issue an as-applied ruling regarding Mrs. Schiavo's specific right to privacy, the statute's implication is even more egregious as applied to her, because her wishes, despite having been exhaustively litigated and finally determined, were overridden. *See Schiavo IV*, 851 So. 2d at 185, 187.

requires no proof) because, as found by the trial court, "[t]he Act, in every instance, ignores the existence of this right and authorizes the Governor to act according to his personal discretion" (R 1383).

The right to control the fate of one's own body is firmly rooted in the Florida Constitution's explicit right of privacy: "Thus, we begin with the premise that everyone has control over his or her person." *Browning*, 568 So. 2d at 10.[9] This fundamental right of self-determination is "inherent in the concept of liberty" and necessarily includes the right to refuse medical treatment regardless of medical condition. *Id.* It applies regardless of an individual's mental or physical condition and regardless of the medical decision itself. One need not be terminally ill or beyond recovery to exercise the right. *Id.* at 13. Further, the right extends to *all* decisions concerning one's health, major or minor, ordinary or extraordinary, life-prolonging or otherwise, and specifically includes the right to choose or refuse the supplying of food and water through a feeding tube. *Id.* at 11, 12; *In re T.W.*, 551 So. 2d at 1192 ("We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime").[10]

Finally, the right to choose or reject medical treatment applies regardless of the physical or mental competence or capacity of the patient. *Browning*, 568 So. 2d at 12; *see also Bludworth*, 452 So. 2d at 924 ("[T]his valuable right should not

[9] The Governor disagrees, claiming "the right to privacy was overextended by the Court in that case" (R 490, n. 5).

[10] Indeed, it is the prolonged period of artificially-sustained life, "accurately described as a means of prolonging the dying process rather than a means of continuing life," that many would choose to avoid. *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So. 2d 921, 923 (Fla. 1984).

be lost because the noncognitive and vegetative condition of the patient prevents a conscious exercise of the choice to refuse further extraordinary treatment."). As this Court has held, a critical component of the right of self-determination of incompetent patients is that when such a person can no longer speak, her right may be exercised by a proxy, including through a court adjudication, upon clear and convincing evidence of the patient's wishes. *Id.*; *Browning*, 568 So. 2d at 13.

Because the Act cannot survive strict scrutiny, the Governor makes the absurd suggestion that Ch. 2003-418 does not even *implicate* the right to privacy and that he is entitled to re-litigate Mrs. Schiavo's wishes. To begin, he simply misrepresents the law, arguing that "[u]nless and until the Act at issue is determined to *violate* Terri's right to privacy. . . the Act remains presumptively constitutional" (Gov. Br. at 23, 25, emphasis added). Violation of the right of privacy, however, is the end conclusion; implication of the right of privacy is the starting point of analysis.[11] The Governor makes no attempt to argue the inescapable: the Act implicates the right of privacy of every person who conceivably falls within its terms, because it strips from the patient the right to

[11] The cases on which the Governor relies, such as *J.A.S. v. State*, 705 So. 2d 1381, 1387 (Fla. 1989) (applying strict scrutiny without factual findings where privacy right was implicated), do not support his claim. *See also Shaktman v. State*, 553 So. 2d 148 (Fla. 1989) (analyzing statute under strict scrutiny without "proof" of privacy right). In *Renee B. v. Florida Agency for Health Care Administration*, 790 So. 2d 1036, 1040 (Fla. 2001), the Court found only that the state's funding decisions do not "affirmatively" interfere with the exercise of rights and thus do not implicate strict scrutiny. And in *North Florida*, 866 So. 2d at 630-31, the only evidence concerned not how a particular person would have wanted her privacy right to be exercised, but general testimony about whether a parental notification statute is the functional equivalent of a parental consent statute.

self-determine her own medical treatment.[12]

Second, as the trial court recognized, whatever argument the Governor may make about the facts, they are irrelevant for purposes of evaluating the Act on its face. "By substituting the personal judgment of the Governor for that of the 'patient,' the Act deprives every individual who is subject to its terms of his or her constitutionally guaranteed right to the privacy of his or her medical decisions" (R 1383).[13]

Third, even with respect to Appellee's as-applied challenge, the only facts required are those that the trial court found were undisputed. Mrs. Schiavo's right to privacy was finally and conclusively litigated in the Florida courts. The specific factual findings that support the guardianship court's holdings are irrelevant. To the extent that a statute compels a person to repeatedly prove her wishes (whether in court or to the Governor's satisfaction), that itself imposes a burden on the right to privacy that must be justified by strict scrutiny.

Fourth, as discussed in Part V below, even if the trial court had held it was bound by determinations of the guardianship court, it would have been correct to do so. The only rights at issue in this proceeding are Mrs. Schiavo's; those rights were conclusively determined by the guardianship court, and no one purporting to

[12] This Court has specifically found the "right implicated" when choosing whether to continue or cease tube feeding of an adult vegetative patient. *See In re T.W.*, 551 So. 2d at 1192; *see also Bush v. Schiavo*, 861 So. 2d at 558 ("ch. 2003-418 implicates the right of privacy").

[13] Because the Act gives the Governor complete authority to implement a stay without regard to the patient's wishes, the Governor's one strained hypothetical is irrelevant (Gov. Br. at 28). Ch. 2003-418 is unconstitutional in all of its applications because it necessarily and in all circumstances infringes the fundamental right of privacy.

be her proxy can challenge them here.

Thus, pursuant to *Browning* and its progeny, the right to privacy is clearly implicated. Appellant must meet the heavy burden of strict scrutiny.

2. *Browning* and Its Progeny Apply to This Case.

The Governor makes the extraordinary argument that *Browning* does not protect Mrs. Schiavo by scouring its fact pattern for any possible differences from this case, no matter how irrelevant, focusing particularly on the difference in age and life expectancy of Mrs. Browning and Mrs. Schiavo, and the fact that Mrs. Schiavo did not memorialize her wishes in writing (Gov. Br. at 30-31). That Mrs. Schiavo could be sustained in her vegetative condition for longer than Mrs. Browning, however, is irrelevant to the applicability of *Browning*'s holding that an incompetent patient has the right to refuse medical treatment – directly, or through a surrogate. Life expectancy, age, and the exact form of the evidence of the patient's wishes do not alter that principle. *Id.* at 10-13.[14] Nor is the right to privacy diminished if the patient's choice is not memorialized in writing. *Id.* Finally, the patient's rights are not contingent on agreement of all relatives. *Id.*

Nor has the legislature somehow "replaced" *Browning* with Chapter 765's substituted decision making procedures. This argument is contradicted by Chapter

[14] The Court's refusal to require written evidence of a patient's wishes recognizes that few people memorialize in writing their choice regarding medical treatment. *See Browning*, 568 So. 2d at 15; *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 289 n.1 (1990) (O'Connor, J., concurring) (citing two surveys showing that only 23% and 15% of those surveyed, respectively, had put their instructions regarding medical treatment in writing).

765 itself, which states that its provisions "are cumulative to the existing law regarding an individual's right to consent, or refuse to consent, to medical treatment and do not impair any existing rights . . . a patient, including a[n] . . . incompetent person . . . may have under the common law, Federal Constitution, State Constitution, or statutes of this state." Fla. Stat. § 765.106 (1994 amend.); *see also Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994) ("[N]either the common law nor a state statute can supersede a provision of the federal or state constitutions."). This Court has repeatedly relied on *Browning*, even after Chapter 765 was amended to include protections for incompetent patients. *See, e.g.*, *North Florida Women's Health*, 866 So. 2d at 619 n.6, 635 n.53; *Dubreuil*, 629 So. 2d at 827 n.13; *see also Schiavo II*, 792 So. 2d at 557 ("After [*Browning*], the legislature wisely revised chapter 765 to better address the issues of life-prolonging treatment.").

Thus, *Browning* and its progeny remain vital law protecting the fundamental right to privacy.

3. The Governor's "Present Intent" Argument Contradicts the Decisions of this Court and Is Internally Inconsistent.

The Governor seeks to distract the Court from the well-established constitutional principles governing this case by insisting that strict scrutiny cannot be applied absent a determination of Mrs. Schiavo's "present intent" (Gov. Br. at 24). This argument is fundamentally flawed in several respects.

First, such a determination is irrelevant because, even if by chance the Governor could prove that his choice coincided with the patient's present wishes,

under the Act, "the Governor is not required to consider, much less act in accord with those desires" (R 1383, Summary Final Judgment). None of the criteria that trigger the application of the Act speaks to Mrs. Schiavo's desires, and nowhere does the statute direct the Governor, in whom it vests the power to decide Mrs. Schiavo's fate, to consider those wishes. Because the Act makes no provision for Mrs. Schiavo's wishes, past or "present," the Governor's argument against application of strict scrutiny is an empty one.[15] It is this unrestricted power to act regardless of the patient's wishes in every situation "which creates this fatal constitutional infirmity on the face of the Act." *Id*.

Second, even if there were an inquiry into the patient's wishes, the only possible issue concerns "the medical choice . . . the patient, if competent, *would have made*." *Browning*, 568 So. 2d at 13 (emphasis added); *see also, e.g., In re Guardianship of Barry*, 445 So. 2d 365, 370-71 (Fla. 2d DCA 1984). As *Browning* recognized, an incompetent person cannot express her "immediate wishes." 568 So. 2d at 13. To honor the patient's right, the Court has looked, logically and necessarily, to expressions of the patient's wishes while still competent. *Id.* at 13 (looking to evidence of declaration executed five years earlier); *Bludworth*, 452 So. 2d at 922 (looking to living will executed nine years earlier, and testimony of wife's promise to honor patient's wishes made three years

[15] By contrast, chapter 765 expressly references the constitutional concept of the patient's choice and provides clear mechanisms for determining and safeguarding the right regardless of whether or not a patient's wishes are expressed in writing. *See* Fla. Sess. Law Serv. Ch. 92-199, Health Care Advance Directives–Life-Prolonging Procedures (1992).

earlier, to determine patient's wishes).

Third, the Governor's argument, also advanced by the Schindler *amici*, regarding "present intent" is internally contradictory, because, taken to its logical conclusion, it would eviscerate even the most detailed advanced directives, written, videotaped, or oral. Such directives are necessarily formulated before the fact of incapacitation. Appellant thus asks this Court to do what it refused to do in *Browning* – accept an argument that would paralyze the substituted-judgment standard by constantly speculating whether or not circumstances may have changed the patient's mind.[16] Since "human limitations preclude absolute knowledge" of the patient's wishes, "we cannot avoid making a decision in these circumstances, for even the failure to act constitutes a choice." *Browning*, 568 So. 2d at 13. In essence, the Governor and the Schindlers seek to relitigate Mrs. Schiavo's case *ad infinitum* until they obtain the result they want.

B. The State Has No Compelling Interest Sufficient to Justify Giving the Governor Unfettered Authority over Any Person's Medical Treatment.

Far from having a compelling interest in forcing Mrs. Schiavo to receive unwanted treatment, "[t]he state has a *duty* to assure that a person's wishes regarding medical treatment are respected." *Browning*, 568 So. 2d at 13 (emphasis

[16] The "changed circumstances" the Governor cites further betray the weakness of his argument, as all have been extensively litigated (*supra* at 6-7). Moreover, *Browning*'s substituted decision process provides a means – through a Rule 1.540(b)(5) petition to re-open those proceedings, not through a separate and standardless reversal thereof – to take into account a truly relevant "new circumstance," such as a new, "complete cure for what [was] . . . a terminal condition." *Schiavo II*, 792 So. 2d at 560.

added); Fla. Stat. §§ 765.305, 765.401 (procedures for effectuating an incompetent patient's wish regarding medical treatment). Rather than respecting and protecting those wishes, the Act completely disregards them.

On its face, and as applied, Ch. 2003-418 furthers no compelling state interests and, indeed, the interests claimed by the Governor have already been found *not* to be sufficiently "compelling" in the context of an individual who chooses to forgo life-prolonging treatment. The Governor's primary argument is that the statute advances a compelling interest in preserving life. This Court has made clear, however, that, while compelling, the interest in preserving life is not sufficient to override "an individual's right to make decisions vitally affecting his private life according to his own conscience," including to refuse medical treatment. *Public Health Trust v. Wons*, 541 So. 2d 96, 98 (Fla. 1989). Forcibly prolonging Mrs. Schiavo's life does not merely preserve the "status quo" (Gov. Br. at 35). Rather, the Act and the Governor's exercise of authority thereunder affirmatively violate the right to privacy by preventing its exercise. *See Browning*, 568 So. 2d at 13.[17] Whether characterized as a delay, a stay or a suspension, such interferences cannot be justified by the interest in life: "One does not exercise another's right of self-determination or fulfill that person's right

[17] The Governor raises the specter of "an erroneous decision" as a basis for finding this interest compelling (Gov. Br. at 35). This Court, however, has rejected such speculation, noting that, while it may be "very convenient to insist on continuing [the incompetent person's] life so that there can be no question of foul play, no resulting civil liability and no possible trespass on medical ethics," "it is quite another matter to do so at the patient's sole expense and against his competent will, thus inflicting never ending physical torture on his body until the inevitable, but artificially suspended, moment of death." *Bludworth*, 452 So. 2d at 924.

of privacy by making a decision which the state, the family, or public opinion would prefer."[18] *Id.*

The Governor's other asserted interests fare no better; indeed, each has been rejected by this Court in other cases in which the patient's right to refuse unwanted medical treatment has been threatened by the State. The desires of "innocent third parties," Gov. Br. at 36, *i.e.*, the Schindlers, cannot override a patient's wishes.[19] *Browning*, 568 So. 2d at 13 (rejecting that interests of family members can trump the patient's wishes). This Court in *Browning* also found the interest in the ethical integrity of the medical profession insufficiently compelling, because "recognition of the right to refuse necessary treatment in appropriate circumstances is consistent with existing medical mores; such a doctrine does not threaten either the integrity of the medical profession, the proper role of hospitals in caring for such patients[,] or the State's interest in protecting the same." 568 So. 2d at 14 (alteration in original) (internal quotation marks omitted) (citation

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[18] Nor can the pronouncements of religious leaders operate to invalidate the clearly stated wishes of Florida residents (*contra*, Gov. Br. at 48, *quoting* statement of Pope John Paul II). In any event, the statement is not seen as a "ban" on withdrawing feeding tubes: "Most ethicists and theologians reject such an extreme interpretation." The Florida Catholic, June 24, 2004, at A18, col. 1.

[19] This Court has held that the interests of third parties cannot trump the wishes of an individual who wishes not to receive medical treatment. *See Public Health Trust*, 541 So. 2d at 98-102 (holding that a mother of young children had the right to refuse a life-saving blood transfusion, and that the state's interest in protecting third parties "is solely concerned with seeing to it that minor children are cared for and not abandoned"). Moreover, the Act cannot be justified as a measure to protect minor children. It refers only to "family members" who object to withdrawing artificial sustenance, thereby permitting the wishes of any relative – adult or minor, no matter how far removed – to trump those of the patient.

omitted). Medical societies consistently acknowledge that it is ethical to honor a patient's wishes to withdraw life-sustaining treatment. *See, e.g.*, American Medical Association, Rule E-2.20, *Withholding or Withdrawing Life-Sustaining Medical Treatment*, http://www.ama-assn.org/ama/pub/category/print/8457.html.

Appellant's alleged interest in protecting the disabled also is insufficient because the disabled, no less than anyone else, have a right to decide their own medical treatment. *Browning*, 568 So. 2d at 10-12 (right to privacy does not turn on patient's mental or physical condition). Indeed, this Court in *Browning* and the Legislature in Chapter 765 provided such procedures, and Mrs. Schiavo received the full protection of the law – in the form of resolution of her rights through extensive litigation in the Florida courts. The Act denies her those protections.

Finally, any compelling interest, including all those the Governor proposes, are insufficient where, as here, they cannot justify the statute enacted. "It is not enough for the state to say that an interest is compelling. It must be demonstrated through comprehensive and consistent legislative treatment." *North Florida Women's Health*, 866 So. 2d at 633. In this regard, Ch. 2003-418 utterly fails to advance any interest, both as written and as applied to Mrs. Schiavo.

The narrowness of Ch. 2003-418 demonstrates that it is anything but "comprehensive and consistent" legislating. The Act was specifically drafted to target Mrs. Schiavo and no one else. As such, it is dramatically underinclusive, if indeed the State actually was seeking to advance any of the interests that the Governor now claims. The Governor cannot explain why, if the provisions of the Act so advance the state's interest in the preservation of life, the statute does not

protect disabled persons other than those in a persistent vegetative state, does not apply to anyone being kept alive by a means other than a feeding tube, only reaches individuals already removed from a feeding tube, and cannot apply to anyone in the future. Indeed, by its terms, Ch. 2003-418 applies only to people like Mrs. Schiavo, who have already received an adjudication, and thus are least in need of intervention to "protect" their rights.

In this regard, the statute cannot be explained or justified as "adding to" the protections of Chapter 765. Ch. 2003-418 does not purport to amend Chapter 765 and, moreover, by authorizing the Governor to act without regard for a patient's wishes, it utterly contradicts Chapter 765's careful scheme for identifying and enforcing an incompetent patient's decision regarding medical treatment. The Governor's claim is also belied by Ch. 2003-418's fifteen day sunset provision – one would expect any change (to the longstanding and detailed provisions of Chapters 744 and 765) that purports to significantly advance the state's interest in the preservation of life would warrant a longer existence than fifteen days.

The one-time nature of this legislative action – besides violating a host of other constitutional provisions – exposes the paucity of government interests behind the Act. Whereas the privacy rights of all other Floridians are governed by the Florida Constitution and Chapter 765, only Mrs. Schiavo is subject to a different legal regime – one that directly contradicts her constitutional rights under *Browning* and its progeny.[20] The narrow focus of Ch. 2003-418 demonstrates only

[20] This inconsistent legislative treatment is more dramatic than in *North Florida Women's Health*, where the Court found no compelling state interest in a law

one thing – that the Legislature and the Governor would prefer that Mrs. Schiavo be kept alive, regardless of her wishes. That desire cannot possibly be a compelling interest sufficient to nullify Mrs. Schiavo's right to privacy.

C. The Act Is Not Narrowly Tailored to Further Any Arguable State Interest.

Ch. 2003-418 fails for lack of a compelling state interest, rendering analysis of the "narrow tailoring" requirement unnecessary. *See, e.g.*, *North Florida Women's Health*, 866 So. 2d at 641. Assuming *arguendo* there were a compelling state interest at stake, however, the Act, which accords the Governor complete discretion to make the ultimate treatment decisions, without guiding standards or any sort of review, utterly fails to satisfy this second constitutional requirement.

"Any inquiry under th[e] [least intrusive means] prong must consider procedural safeguards relative to the intrusion." *In re T.W.*, 551 So. 2d at 1195-96. These safeguards, which are the State's burden to establish, "at a minimum, necessitate judicial approval prior to the state's intrusion into a person's privacy." *Shaktman v. State*, 553 So. 2d 148, 152 (Fla. 1989).

In this case, to state the relevant inquiry is to answer it: the Act contains no procedural safeguards whatsoever. Persons who have not expressed their wishes regarding medical treatment in writing have no opportunity to have those wishes determined and implemented. Their privacy interest is simply and unceremoniously subjected to the whims of another. No standards govern the

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requiring minors to obtain parental consent for an abortion. This was because of the stark contrast between the legislature's decision to require parental consent in that situation while permitting minors to make other, significant decisions without consent. 866 So. 2d at 633-34.

family member's challenge to the withholding of artificial nutrition and hydration – it can be for any reason, or no reason. Nor is the Governor required to act on such a challenge – that challenge is only a prerequisite to the authority to issue a stay. The Governor's power to override the individual patient's choice is standardless and unreviewable.

The Governor devotes only a single paragraph to defending Ch. 2003-418 as being "narrowly tailored," arguing that his standardless stay power is necessary to permit the appointment of a guardian *ad litem*. The guardian *ad litem* provision, however, does nothing to save the statute. The Act provides no guidance for the guardian *ad litem*'s recommendations, no standards to guide the Governor's consideration of the guardian *ad litem*'s recommendations, and no reference to honoring the patient's wishes.[21] Most importantly, the *guardian ad litem* has no power at all under the Act; all power is reserved for the Governor.

The Act's procedural infirmity is shocking when compared to other laws found procedurally lacking under the Florida Constitution. *See In re T.W.*, 551 So. 2d at 1195-96 (holding that parental consent statute was not least intrusive means because it lacked procedural safeguards for a minor seeking a judicial bypass); *Caddy v. State Dep't of Health,* 764 So. 2d 625, 629 (Fla. 1st DCA 2000)

[21] A guardian *ad litem* typically makes recommendations in a ward's "best interests" and is subject to judicial review. *See, e.g.*, *Wixtrom v. Dep't of Children & Families*, 864 So. 2d 534, 543 (Fla. 5th DCA 2004); *Perez v. Perez*, 769 So. 2d 389, 393-94 (Fla. 3d DCA 1999). The Florida Constitution, however, demands that end-of-life decision making for incompetent patients be based on the substituted judgment standard, not best interests. *See Browning*, 568 So. 2d at 10, 13. When a substituted judgment inquiry is possible, it cannot satisfy narrow tailoring to apply a best interests standard instead.

(striking down psychology board regulation that banned all psychologist-patient relationships regardless of whether the patient was still receiving therapy from the psychologist).[22] In *In re T.W.*, the Court declared the statute unconstitutional because, in part, "appellate review is meaningless": "Without a record, the appellate court will be unable to determine whether the denial was lawful or was simply based on the trial judge's moral, religious, or political beliefs." 551 So. 2d at 1196. That statute at least provided for a hearing, standards for the judge to apply, and a right to appeal, all of which are lacking in Ch. 2003-418. As with the trial judge in *In re T.W.*, one can never determine whether the Governor's decisions under Ch. 2003-418 are politically or ideologically motivated. Worse, if the Governor, *arguendo*, admitted that he had decided to tube feed Mrs. Schiavo against her wishes in order to satiate his own ideological and political needs, even that could not constitute grounds under the Act to reverse his decision (as there are no mechanisms to compel such a reversal).

The government may not eliminate all procedural protections inherent to the substituted judgment inquiry and leave decision making to the Governor's whim.

II. THE STATUTE VIOLATES THE SEPARATION OF POWERS.

Even if Ch. 2003-418 did not unconstitutionally strip Mrs. Schiavo of her

[22] Ch. 2003-418 goes far beyond the statute upheld in *Cruzan*. There is no comparison between requiring a heightened evidentiary burden (clear and convincing evidence, exactly what was applied by the Florida courts in Mrs. Schiavo's case) and granting the Governor standardless power to override an individual's personal choice regarding treatment, not to mention a choice that has been affirmed by court order.

right to privacy, it would have to be struck down as a violation of the "strict" separation of powers mandated by Article II, Section 3 of the Florida Constitution.

A. The Florida Constitution Ensures that the Executive, Legislative, and Judicial Powers Are Exercised by Different Bodies.

Nothing is more fundamental to the American system of government than the division of governmental power among the three Branches. The Framers of the U.S. Constitution saw the separation of powers as essential not only to the orderly conduct of government, but also to the protection of liberty for all citizens. Indeed, the "primary purpose" of the separation of powers is "to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government, that is, to protect the governed from arbitrary and oppressive acts on the part of those in political authority." *In re Advisory Opinion to the Governor*, 213 So. 2d 716, 719 (Fla. 1968) (quoting 16 C.J.S. Constitutional Law § 104); *see Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (the separation of powers "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigants' rights to have claims decided before judges who are free from potential domination by other branches") (internal quotation marks and citation omitted). Placing all three types of power in one branch results in the sort of tyranny that the founders of this country rebelled against: "There would be an end of everything, were the same . . . body . . . to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 263

(Fla. 1991) (quoting Charles de Montesquieu, *L'Esprit des Lois* 70 (Robert Hutchins ed., William Benton 1952) (1748)).

The Florida Constitution embodies a far stricter and more categorical approach to the separation of powers than does the U.S. Constitution. *See B.H. v. State*, 645 So. 2d 987, 991 (Fla. 1994) (holding that the Florida Constitution "absolutely requires a 'strict' separation of powers.").[23] Like the U.S. Constitution, the Florida Constitution assigns legislative, executive, and judicial power to each branch. But, unlike the federal constitution, the Florida Constitution expressly prohibits members of one branch from exercising authority committed to another. Pursuant to Article II, Section 3,

> Branches of government.–The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Art. II, § 3, Fla. Const. The second sentence is "an express limitation upon the exercise by a member of one branch of any powers appertaining to either of the other branches." *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978).

As a result, Florida's separation of powers mandates that "the courts possess the entire body of judicial power. The other departments cannot, as a general rule, properly assume to exercise any part of this power, nor can the constitutional courts be hampered or limited in the discharge of their functions by either of the other two branches." *In re Advisory Opinion*, 213 So. 2d at 719 (internal

[23] Case law on the separation of powers at the federal level informs interpretation of the Florida Constitution, but is not dispositive. *See B.H*, 645 So. 2d at 991.

quotation marks and citation omitted). Thus, judicial acts cannot be subject to review or revision by the Governor or the Legislature. *Id.* at 720 (statutes that subject judicial decision "to review as to their accuracy by the Governor" are prohibited); *Chiles*, 589 So. 2d at 269 ("The judicial branch cannot be subject in any manner to oversight by the executive branch."). Rather than rescission by the Executive or annulment by the Legislature, "appeal is the *exclusive* remedy" to litigants who are dissatisfied with the results of judicial acts. *In re Advisory Opinion*, 213 So. 2d at 720 (emphasis added).

Ch. 2003-418 violates these principles in almost every way imaginable. It grants the Governor absolute discretion to suspend constitutional rights without judicial review; it assigns to the Executive authority without standards or guidance; and it authorizes the Governor to upend an adjudication by the Judicial Branch. By thus assigning to the Governor limitless power to make, enforce, and interpret the law, Ch. 2003-418 violates every building block of divided government fundamental to American democracy and the Florida Constitution.

B. Ch. 2003-418 Impermissibly Assigns Judicial Power to the Governor.

Ch. 2003-418 cannot be understood as anything other than a measure authorizing the Governor to nullify an adjudication of Mrs. Schiavo's constitutional rights. That is a quintessential example of Judicial Power, and therefore a clear violation of Article II, Section 3.

Regardless of its form, a statute that supplants a court decision adjudicating the constitutional rights of a Florida resident is an incursion into the Judicial

Power. "[A] 'judicial Power' is one to render dispositive judgments." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (citation and internal quotations omitted). "[A] judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and [the legislature] may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the court said it was." *Id.* at 227; *see also Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government.").

Legislation which nullifies or "reverse[s] a determination, once made, in a particular case" impinges on the judicial power. *Plaut*, 514 U.S. at 225. Similarly, the power to suspend or compel a rehearing of a judicial decision is itself authority that lies exclusively in the Judicial Branch. *See Trustees Internal Improvement Fund v. Bailey*, 10 Fla. 238, 253 (1863).[24] Indeed, the drafters of the Florida Constitution framed its protections to ensure that a legislature could not "overturn[] solemn decisions of the Courts of the last resort, by, under the pretense of remedial acts, enacting for one or the other party litigants such provisions as

[24] Forbidding the legislature from using its power to adjudicate individual rights retroactively was at the cornerstone of the separation of powers established at the nation's founding. *See Plaut*, 514 U.S. at 219. Viewing themselves as "last courts of equity," colonial legislatures set aside judgments, ordered new trials, granted new privileges to one party, and reopened controversies so that the legislature's will could be taken into account. *Id.* at 219-22. The Framers found such abuses to be corrosive to democracy and antithetical to the rule of law. *Id.*

would dictate to the judiciary their decision, and leaving everything which should be expounded by the judiciary to the variable and ever-changing mind of the popular branch of the Government." *Id.* at 250-51; *Bigham v. State*, 156 So. 246, 257 (Fla. 1934) (holding that a statute "affirming" or "ratifying" a court judgment is "clearly unconstitutional"). *See also Plaut*, 514 U.S. at 225 ("If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry.") (quoting Thomas Cooley, Constitutional Limitations, at 94-94 (1868)).[25]

[25] Federal courts, under the less stringent standards of the U.S. Constitution, have repeatedly invalidated laws that derogated the Judicial Power, under a variety of guises, including provisions that set aside, nullify, or suspend judgments, compel the grant of new trials, require the findings of facts contrary to final judicial decisions, or make judgments conditional on Executive Branch actions. *See, e.g.*, *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 647-48 (1874) ("Judicial jurisdiction implies the power to hear and determine a cause, and . . . Congress cannot subject the judgments of the Supreme Court to re-examination and revision of any other tribunal"). *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 411, n.* (1792) (opinion of Wilson and Blair, JJ., and Peters, D.J.) ("[R]evision and control" of judicial judgments is "radically inconsistent with the independence of that judicial power which is vested in the courts."); *id.* at 413 n.*(opinion of Iredell, J., and Sitgreaves D.J.) ("[N]o decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even a suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested."); *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J.) (the power to grant a new trial is "judicial in its nature; and whenever it is exercised . . . it is an exercise of judicial, not of legislative, authority").

Ch. 2003-418 reverses the adjudication of Mrs. Schiavo's rights and suspends her rights indefinitely. The Florida courts have fully and finally adjudicated her wishes and her rights under the Florida Constitution; a court of this state entered a final judgment vindicating those rights. The Act and order render the guardianship court's order inoperative, strip the court of its power to enforce its order (including by contempt), reverse the effect of the court's order, and strip Mrs. Schiavo of her vested rights under the order. In each of these ways, Ch. 2003-418 is an unconstitutional incursion into the judicial power.

Moreover, Ch. 2003-418 impinges on the judicial power because it gives the Governor authority to suspend rights on a case-by-case basis. The Act affects only one person in the entire state of Florida (thus its moniker, "Terri's Law"). Rather than prospective lawmaking, such an individualized piece of lawmaking is a barely disguised form of adjudication. As this Court has held in invalidating a statute that purported to legislate a divorce, "[a]n act which is limited in its operation, and which exhausts itself upon a particular person, or his rights is, in its very spirit and terms, a judicial proceeding." *Ponder v. Graham*, 4 Fla. 23, 1851 WL 1091, at *8 (1851) (internal quotation marks and citation omitted).

Appellant's efforts to defend the statute all elevate form over substance. First, Appellant and *amici* (*see*, *e.g.*, Center for Human Life and Bioethics regarding *parens patriae*), argue that because guardianship and end-of-life decision making are areas in which the Legislature and the Executive traditionally play a substantial role, the statute does not delegate judicial power to the Governor. But the power to legislate in the area of guardianship does not

authorize the Legislature or Governor to exercise complete dominion over Mrs. Schiavo's fate. Although Appellant pays lip service to the notion that all three branches of government play a role in the guardianship area (Gov. Br. at 41-43), he ignores the fact that Ch. 2003-418 provides *no role* for the courts whatsoever.[26]

Second, Appellant and *amici* claim that the Governor's Executive Order does not nullify a judgment, but rather only "affects the consequences of the judgment." *See Amici* Not Yet Dead at 5.[27] The court's order mandated the removal of the feeding tube and thus any exercise of power compelling the re-insertion of the tube reverses that judgment. Indeed, Senate Staff Analysis and Economic Impact Statement of the Act recognized the statute for what it is:

> This bill implicates separation of powers as it contains provisions that arguably invade the purview of the judicial branch. *See* art. II, s. 3, Fla. Const. Currently, the Governor has no present constitutional or statutory authority to issue a stay on actions relating to the withholding or withdrawal of sustenance or hydration.

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[26]Regardless of the "kind" of authority at issue, Florida's separation of powers requires that the exercise of any authority affecting constitutional rights be subject to judicial review (R 293) ("The Legislature regulates executive authority under *parens patriae* by establishing public policy and the judiciary regularly reviews various executive actions taken under *parens patriae* authority. All of these, legislative regulation, executive exercise and judicial review confirm and establish the separation of powers in this area").

[27] That Ch. 2003-418 calls this power a "stay" does not render it constitutional. The power to issue stays or injunctions, especially those that operate to nullify the decisions of a court, is a judicial power. *See Landis v. North American Co.*, 299 U.S. 248, 254 (1936) ("the power to stay proceedings is incidental to the power inherent in every court"). Under the Florida Constitution, the power to issue writs, such as stays, injunctions, mandamus, or any writ "necessary or proper to the complete exercise of their jurisdiction" is expressly and exclusively committed to the Judicial Branch. Art. V, § 5, Fla. Const. (powers of the Circuit Courts).

> Such authority would in effect give the Governor the authority, albeit for a limited time, to override the effect of any court order relating to this matter.

Moreover, the Act itself makes clear that it was intended to interfere with the workings of the court. Ch. 2003-418 does not authorize the Governor to compel nutrition and hydration to *all* Floridians in a persistent vegetative state, regardless of their wishes (which would also be unconstitutional). Rather, it operates solely when a court has already rendered a determination that the individual is in a persistent vegetative state. Further, the statute immunizes all persons "taking action to comply with a stay"–and thereby violating the court's order–from the threat of any punishment. It thus directly interferes with the court's inherent power to enforce its judgments, whether through contempt or otherwise.[28]

Finally, the Governor attempts to defend Ch. 2003-418 by claiming that it is an exercise in prospective lawmaking which adds additional procedures to "protect" Mrs. Schiavo's rights and that the Act does not entail a revision of a judicial decree because legislatures can always alter executory decrees (Gov. Br. at 46). That argument also fails for multiple reasons. First, that is not what Ch. 2003-418 does. Rather than compel a re-adjudication of Mrs. Schiavo's rights by a court of law based on new legislative standards, it strips the courts of all authority and gives that authority – the judicial power to determine Mrs. Schiavo's

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[28] "Any legislative enactment that purports to do away with the inherent power of contempt directly affects a separate and distinct function of the judicial branch, and, as such, violates the separation of powers doctrine contained in article II, section 3 of the Florida Constitution." *Walker*, 678 So. 2d at 1267; *see also Ex parte Earman*, 95 So. 755, 760 (Fla. 1923).

rights – to the Governor with no standards. As such, the Act "relocate[s] by legislative fiat, the coequal powers of the judiciary within the executive branch" in violation of Article II, Section 3. *Chiles,* 589 So. 2d at 268.

Second, Ch. 2003-418 does not provide for new rules of procedure for a court (or anyone) to apply for ascertaining the wishes of a person in a persistent vegetative state. As the trial court recognized, *it provides for no procedures at all* directed toward the answer of this question and sunsets after only 15 days. Nor does the statute provide a new rule of decision to be applied in current or future cases. It does not change the underlying substantive law governing Mrs. Schiavo's rights, nor could it; the Legislature could not create a new substantive rule to govern Mrs. Schiavo's case (or anyone else's) because the right to privacy is derived from the Constitution itself.[29] To the extent that the Legislature has any power to interfere with previously adjudicated rights, it has no power where constitutional rights are at stake. Moreover, even if the statute merely did compel a "re-evaluation," it would still be unlawful. Although a court may itself determine to re-open an issue before it, the legislature cannot compel a court to re-evaluate its decision or re-open a decision. *See Trustees Internal Improvement Fund,* 10 Fla. at 253.[30] If the Governor's view is correct, the Florida Constitution

[29] The Governor cites to a variety of legislative enactments that state that a particular court decision was incorrect or purport to overrule court decisions (Gov. Br. at 45-46). All of those statutes, however, operate prospectively. None re-opened any adjudication, much less an adjudication of constitutional rights.

[30] The Governor's discovery demand and claim that he is entitled to re-adjudicate Mrs. Schiavo's rights simply highlights the violation of the separation of powers. The Legislature is without authority to compel a re-adjudication of her rights directly, and cannot achieve the same objective by requiring (as Appellant claims)

would bestow no rights because the Legislature could force individuals to re-prove their entitlement over and over in an endless game.

In sum, Ch. 2003-418 cannot be squared with the Florida Constitution's firm commitment to the separation of powers or to the fundamental principles that underlie judicial review. If judicial decisions were subject to review, alteration, or suspension by the other Branches, the judicial power – as an independent protector of civil liberties – would be emasculated, only to be replaced by a tyranny of the Legislative and/or Executive Branches.[31] Indeed, the Act destroys this carefully crafted separation of powers in precisely the manner the Framers feared.[32]

C. Chapter 2003-418 Is an Unlawful Delegation of Legislative Power to the Governor.

Ch. 2003-418 also violates the separation of powers by impermissibly delegating legislative authority to the Governor without standards (R 1378).

It is the province of the Legislature to make the laws. Legislation delegating authority without "objective guidelines and standards," cedes this

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that she re-prove her wishes to invalidate the statute. That the guardianship court has the power to revisit its judgment pursuant to Rule 1.540(b)(5) does not make the judgment any less "final" for separation-of-powers analysis.

[31] If the Act passes muster, the Legislature could authorize the Governor to "stay" the effect of any judgment invalidating a statute where there was a dissenting voice or could "stay" the grant of a permit for a peaceful protest, if there were any person who objected to the views the protester intended to express.

[32] Ch. 2003-418 also unlawfully commandeers the Judiciary into providing an advisory opinion. Although this Court may issue advisory opinions in limited circumstances specified by the Constitution, the Florida courts are prohibited from issuing such opinions outside those confines. *See Sarasota-Fruitville Drainage Dist. v. Certain Lands*, 80 So. 2d 335 (Fla. 1955). The Act violates this provision by making the decisions of the courts contingent on the Governor's stay power.

power, allowing the executive effectively to control both what the law is and to whom it applies. *Smith v. Portante*, 212 So. 2d 298, 299 (Fla. 1968); *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 211 (Fla. 1968). Moreover, absent such standards, a reviewing court cannot determine whether action taken pursuant to a statute is valid. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 918 (Fla. 1978); *Fla. State Bd. of Architecture v. Wasserman*, 377 So. 2d 653, 656 (Fla. 1979) ("[T]he discretion that is granted to such an agency must be sufficiently governed by legislative standards as to constitute a judicially reviewable discretion."). For these reasons, Article II, Section 3 requires that legislation provide "standards and guidelines ascertainable by reference to the enactment establishing the program." *Askew*, 372 So. 2d at 925; *Delta Truck Brokers, Inc. v. King*, 142 So. 2d 273, 275 (Fla. 1962); *Bailey v. Van Pelt*, 82 So. 789, 793 (Fla. 1919) (requiring "definite . . . limitations" on any legislative delegation).

Ch. 2003-418 provide no standards to guide the Governor's discretion to stay artificial nutrition and hydration.[33] The Governor has unfettered authority to issue, deny, prolong, or lift a stay for any reason. As such, the Governor does not "'flesh out' an articulated legislative policy," but instead "mak[es] the initial determination of what policy should be." *Askew*, 372 So. 2d at 920.[34] Delegating such "unbridled discretion" violates Florida's strict separation of powers. *City of*

[33] Because the statute provides *no* standards whatsoever to the Governor, there can be no dispute that it is unconstitutional in all its applications.

[34] Indeed, the Governor could decline to issue a stay because of a policy choice that the cost of care was not justified by the quality of life of the individual, regardless of her wishes or the desire of the Legislature in enacting the statute.

Miami, 107 So. 2d at 388 (invalidating license ordinance for daycare centers "because no guides or standards are set out or even referred to"); *High Ridge Mgmt. Corp. v. State*, 354 So. 2d 377, 380 (Fla. 1977) (invalidating law creating rating system for nursing homes but providing no objective standards).

It is no answer, as the Governor suggests, that the Legislature defined the class of people to which Ch. 2003-418 applies, *i.e.*, patients without an advance directive, whose relatives have objected, whom a court had found to be in a persistent vegetative state, and who have been removed from nutrition and hydration (Gov. Br. at 49). Those factors provide no guidance on *whether* to issue a stay; they merely define the subject matter over which the executive enjoys absolute discretion. The Act is similar to the statute invalidated in *Askew*, which empowered an administrative agency to designate environmental areas of critical state concern. 372 So. 2d at 918-19. Although the statute defined its subject matter, it failed to "establish or provide for establishing priorities or other means for identifying and choosing among the resources the Act [was] intended to preserve." *Id.* at 919 (citation omitted).

The Governor also contends that the statute provides adequate guidance by directing him to ascertain Terri's "present" wishes (Gov. Br. at 48). That argument fails for two reasons. First, nowhere does the statute direct the Governor to ascertain Mrs. Schiavo's wishes or bind the Governor to take action consistent with her wishes. Rather, the statute makes the Governor's wishes paramount – exactly the sort of "unbridled discretion" the Constitution forbids. As the trial court held, the text of Ch. 2003-418 is "crystal clear" (R 1380), and the Governor

cannot engraft the provisions of Chapter 765 onto it. *See Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). Second, it is absurd for the Governor to now claim that the Act requires a re-evaluation of Mrs. Schiavo's wishes under "present circumstances." The circumstances under which the Act was passed were the same circumstances the guardianship court faced when it directed the end to artificial methods of prolonging Mrs. Schiavo's life just six days earlier.

The trial court was thus correct in holding that Ch. 2003-418 violates the separation of powers because it grants standardless discretion to the Governor.

III. THE ACT IS UNCONSTITUTIONAL RETROACTIVE LEGISLATION.

The trial court was also correct in invalidating the statute as unconstitutionally retroactive legislation. Legislation that retroactively abolishes vested rights violates fundamental principles of due process, especially where, as here, those rights have been fully adjudicated in the courts. *See Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 503 (Fla. 1999).

Legislation is retroactive whenever it "'attaches new legal consequences to events completed before its enactment.'" *Id*. at 499 (quoting *Landgraf*, 511 U.S. at 269). Ch. 2003-418 does that in two ways. First, as the trial court found, Ch. 2003-418 deprives Mrs. Schiavo of the rights accruing from the final judgment in the guardianship proceeding. Judicial adjudications, especially of constitutional rights, are vested rights that cannot be impaired. *See R.A.M. of S. Fla., Inc. v. WCI Cmtys., Inc.*, 869 So. 2d 1210, 1220 (Fla. 2d DCA 2004) ("[I]t is impermissible for a statute to be applied to prevent the enforcement of a judgment that was obtained

before the effective date of the statute."). Second, even if the guardianship court had not already entered final judgment, the statute nonetheless would be unconstitutionally retroactive because it attaches new legal consequences to the acts that Mrs. Schiavo took to express her wishes. Whereas every other Floridian who, prior to enactment of Ch. 2003-418, orally expressed a desire that artificial means not be used to prolong life had the right to have that desire vindicated by the courts without a written advanced directive, only Mrs. Schiavo is required to have had such an advance directive (something she cannot now execute) to avoid having her right to privacy be subject to the Governor's control.[35]

Having determined that Ch. 2003-418 applied retroactively and interfered with Mrs. Schiavo's vested rights, the trial court properly evaluated the factors this Court has identified for determining whether such legislation is invalid. The impact of the statute on the right and the importance of the right are clear: the statute effectively annuls Mrs. Schiavo's right to privacy, a fundamental right under Florida's Constitution. To counter-balance this invasion, there is no public interest in eviscerating a final adjudication of rights and giving the Governor

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[35] To the extent that the statute effectively requires Mrs. Schiavo to have had a written advance directive to avoid subjecting her privacy right to the Governor's veto, it is unconstitutional for the same reasons that Florida courts have invalidated retroactive application of requirements such as the statute of frauds. *See Keith v. Culp*, 111 So. 2d 278, 280-81 (Fla. 1st DCA 1959); *Maison Grande Condominium Ass'n v. Dorten, Inc.*, 600 So. 2d 463 (Fla. 1992) (invalidating retroactive application of a prohibition on certain contracts). *Cf. Chew Heong v. United States*, 112 U.S. 536, 559-60 (1884) (Harlan, J.) (prohibiting retroactive requirement of a certificate to reenter the country which was unavailable when petitioner originally departed).

unfettered authority to control the privacy right of one Florida citizen (R 95-96). Finally, the court correctly found that this deprivation was particularly "manifest" because it followed a judicial decree vindicating those rights. (R 96) ("The subject legislation cannot retroactively create in the Governor some previously nonexistent legal interest in controlling Mrs. Schiavo's private medical decisions after those decisions have been fully adjudicated and her rights thereto vested.").

IV. THE STATUTE VIOLATES A HOST OF OTHER CONSTITUTIONAL PROVISIONS.

Because the trial court invalidated Ch. 2003-418 on multiple grounds, it did not reach the numerous other constitutional arguments raised by Appellee. These additional constitutional infirmities provide alternative grounds for affirmance.

A. Ch. 2003-418 Violates the Equal Protection Clause.

A classification that interferes with a fundamental right is invalid under the equal protection provision of the Florida Constitution unless the State can satisfy strict scrutiny. *See North Florida Women's Health*, 866 So. 2d at 620; *Public Health Trust*, 541 So. 2d at 97-98. As discussed in Part I, *supra*, Ch. 2003-418, on its face, fails to satisfy the compelling interest and narrow tailoring prongs.

But in singling out Mrs. Schiavo, Ch. 2003-418 is an even more egregious violation of equal protection because the State has created separate rules for one person. Appellant can provide no justification as to why every other citizen's privacy rights can be adequately protected with Chapter 765 or *Browning*-type procedures. Only Mrs. Schiavo's decision is subject to the Governor's veto.

Above all else, the guarantee of equal protection is that no person or group may be singled out and forced to endure a different legal regime than the rest of society, especially one that reposes unreviewable discretion in a single government official. In this regard, Ch. 2003-418 is similar to (though far more egregious than) statutes that the U.S. Supreme Court has invalidated on federal equal protection grounds. *See Zablocki v. Redhail*, 434 U.S. 374, 389-91 (1978) (invalidating a statute prohibiting marriage for a certain class without court approval); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448-50 (1985) (invalidating law requiring a special permit for a group home premised on concerns that neighbors might object). Ch. 2003-418 is the antithesis of a narrowly tailored restriction on a fundamental right.

B. Ch. 2003-418 Is an Unlawful Bill of Attainder.

Because Ch. 2003-418 singles out Mrs. Schiavo and inflicts punishment by suspending her rights, it is an unlawful bill of attainder. *See* Art. 1, § 10, Fla. Const.; *see also* U.S. Const. art. I, § 9 cl. 3. "[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial are bills of attainder." *United States v. Lovett*, 328 U.S. 303, 315-16 (1946); *Mayes v. Moore*, 827 So. 2d 967, 972 (Fla. 2002).

The prohibition on bills of attainder prevents legislatures from exercising functions properly left to the judiciary. *United States v. Brown*, 381 U.S. 437, 442 (1965). Because legislatures are "peculiarly susceptible to popular clamor," the Framers sought to limit legislatures to the task of writing general rules. *Id.* at 445-

46. The U.S. Supreme Court has given a "broad and generous meaning to the constitutional protection against bills of attainder," *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 470 (1977).

A law must be struck down as a bill of attainder if it (1) "singles out" a particular party, and (2) imposes a "punishment" on that party without a judicial trial. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 846-47 (1984). Unlawful "punishment" is not limited to the classic criminal penalties, but includes "new burdens and deprivations [that] might be legislatively fashioned" that are inconsistent with the bill of attainder guarantee. *Nixon*, 433 U.S. at 475; *see also Jones v. Slick*, 56 So. 2d 459 (Fla. 1952); *Brown*, 381 U.S. at 448-49 (invalidating law barring Communist Party members from serving as labor union officers); *Lovett*, 328 U.S. at 315-17 (invalidating law preventing named individuals from being paid for government employment); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1867) (invalidating law barring those who served with the Confederacy from legal practice) *Fla. E. Coast Indus. v. State Dep't of County Affairs*, 677 So. 2d 357, 362 (Fla. 1st DCA 1996).

Ch. 2003-418 singles out Mrs. Schiavo. That the Act does not name her is irrelevant because a statute is "an attainder whether the individual is called by name or described in terms . . . which . . . operate[] only as a designation of [a] particular person." *Selective Serv. Sys.*, 468 U.S. at 847 (internal quotation marks and citation omitted). By narrowly and specifically limiting the statute to a class of patients that could only include Mrs. Schiavo and limiting the statute's

operation to only fifteen days, the Legislature ensured that it would operate only against Mrs. Schiavo.

The legislation also imposes punishment on Mrs. Schiavo. It is axiomatic that the wholesale deprivation of a fundamental constitutional right is a punishment. *See Cummings v. Missouri*, 71 U.S. 277 (4 Wall.), 320 (1866) ("[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment."). Ch. 2003-418 deprives her of rights, as adjudicated by the courts, subjects her to a medical procedure against her wishes, and deprives her of the redress of the courts by giving unfettered authority to the Governor. The law is especially egregious because there is nothing that Mrs. Schiavo can do to escape from its burden. As such, Ch. 2003-418 constitutes an unlawful bill of attainder.

C. Ch. 2003-418 Is an Invalid Special Law.

The Act violates Article III, Section 10 of the Florida Constitution, which directs that "[n]o special law shall be passed unless notice of intention to seek enactment thereof has been published in a manner provided by a general law."

A special law, rather than operating uniformly within a permissible classification, relates to or is designed to operate on particular persons. *State ex rel. Landis v. Harris*, 163 So. 237, 240 (Fla. 1934); *Schrader v. Fla. Keys Aqueduct Auth.*, 840 So. 2d 1050, 1055 (Fla. 2003). That a law is written in general terms does not save it, "[e]ven though a bill is introduced and treated by the Legislature as a general law, if the bill in truth and in fact is clearly operative as a . . . special act and the court can so determine from its language or context." *Dep't of Bus. Regulation v. Classic Mile, Inc.*, 541 So. 2d 1155, 1157-58 (Fla.

1989). Thus, when a law employs an "arbitrary classification scheme" that is clearly meant to "identif[y] [a person] rather than classif[y]" a group of Floridians, it is nonetheless a special law. *Id.* at 1157.

Ch. 2003-418 is such a law. As described above, the statute's "classification" – applying to a patient with no advance directive who had been determined by a court to be in a persistent vegetative state, had had nutrition and hydration withheld in the past (but was still alive), and had objecting relatives – could only apply only to Mrs. Schiavo. The statute does not "protect" all disabled people or all people in a persistent vegetative state or address other life prolonging procedures. Ch. 2003-418 utterly fails as a general enactment seeking to "protect life" or add additional procedures to protect disabled people in Florida.

Even if the "classification" were not itself arbitrary and irrational (except as means to identify one person), the Act's narrow time frames reveal that it is a special law directed at Mrs. Schiavo. Any person who requires life-prolonging measures and any dispute over life-prolonging procedures beginning after October 15, 2003, do not fall within its ambit. Where it is impossible in the future for others to meet the statute's criteria, it is a special law. *See City of Miami v. McGrath*, 824 So. 2d 143, 151 (Fla. 2002).

Because Ch. 2003-418 amounts to a special law, it would be legitimate only if the legislature had followed statutory notice provisions required by Article III, Section 10 and detailed in Florida Statute § 11.02. The legislature indisputably did not follow this procedure here (R 515). As a result, the Act is unconstitutional.

V. THE GOVERNOR'S PROCEDURAL OBJECTIONS ARE MERITLESS.

Lacking an argument on the merits, the Governor has no choice but to raise procedural obstacles to delay final adjudication of the unconstitutionality of Ch. 2003-418. All of the Governor's procedural arguments revolve around his view that he is entitled to re-litigate issues conclusively resolved in the guardianship proceeding or re-open the issue based on "present circumstances." As the trial court found, however, no trial is needed to determine that Ch. 2003-418 is unconstitutional, both on its face and as applied to Mrs. Schiavo. Nonetheless, the Governor's claims that he is entitled to discovery, that the trial court exceeded the proper scope of judicial notice or collateral estoppel, and that he has a right to a jury trial each fail even on their own terms.

A. The Governor Has No Right to Re-litigate Issues Conclusively Resolved in the Guardianship Proceeding.

The Governor's claims about discovery, judicial notice, and collateral estoppel are all facets of his primary argument that he is entitled to discovery prior to an adjudication of the constitutionality of Ch. 2003-418. The sole purpose of the discovery that the Governor seeks is to re-litigate Mrs. Schiavo's wishes, an issue exhaustively and conclusively litigated in the guardianship proceeding. In the Governor's view, the six years of litigation are a nullity because the Governor never participated in that action. That argument fails for three reasons.

First, the factual issues established in the guardianship proceeding were irrelevant to the trial court's decision. By definition, the trial court's conclusion – that the statute is unconstitutional on its face because it unlawfully delegates

legislative power to the Governor and transfers the right to control medical treatment to the absolute discretion of the Governor – does not require any fact finding.[36] With respect to the trial court's determination that the Act is unconstitutional as applied to Mrs. Schiavo because it nullifies a court judgment in violation of the separation of powers and retroactively strips Mrs. Schiavo of a vested right, the trial court found that the only relevant facts are those to which the parties stipulated (R 1387-1389).

The trial court thus did not improperly judicially notice *any* facts and could not have exceeded the proper scope of judicial notice.[37] In his brief, the Governor points to no specific facts of which the trial court took judicial notice. To the contrary, the only facts relevant to the trial court's holdings were the existence of the guardianship court final judgment, the removal of the feeding tube pursuant to that judgment, and that the Act has been used by the Governor to reverse the implementation of that adjudication (R 1391). Those facts were the subject of stipulations by the parties and cannot be the subject of any genuine dispute.

Second, the Governor's claim that he cannot be "bound" by a judgment in a case to which he was not a party is, as the trial court noted, "misplaced, if not

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[36] A facial challenge to the constitutionality of a statute involves a pure question of law. *See Harvey v. State*, 848 So. 2d 1060, 1066 (Fla. 2003). Accordingly, such a challenge necessarily does not involve fact-finding. *State Comm'n on Ethics v. Sullivan*, 430 So. 2d 928, 942 (Fla. 1st DCA 1983). *See also Travis v. State*, 700 So. 2d 104, 106 (Fla. 1st DCA 1997) (finding that a statute facially invalid means that the statute cannot be applied in any case regardless of the facts).

[37] A court can take judicial notice of the valid and final guardianship court judgment. *See* Fla. Stat. § 90.202; *see also* Charles W. Ehrhardt, *Florida Evidence* § 202.6, at 59-60 (2003 ed.).

misleading" (R 1392). The *Governor's rights* were not at issue in the guardianship proceeding, which neither imposed legal obligations nor conferred any benefit on the Governor, nor are they at issue here. The guardianship court adjudicated only Mrs. Schiavo's rights. Because her rights have been conclusively determined, no party – including the Governor – can purport to re-litigate them now. Regardless of whether the Governor is personally "bound" by the guardianship court's factual and legal determinations, he is bound to respect the valid judicial decrees of the State of Florida. Indeed, if the Governor's logic holds true, *no* judicial judgment is *ever* final because strangers to an original judgment – regardless of their connection to the subject matter – can always refuse to acknowledge that judgment. The concept of judicial repose would become a farce. As the trial court recognized, the Governor's invocation of collateral estoppel (for the purpose of disregarding the guardianship court's judgment) is a straw man.

Third, even if the trial court had held that the Governor were estopped from challenging the factual and legal determinations of the guardianship court, it would have been correct in so holding. The only rights at issue are those of Mrs. Schiavo and those rights were conclusively and finally determined in the guardianship proceeding. Under traditional rules of collateral estoppel, no party purporting to litigate on her behalf or as a proxy for her can challenge those facts. The Governor claims that the statute makes him a proxy for Mrs. Schiavo (Gov. Br. at 47). If that were true, he would be precluded from re-litigating issues related to her right to privacy because, as a proxy, he would be in privity with her and thus estopped from re-litigating facts and issues already resolved. *See*

Taddiken v. Florida Patient's Comp. Fund, 478 So. 2d 1058, 1061-62 (Fla. 1985).[38]

B. The Governor Has No Right to a Jury Trial.

The Governor asserts not only that he is entitled to a complete re-adjudication of Mrs. Schiavo's wishes, but that he is entitled to a jury trial on all "factual matters" (Gov. Br. at 10-11). That assertion, premised on the Seventh Amendment to the U.S. Constitution and on the Florida Constitution, is wrong.

As an initial matter, the Seventh Amendment to the U.S. Constitution applies only at the federal level. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 418 (1996); *see also Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916); *Blair v. State*, 698 So. 2d 1210, 1213 (Fla. 1997). Thus, the Governor's asserted right to a jury trial must be assessed under Florida law.

The Governor cites no authority that even arguably supports his position that a jury must resolve constitutional challenges to statutes. Under Florida law, a litigant has a right to a jury trial with regard to *issues* that were triable before a jury at common law. *B.J.Y v. M.A.*, 617 So. 2d 1061, 1062 (Fla. 1993); *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla. 1986); *Wiggins v.*

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[38] Even if the Governor were not a proxy for Mrs. Schiavo, he would still be precluded from re-litigating issues resolved in the guardianship proceeding because his interests are so closely aligned with the Schindlers, who litigated the precise issue the Governor now seeks to re-open. Under the law of collateral estoppel, the Schindlers must be deemed to be the Governor's "virtual representative" in that prior litigation. *Stogniew v. McQueen*, 656 So. 2d 917, 920 (Fla. 1995) (explaining virtual representative theory of collateral estoppel, citing *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975)); *see also Taddiken*, 478 So. 2d at 1061-62.

Williams, 18 So. 859, 863-64 (Fla. 1896); *Olin's Inc. v. Avis Rental Car Sys. of Fla.*, 131 So. 2d 20, 21 (Fla. 3d DCA 1961). "[I]t is the nature of the controversy between the parties, and its fitness to be tried by a jury according to the rules of the common law, that must decide the question." *Wiggins*, 18 So. at 864 (internal quotation marks omitted). It is not the mechanism of declaratory judgment that dictates if a jury trial is required (Gov. Br. at 11), but the nature of the claim itself.

Florida's common law includes both English and American law at the time Florida joined the union. Fla. Stat. § 2.01 (2004); *see also Forfeiture of 1978 Chevrolet Van*, 493 So. 2d at 436-37. The question, then, is whether, under English and American practice in 1845, the constitutionality of a statute was a question for a jury to resolve. Under that practice, equitable causes of actions and suits against the sovereign were decided by judges, not juries. *See Colegrove v. Battin*, 413 U.S. 149, 155 & n.9 (1973) (discussing distinction between actions seeking equitable relief and suits seeking legal remedies); *Lehman v. Nakshian*, 453 U.S. 156 (1981) (suit against the sovereign is not a "suit" at common law). Moreover, a judge's power to review legislative action or constitutional challenges to a statute or executive action is deeply rooted in American legal history. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Moreover, as *Browning* and Chapter 765 amply demonstrate, exercise of the right to privacy and questions concerning a patient's wishes are issues committed to the courts, not juries. Because there is no precedent for a jury trial to determine the constitutionality of statutes, the Governor has no entitlement to a jury trial.

CONCLUSION

Under Ch. 2003-418 and the Governor's Order, Mrs. Schiavo was forced from her hospice bed, was forcibly operated upon, and is now being force-fed through a tube against her will. Stripped of her most intimate personal rights, Mrs. Schiavo is more akin to subjects of an absolute dictatorship than citizens of a democratic state. Nothing could be more repugnant to the Florida Constitution.

In our representative constitutional democracy, the judiciary is designed to function as the bulwark against governmental encroachment upon individual freedom and liberty. The trial court, in the highest tradition of the judiciary of this State, entered a judgment vindicating Mrs. Schiavo's rights. This Court should resoundingly and promptly affirm that order so it may be implemented without delay. Mrs. Schiavo deserves no less.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished this 23rd day of July, 2004 by overnight-next-business-day delivery to Kenneth L. Conner, One North Dale Mabry, Suite 650, Tampa, Florida 33606, Counsel for the Governor, and by U.S. mail to: Jason Vail, Deputy Attorney General of the State of Florida, Office of the Attorney General – PI 01, 400 S. Monroe Street, Tallahassee, Florida 32399-6536; William L. Saunders, Jr., 801 G Street, NW, Washington, D. C. 20001, and Jan G. Halisky, 507 S. Prospect Avenue, Clearwater, Florida 33756, attorneys for amicus Center for Human Life and Bioethics at the Family Research Council; Max Lapertosa and Kenneth M. Walden, 614 West Roosevelt Road, Chicago, Illinois 60607, and George K. Rahdert, 535 Central Avenue, St. Petersburg, Florida 33701, attorneys for amici Not Dead Yet, *et al.*; and, Jay Alan Sekulow, James M. Henderson, Sr., Walter M. Weber, and David A. Cortman, 201 Maryland Avenue, NE, Washington, D. C. 20002, and Patricia Anderson, 447 3rd Avenue North, Ste. 405, St. Petersburg, Florida 33701, attorneys for amici Robert and Mary Schindler.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this computer-generated brief is submitted in Times New Roman 14-point font.

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