IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEB BUSH,
Governor of the State of Florida,

Appellant,

CASE NO.: SC04-925

v.

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

Appellee.
_____/

AMENDED MOTION FOR REHEARING AND CLARIFICATION

Appellant, Jeb Bush, Governor of the State of Florida, pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure, hereby files this Motion for Rehearing and Clarification of the Court's September 23, 2004 opinion in this matter. Appellant respectfully assert that the Court has overlooked and/or misapprehended critical facts in this matter, as well as misapprehended or misapplied the law. The Motion for Clarification seeks to ensure that the Court's holding regarding delegation of powers is not later interpreted in a way that will throw the operation of state government into disarray. Appellant's arguments are set forth below.

I. THE COURT MISAPPLIED THE LAW BY FAILING TO BEGIN ITS ANALYSIS BY PRESUMING THE ACT TO BE CONSTITUTIONAL.

When reviewing the constitutionality of a statute, the Court must begin with a presumption that the statute is valid and the legislature has not acted unreasonably or arbitrarily. *Chicago Title Insurance Company v. Butler*, 770 So. 2d 1210 (Fla. 2000). *See also*, *Wright v. Board of Public Instruction of Sumter County*, 48 So. 2d 912 (Fla. 1950) (Court should presume that the legislature would not knowingly enact an unconstitutional measure). This Court should resolve all doubt in favor of the constitutionality of a statute, *Bonvento v. Bd. Of Public Instruction of Palm Beach County*, 194 So.2d 605 (Fla. 1967), and an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. *Knight and Wall Co. v. Bryant*, 178 So.2d 5 (Fla. 1965). *Biscayne Kennel Club, Inc. v. Florida State Racing Commission*, 165 So. 2d 762 (Fla. 1964) (presumption of constitutionality continues until the contrary is proved beyond all reasonable doubt).

In the case at bar, this Court did not even entertain the possibility that the statute and actions that the Governor took in conformity with it were intended to, and did, in fact, serve as *prospective* steps designed "to protect the due process rights of Theresa and other individuals in her position."

Schiavo, No. SC 04-925, Slip op. at 2 (Fla. 2004). The analysis proposed by the Governor is not only reasonable under the circumstances, it is required by the doctrine of separation of powers itself.

The rule that courts must construe statutes in conformity with constitutional provisions if it is reasonable to do so, *Department of Health & Rehabilitative Services v. Cox*, 627 So. 2d 1210 (Fla. 2D. DCA 1993), review granted, 637 so 2d 234 (Fla. 1994), quashed in part on other grounds, 656 So. 2d 902 (Fla. 1995); *Kass v. Lewin*, 104 So. 2d 572 (Fla. 1958), and this Court's recognition that it has a duty to save statutes from constitutional infirmity wherever possible, *Doe v. Mortham*, 708 So. 2d 929 (Fla. 1998), apply to all statutes. If a statute is susceptible of two constructions, one of which will give effect to it and the other which will defeat it, the former construction is preferred. *Industrial Fire & Cas. Co. v. Kwechin*, 447 So.2d 1337, 1339 (Fla. 1983). The presumption of constitutionality follows a statute on review even after a trial court has found it unconstitutional. *In re Caldwell's Estate*, 247 So. 2d 1 (Fla. 1971).

Where, as here, the legislature could validly conclude that persons who met the statutory criteria were in need of enhanced protection, and that the statute it enacted had prospective effect only, the statute should have been construed in such a way as to effectuate the legislature's intent and

resolve all doubts as to validity of statute in favor of its constitutionality. *McKibben v. Mallory*, 293 So.2d 48 (Fla. 1974). When a legislative enactment is challenged, the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt. *Bush v. Holmes*, 767 So.2d 668 (Fla. 1st DCA 2000).

Because the Governor disputes the notion that the statute violates the separation of powers (either facially or as applied), the Due Process Clauses of the Florida Constitution and federal constitutions require that he be given an opportunity to be heard, to confront and to cross-examine witnesses, and to adduce any other evidence on his behalf that would cast doubt on the separation of powers claim. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("The fact that [a legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."); *State v. Giamanco*, 682 So.2d 1193 (Fla. 4th DCA 1996); *Florida Jai Alai, Inc. v. Lake Howell Water and Reclamation District*, 274 So. 2d 522, 524 (Fla. 1973) (an act of the legislature is presumed valid and will not be declared unconstitutional unless it is patently invalid).

II. THE APPLICATION OF THE COURT'S SEPARATION OF POWERS ENCROACHMENT ANALYSIS VIOLATES THE GOVERNOR'S DUE PROCESS RIGHTS BY BINDING HIM TO RULINGS IN CASES TO WHICH HE WAS NEVER A PARTY.

This Court reviewed the lower court's order granting summary final judgment. As such, this Court was required to view the facts in the light most favorable to the Governor as the non-moving party. *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1996). While acknowledging that the order appealed was a summary judgment, this Court avoided all reference to the factual issues raised in this case by stating that the summary judgment posed "a pure question of law." *Bush v. Schiavo*, No. SC 04-925, Slip op. at 12 (Fla. 2004). By so framing the issue, the Court avoided the Governor's contention that the lower court denied him due process of law by refusing to permit the discovery necessary to defend the constitutionality of the statute.

Challenges to statutes not involving constitutionally protected freedoms must be examined in the light of the facts of the case at hand. *U.S. v. Mazurie*, 419 U.S. 544, 550 (1975), *State v. Kirvin*, 718 So.2d 893, 895 (Fla. 1st DCA 1998). In this case, the Governor was deprived of the opportunity to develop any facts, and the Court accepted as true allegations made in other proceedings and not made a part of the record in this case.

The absence of this competent factual record precluded this Court from finding the statute unconstitutional.

The Court's opinion cites many "facts" which are mere allegations in these proceedings. Because the lower court refused the Governor discovery of any type, the only competent facts in the record of this case were those stipulated to by the parties and judicially noticed by the lower court during the December 2, 2003 case management conference below. (R. 598-610).[1] The allegations cited by the Court as facts are not evidence derived from an adversarial proceeding in this case, but rather are mere statements lifted from opinions of other courts and inaccurate characterizations of the stipulations agreed to by the parties. For example, the very first sentence of the opinion states as fact that Terri is "in a persistent vegetative state." This assertion has not been established in this case and was controverted by the Governor. (*See* R. 752-754; 762-763; 768-785; 911-918; 921-934; 937-945; 983-984; 994-998; 1048-1061) In fact, the Governor was only willing to stipulate that "a court had found her to be in a persistent vegetative state," because this finding was a prerequisite to the Governor's ability to issue the Executive Order.

[1] Those facts concerned the identity of the parties, the history of enactment of Chapter 2003-418, the issuance of the executive order, and the fact that certain opinions had been rendered in the guardianship proceeding. (R. 598-610).

Other unproven assertions in the opinion include statements that Terri and Michael were "happily married," that Terri's cardiac arrest was "a result of a potassium imbalance," that Terri has no "cognition or awareness," that "[M]edicine cannot cure this condition," that Terri is "unconscious" and "reflexive,"; and that there is “no hope of a medical cure." Slip op. at 2-4. All of these statements were extracted directly from appellate decisions in the guardianship case concerning Terri Schiavo. None of these assertions are supported by competent facts in the record.

These assertions may or may not be true. The point is that the facts in this case have yet to be determined. To present such disputed matters as "facts" is improper. Because this Court must view facts in the light most favorable to the Governor, this Court must assume that Terri can recognize and respond to stimuli, that she is at least to some extent aware, and that her condition may not be permanent or incurable. Moreover, this Court cannot presume that Terri was happily married, that her condition was merely the result of an innocent medical event, that Terri's guardian is free of fundamental conflicts of interest (financial or personal), and that Terri wishes to have her tube-feeding withheld, had no effect on either her due process rights, or those of the Governor. They are disputed facts, and the

burden of proving them (to the extent that they are relevant against the Governor) rests on the plaintiff, Michael Schiavo.

Although prior court rulings may be judicially noticed, it does not follow that factual recitations contained within those rulings are competent evidence in other proceedings. This Court fails to recognize that its ruling in the case at bar was based on its acceptance as "fact" statements contained in the opinions of the trial and appellate courts in the guardianship cause – proceedings not involving the Governor or the statute at issue.

The rules of res judicata and collateral estoppel are grounded in the right to due process in the Florida and federal constitutions. As the United States Supreme Court noted in *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 797, 116 S.Ct. 1671, 1765 (1996), extreme applications of those rules may implicate a fundamental federal right.

> "The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. *Southern Pacific R.R. Co. v. United States*, 168 U.S. 1, 48, 18 S.Ct. 18 [27], 42 L.Ed. 355; Greenleaf Ev., § § 522-523. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. *Windsor v. McVeigh*, 93 U.S. 274, 277, 23 L.Ed. 914; *Louisville & Nashville R.R. Co. v. Schmidt*, 177 U.S. 230, 236, 20 S.Ct. 620 [622], 44 L.Ed. 747; *Simon v. Craft*, 182 U.S. 427, 436, 21 S.Ct. 836 [839], 45 L.Ed. 1165. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard

> (*Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565; Scott v. McNeal, 154 U.S. 34, 46, 14 S.Ct. 1108 [1112-1113], 38 L.Ed. 896; *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423, 35 S.Ct. 625 [628], 59 L.Ed. 1027) **so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.**"

Id. at n.4, quoting *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 467, 476, 38 S.Ct. 566, 570-571 (1918) (*emphasis added*).

This Court's application of the separation of powers doctrine effectively deprives the Governor of the due process protections accorded other litigants thorough the principles of res judicata and collateral estoppel. As a consequence, the Governor has been deprived of his due process rights under the Florida and federal constitutions. *See*, *e.g.*, Art. 1, § 22, FLA. CONST.; U.S. CONST. amend. VII; U.S. CONST. amend. XIV, § 1; and Rules 1.430 and 1.280, Fla. R. Civ. P. The Court has invoked the separation of powers to create an exception to rules protecting the right to due process where the executive and legislative branches are concerned that does not apply to other litigants.

III. WITHOUT CLARIFICATION, THE COURT'S ANALYSIS OF THE SEPARATION OF POWERS CALLS INTO QUESTION OTHER EXECUTIVE POWERS.

The Court's separation of powers encroachment analysis calls into question previously unquestioned executive powers. This Court held that

Chapter 2003-418 "resulted in an executive order that effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment of the power that has been reserved for the independent judiciary." Slip op. at 15-16. *See also id*. at 17 (Act "allows the executive branch to interfere with the final judicial determination in a case"). However, instances exist wherein the legislative and executive branches have constitutionally taken action to alter or even eliminate the effect of court decrees**.**

For example, in 1994 the Florida Legislature amended the Medicaid Third Party Liability Act to create a new cause of action for the state and eliminate traditional defenses such as assumption of risk. Section 409.910, Fla. Stat. (1994). The statute authorized a state agency to pursue recovery of Medicaid payments made on behalf of individual smokers from the tobacco industry, which had been nearly immune from judgment in private litigation due in part to the defenses abolished by the new statute. Juries had rejected claims for damages brought by individual smokers, finding the industry was not liable, and final orders were entered thereon. *Recent Legislation*, 108 HARV. L. REV. 525, 525-528 (1994); Brian H. Barr, *Engle v. Reynolds: The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers*, 29 FLA. ST. U. L. REV. 787, 787, 790, 793-795 (2001). Upon this

change in the law, the industry was held liable to the new state plaintiff in new final orders that seemingly overruled the orders in prior cases. Brian H. Barr, *Engle v. Reynolds,* 29 FLA. ST. U. L. REV. at 798-802. The change in the law was challenged as a violation of due process, and was upheld by this Court in *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 678 So. 2d 1239 (Fla. 1996).

As a further example, child dependency cases, like guardianships, are ongoing proceedings that do not end until adoption, majority, or death. *M.W. v. Davis*, 756 So.2d 90 (Fla. 2000); *Reece v. Reece*, 890 S.W.2d 706, 712-713 (Mo. App. 1995). *See also Jasmine A. v. Commissioner of the Administration for Children's Services*, 305 A.2d 131, 133 (N.Y. App. 2003). In such cases it is foreseeable that should the legislature amend Chapter 39, Florida Statutes, to limit the use of or require additional criteria for permanent foster placement, the child protection agency would reexamine existing, ongoing cases and perhaps seek alteration of a final order of placement in the case to comply with the new standards. Similarly, when an adult has custody of a child by court decree separation of powers does not prevent the child protection agency from taking custody of the child where there is probable cause to suspect abuse.

Second, taken to its logical extreme, the Court's separation of powers analysis of whether the legislature unlawfully delegated its power to the executive could be interpreted in such a way as to throw into question other executive powers of great discretion. For example, Section 943.04, Florida Statutes, authorizes the Governor, upon written order, to direct the Department of Criminal Justice Investigations and Forensic Science to "investigate violations of any of the criminal laws of the state," and provides no other criteria for the Governor as to when and whether to exercise that authority. This Court in *Thompson v. State*, 342 So. 2d 52, 55 (Fla. 1976), upheld the exercise of such discretion by the Governor.

Likewise, Section 27.14, Florida Statutes, confers upon the Governor broad discretionary authority to assign and exchange state attorneys "for any other good and sufficient reason" based on a determination that "the ends of justice would be best served." Section 27.14, Fla. Stat. This broad criteria was found acceptable by this Court in *Finch v. Fitzpatrick*, 254 So. 2d 203, 204-205 (Fla. 1971).

Similarly, Section 117.01, Florida Statutes, confers upon the Governor discretionary authority to appoint "as many notaries public as he deems necessary." No standards exist in the law other than the factual requirements

that appointees be at least 18 years of age and a legal resident of the state. Section 117.01, Fla. Stat.

These and other statutes and prior decisions may be called into question by this Court's broad interpretation of the separation of powers and failure to presume constitutionality. This Court's analysis of the principle of non-delegation is flawed in another way. This Court found Chapter 2003-418 facially unconstitutional because it delegates legislative power to the Governor. *Bush v. Schiavo*, No. SC 04-925, Slip op. at 18 (Fla. 2004). However, the plain language of Chapter 2003-418 does not expressly give the Governor the powers of the legislature. It is only by reference to documents and events outside the four corners of Chapter 2003-418, that is, to the prior guardianship cases and the orders issued therein, that the Court finds the statute to facially violate the separation of powers. Such a conclusion can only result from an analysis of the separation of powers as applied to Terri Schiavo. Such lack of clarity leads to confusion as to the disposition of all a facial constitutional challenges. The "effect" of each of these exercises of executive power is to effect a prospective change the legal *relationships* settled by a final decree, but they have no effect whatever on the integrity or binding nature of those decrees. The parties to the decree are bound by it, but third parties are not. They remain free to seek an

independent judicial determination of their own rights. *See Schindler v. Schiavo,* 851 So. 2d 182 (Fla. 2d DCA 2003).

IV. WITHOUT CLARIFICATION, THE COURT'S BROAD APPLICATION OF THE PRINCIPLE OF UNLAWFUL DELEGATION LEADS TO THE RESULT THAT ALL NEWLY ENACTED STATUTES MUST BE INTERPRETED WITHOUT REFERENCE TO PRIOR STATUTES, UNLESS SUCH STATUTES ARE EXPRESSLY INCORPORATED IN THE BODY OF THE NEW STATUTE.

The doctrine of unlawful delegation of authority is a doctrine fraught with peril. It ultimately hinges upon a case-by-case judicial determination of "how much is too much" delegation and opens the doctrine to criticism that it is essentially a means of striking down or upholding legislation as the Court sees fit. To forestall this charge, the doctrine must be invoked only with hesitation, and certainly not in a manner that yields a patchwork of inconsistent and seemingly arbitrary results. Indeed, such a doctrine would itself fail its own test of standardless discretion.

This Court misapplied the law by presuming that Chapter 2003-418 was unconstitutional rather than attempting to reconcile the legislation with existing law as found in Chapters 744 and 765 of the Florida Statutes. The Court failed to utilize its power to construe the statute in such a way as to find it constitutional, which the Court should have done by presuming that the statute requires the Governor to act reasonably and in accordance with

existing law. *Department of Health & Rehabilitative Services v. Cox*, 627 So. 2d 1210 (Fla. 2D. DCA 1993), review granted, 637 So. 2d 234 (Fla. 1994), quashed in part on other grounds, 656 So. 2d 902 (Fla. 1995); *Kass v. Lewin*, 104 So. 2d 572 (Fla. 1958); *Doe v. Mortham*, 708 So. 2d 929 (Fla. 1998). Further, the statute should have been construed liberally because of the direct interest at stake in human life.

The Court's interpretation of the unlawful delegation of powers doctrine raises questions that could impede efficient governing. Clarification of the Court's opinion is necessary to establish the extent to which new statutes may or may not be interpreted with reference to existing statutes not expressly included in new laws. The Court's opinion states, "[I]n short, there is no indication in the language of Chapter 2003-418 that the legislature intended the Governor's discretion to be limited in any way." Slip op. at 23. This statement turns the presumption of constitutionality on its head.

This Court was able to decide that Chapter 2003-418 gives the Governor "standardless discretion" only because it was unwilling to provide a limiting construction by reconciling the legislation with existing law as found in Chapters 744 and 765 of the Florida Statutes. Because the preconditions imposed on the Governor assume that the dispute arises in a

proceeding governed by Chapter 765, and there is nothing in the statute that compels the conclusion that Chapters 744 and 765 should *not* apply, the practical result is that no newly-enacted statute will be construed in *pari materia* with pre-existing laws unless the language of the new statute clearly indicates that such a construction is permitted.

The Governor submits that this result has serious implications for the separation of powers. The rules of statutory construction have always assumed that laws are to be read and interpreted in the context in which they are enacted: *i.e.* in light of existing laws and against a backdrop of hundreds of years of common law guidance. The rules of constitutional construction proceed from the same assumption: *i.e.* that the legislature and the Governor know and understand the nature and limits of their constitutional authority. Here, the legislature narrowly delimited the circumstances in which the Governor could intervene and then entrusted to him the "operation and enforcement of the law." Fla. Const. Art. II s. 3. The state constitution requires no more. As this Court has observed, "[t]he legislature itself is hardly suited to anticipate the endless variety of situations that may occur or to rigidly prescribe the conditions or solutions to the often fact-specific situations that arise." *Avatar Development Corp. v. State*, 723 So. 2d 199,

204 (Fla. 1998). The Governor thus respectfully urges the Court to utilize its power to construe the statute in such a way as to make it constitutional.

CONCLUSION

The protection of vulnerable persons with disabilities requires that all three branches remain vigilant in defense of their rights. Just as the judicial branch has a constitutional obligation to adjudge cases properly presented to them for decision, so too do the Governor and the legislature. The legislature was entitled to enact, and the Governor to enforce, a change in the manner in which situations governed by Chapter 2003-418 are governed. This Court should clarify its opinion, grant rehearing and, upon rehearing, reverse the Circuit Court's entry of summary final judgment, and remand the case for trial on the separation of powers and unlawful delegation claims

WHEREFORE, Appellant respectfully requests this Court grant this Motion for Rehearing and Clarification.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to **George J. Felos,** Felos & Felos, P.A., 595 Main Street, Dunedin, Florida, 34698; **Thomas J. Perrelli, Robert M. POrtman, Nicole G. Berner,** Jenner & Block, LLC, 601 13th Street, NW, Suite 1200, Washington, D.C; **Randall C. Marshall,** Legal Director, American Civil Liberties Union of Florida, 4500 Biscayne Blvd., Suite 340, Miami, Florida, 33137; **Jay Vail**, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida, 32399; **James Alan Sekulow, James M. Henderson, Sr., Walter M. Weber, David Cortman,** ACLJ, 1000 Hurricane Shoals Road, Suite D-600, Lawrenceville, GA, 30043; **Patricia Fields Anderson,** 447 Third Avenue North, Suite 405, St. Petersburg, Florida, 33701; **Max Lapertosa, Kenneth M. Walden, Aliza Kaliski,** Access Living, 614 West Roosevelt Road, Chicago, Illinois, 60607; **George K. Rahdert**, Rahdert, Steele, Bryan & Bole, P.A., 535 Central Avenue, St. Petersburg, Florida, 33701; **William L. Sanders, Jr.,** Center for Human Life and Bioethics at The Family Research Council, 801 G. Street, NW, Washington, DC 20001; **Jan G. Halisky**, 507 S. Prospect Avenue, Clearwater, Florida, 33756; **Mary L. Wakeman, Lauchlin T. Waldoch, Scott M. Solkoff**, The Elder Law Section of the Florida Bar and AFELA, 101 N. Monroe Street, Suite 900, Tallahassee, Florida, 32302-0229; **David S. Ettinger, Jon B. Eisenberg**, Horvitz & Levy, LLP, 15760 Ventura Blvd., 18th Floor, Encino, California, 91436; **Bruce G. Howie**, 5720 Central Avenue, St. Petersburg, Florida, 33707; and **Gordon Wayne Watts,** 821 Alicia Road, Lakeland, Florida, 33801-2113, on this 5th day of October, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the Florida Rules of Appellate Procedure 9.210 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.

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