

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.

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**OPPOSITION TO APPELLANT'S AMENDED MOTION FOR  
REHEARING AND CLARIFICATION**

COMES NOW the Appellee, MICHAEL SCHIAVO, as Guardian of the  
person of THERESA MARIE SCHIAVO, and opposes the aforesaid motion of  
Appellant, and states:

**INTRODUCTION**

The Governor's motion for rehearing should be denied because it is  
improper and is without merit. The Governor's motion represents simply another  
attempt to delay effectuation of Mrs. Schiavo's right to decide her own medical  
treatment.

Although the Governor baldly contends that this Court “misapprehended critical facts” and “misapplied the law,” Mot. at 1, his motion merely rehashes arguments already considered and rejected by this Court. As such, it is an entirely improper basis for such a motion. *See, e.g., Groover v. Walker*, 88 So. 2d 312, 314 (Fla. 1956) (“[W]here the petition for rehearing merely reargues the case on points and facts found and considered in the prior hearing of the cause, then the petition for rehearing goes beyond its proper scope and it should be denied.”); *see also* Florida Rule of Appellate Procedure 9.330, Committee Notes on 2002 Amendment (a motion for rehearing must do more than “express mere disagreement with [the court’s] resolution of the issues on appeal”).

Further, it is not the function of a motion for rehearing to request the court to change its mind as to a matter which has already received the careful attention of the judges. *Parker v. Baker*, 499 So. 2d 843, 847 (Fla. 2d DCA 1986). This Court ruled as it did after certifying this case to be of great public importance, reviewing 205 pages of briefs, hearing rigorous oral argument, and as noted in its opinion, “careful consideration of the arguments of the parties and amici... .” Slip Op. at 1. The Governor’s motion should be denied because it, in essence, asks this Court to change its conclusion on issues upon which the Court obviously has given its most careful consideration.

Finally, the motion should be denied because, as shown below, the Governor’s points are meritless.

**I. The Governor’s Arguments Regarding Encroachment on the Judicial Power Were Correctly Rejected by this Court.**

This Court already considered and rejected the Governor’s erroneous contention that Ch. 2003-418 has “prospective effect only,” and therefore does not encroach on the judicial power. Mot. at 3. This contention is indistinguishable from the Governor’s previous argument that the guardianship court’s order – directing artificial life-prolonging procedures be discontinued pursuant to Mrs. Schiavo’s wishes – was not a final judgment. *See* Initial Br. at 44-46. In its opinion, this Court carefully explained that, unless and until the judgment is vacated by judicial order, it is “the last word of the judicial department with regard to a particular case or controversy.” Slip Op. at 16-17 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995)). The Governor may disagree with the Court’s conclusion, but that does not entitle him to rehearing.

The Governor’s motion is but a continuation of his attempt to obscure both reality and the text of the statute. As the Court’s opinion recognizes, the Governor’s claim that the Act is “prospective” is both incorrect and, even if it were not, would not save it from its fundamental infirmities – it eviscerates a court judgment, rendering that judgment a nullity and transferring the power to control Mrs. Schiavo’s rights to the Governor (in his standardless discretion).

Similarly, the Governor’s argument that he is merely following the principle that “third parties” to a judicial order “remain free to seek an independent judicial

determination of their own rights” rings hollow because his stay power under the Act is unilateral, standardless, was exercised outside of and in contravention of the guardianship proceedings, and is subject to no review of any kind. Mot. at 13.

Nothing in the Act, and nothing in the Governor’s exercise of his stay power under the Act, is directed at “seek[ing] an independent judicial determination.”

Moreover, the Governor identifies no independent “right” of his own which Ch. 2003-418 supposedly vindicates. This is because he has none.<sup>1</sup>

The statute’s purpose and effect was to give the Governor unilateral power to override a judicial decision and, in the process, the rights of Mrs. Schiavo. This Court already rejected the view that such a power could pass muster with Florida’s separation-of-powers clause, by holding that “it is without question an invasion of the judicial branch for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination in a case. This is precisely what happened here.” Slip Op. at 17.<sup>2</sup>

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<sup>1</sup> This Court’s decision in *Agency for Health Care Administration v. Associated Industries of Florida*, 678 So. 2d 1239 (Fla. 1996), provides no support for the Governor. See Mot. at 10-11. That case, which upheld the legislature’s creation of a cause of action whereby the state could sue to recover Medicaid expenditures from the tobacco industry, has nothing to do with the situation here. *Associated Industries*, 678 So. 2d at 1249. The legislature’s action did not interfere with previously rendered final judgments as to litigation between individual smokers and the industry. Rather, it accorded the state a substantive right to pursue claims on its own behalf, for injury suffered to the public purse. See *id.* at 1249-51.

<sup>2</sup>The Governor’s insistent invocation of the “presumption of constitutionality,” Mot. at 3, Initial Br. at 22-27, is thus profoundly misplaced: there is no way to interpret Chapter 2003-418 as consonant with the Florida Constitution’s “strict

## II. The Governor’s Arguments Regarding Unlawful Delegation of Legislative Power Were Also Properly Rejected by This Court.

This Court also considered and rejected the Governor’s argument that the Act, either standing alone or read in *pari materia* with Chapters 744 and 765 of the Florida Statutes, provides sufficient standards to be a lawful delegation of power. *See* Slip Op. at 19-26; *cf.* Mot. at 11-13, 15-16. As this Court correctly reasoned, Ch. 2003-418 falls squarely within the type of statutes which have been held to be so “lacking in guidelines” for the exercise of executive power that they violate the separation of powers under the Florida Constitution. Slip Op. at 19 (quoting *Askew v. Cross Key Waterways*, 372 So. 2d 913, 918-19 (Fla. 1978)). The Governor purposefully ignores the Court’s careful explanation that Ch. 2003-418 cannot coherently be read with reference to Chapters 744 and 765, *not* simply because Ch. 2003-418 fails to reference those statutory chapters, *cf.* Mot. at 14-15, but also because Ch. 2003-418’s standardless grant of executive power utterly contradicts the existing statutory scheme for safeguarding and honoring the individual patient’s wishes, *see* Slip Op. at 23-27.<sup>3</sup> Thus, there is no need to “clarify,” as the

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separation of powers doctrine.” Slip Op. at 11 (quoting *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000)).

<sup>3</sup> And, of course, the fact that Ch. 2003-418 was in effect for only 15 days further underscores the implausibility of the Governor’s repeated argument that Ch. 2003-418 merely provides additional “protect[ions]” beyond those found in Chapter 765 for an entire class of incompetent persons. Mot. at 2. As already noted by this Court, “[i]n theory, the Act could have applied during its fifteen-day window to more than one person, but it is undeniable that in fact the criteria fit only Theresa Schiavo.” Slip Op. at 27.

Governor contends, whether new statutes may be interpreted in *pari materia* with existing laws even without expressly referring to those laws. Mot. at 15. The Court’s opinion in this case did not, however, change the law in any way – it merely applied existing law, under which, as the Court made abundantly clear, the Act cannot be read in the manner the Governor proposes.

Moreover, in reaching its decision on the Act’s facial unconstitutionality under the nondelegation doctrine, this Court did not have to (and did not) look to “documents and events” outside of the Act itself. Mot. at 13. Rather, applying a straightforward nondelegation analysis to the face of the statute, this Court concluded that Ch. 2003-418 grants the Governor completely “open-ended power.” Slip Op. at 23. In doing so, the Court relied on case law, the language of Ch. 2003-418, and comparison with Chapter 765. *Id.* at 18-26. The Court did not rely on facts, whether disputed or undisputed.

### **III. The Governor’s Due Process Argument Merely Repeats Baseless Contentions Previously Raised, and Necessarily Rejected, by this Court.**

The Governor’s repetitive incantation of his alleged “due process rights” constitutes yet another improper attempt to make once again arguments already considered and rejected by the Court. The Governor spent many pages in his original briefing arguing that he is entitled to relitigate Mrs. Schiavo’s wishes. *See* Initial Br. at 9-21. The Court did not, as the Governor misleadingly claims, rely on disputed facts. This claim simply ignores the Court’s determination that, “The

resolution of the discrete separation of powers issue presented in this case does not turn on the facts of the underlying guardianship proceedings...” Slip Op. at 2.

Further, in striking down the statute on its face, the Court necessarily concluded that no facts were required for its analysis; in striking down the statute as applied, the Court expressly concluded that the only material facts were those to which the parties had stipulated.<sup>4</sup> Slip Op. at 10; *id.* at 22-26. In either case, the Court necessarily decided that the Governor’s claim of entitlement to discovery had no merit. *See State v. Barnes*, 25 Fla. 86, 87 (1889) (rehearing not warranted where issue allegedly overlooked was necessarily determined by the decision of an alternative question in the case).<sup>5</sup>

## CONCLUSION

The Governor’s motion for rehearing fails utterly to satisfy the standard for granting such a motion. It points to no facts or authorities overlooked or misapprehended by this Court but, rather, seeks merely to reargue the merits of the

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<sup>4</sup> Relatedly, there was no failure to draw inferences in favor of the Governor as the non-moving party on summary judgment. The facts upon which the Governor focuses were not necessary to the Court’s decision, rendered as a matter of law. *See, e.g., Continental Concrete, Inc., v. Lakes at La Paz III Limited Partnership*, 758 So. 2d 1214, 1217 (Fla. 4<sup>th</sup> DCA 2000) (“Issues of nonmaterial facts are irrelevant to the summary judgment determination.”); *Fine Arts Museums Fndn. v. First Nat’l in Palm Beach*, 633 So. 2d 1179, 1180-81 (Fla. 4<sup>th</sup> DCA 1994) (explaining that no factual issue is material to a pure question of law for purposes of summary judgment). The facts were rightly deemed incidental by the Court.

<sup>5</sup> As the trial court correctly concluded, the Governor’s claimed right to re-litigate the guardianship court’s decision is “misplaced, if not misleading.” (R 1392).

appeal that was fully litigated, which the Governor lost. This further attempt to prolong this litigation and prevent Mrs. Schiavo's rights from being honored should not be countenanced. Appellee respectfully urges this Court to deny the motion as quickly as possible and to deny any further requests to delay the issuance and effect of its mandate.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was furnished this 8<sup>th</sup> day of October, 2004 by U.S. mail to Kenneth L. Connor, One North Dale Mabry, Suite 650, Tampa, Florida 33606, Counsel for the Governor; 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 3<sup>rd</sup> Avenue North, Ste. 405, St. Petersburg, Florida 33701, attorneys for amici Robert and Mary Schindler.

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