IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL CASE NO. 03-008212-CI-20

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

Petitioner,

vs.

JEB BUSH, Governor of the State of Florida,
and CHARLIE CRIST, Attorney General
of the State of Florida,

Respondents.
_____/

PETITIONER'S BRIEF

George J. Felos
(Fla. Bar No. 226653)
(SPN00030478)
Felos & Felos, P.A.
595 Main Street
Dunedin, FL 34698
(727) 736-1402

Randall C. Marshall, Legal Director
(Fla. Bar No. 0181765)
American Civil Liberties Union of Florida
4500 Biscayne Boulevard -- Suite 340
Miami, FL 33137
(305) 576-2337

Thomas J. Perrelli (*pro hac vice* pending)
Robert M. Portman (*pro hac vice* pending)
Nicole G. Berner (*pro hac vice* pending)
Jenner & Block LLC
601 13th Street, NW, Suite 1200
Washington, DC 20005
(202) 639-6000
Cooperating Counsel with ACLU

Attorneys for Guardian

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COMES NOW MICHAEL SCHIAVO, as guardian of the person of THERESA MARIE SCHIAVO, and hereby files his brief as ordered by this Court, and states:

INTRODUCTION

This case is not about whether Theresa Schiavo is in a persistent vegetative state from which she will not recover, nor is it about what her wishes would be if she were now able to decide whether to prolong her life through artificial measures. *That* case was already fully and conclusively decided by the courts of Florida, which determined that there is no hope Mrs. Schiavo can recover from her current condition, and that after 13 years in a persistent vegetative state, she would have wanted to be removed from artificially provided nutrition and hydration. Whatever one thinks about those decisions, that chapter is closed.

This case is instead about whether the Legislative and Executive Branches of the State of Florida can nullify the decisions of the courts of this state and can suspend the operation of the Constitution of the State of Florida with respect to a single citizen. That is precisely the effect of HB 35-E, which gives the Governor unfettered and unreviewable discretion to "stay" the withholding of artificially provided nutrition and hydration from Mrs. Schiavo and prevent her from dying with dignity. Nothing could be more repugnant to the Constitution of the State of Florida.[1] This Court should invalidate HB 35-E because it eradicates Mrs. Schiavo's rights to privacy and due process, is an example of

[1] HB 35-E violates both the state and federal constitutions, but this Court should decide all issues on state constitutional grounds. This brief focuses on the state constitution, drawing on federal precedents where useful to illuminate state constitutional guarantees. As discussed below, the Florida Constitution's provisions concerning the right of privacy and the separation of powers exceed those of the U.S. Constitution.

Legislative and Executive overreaching prohibited by the separation of powers enshrined in the Florida Constitution, and violates a host of other state and federal constitutional provisions.

BACKGROUND

This case is yet another chapter in the "bitter dispute" over "Mrs. Theresa Schiavo's . . . right to forego life-prolonging medical procedures." *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 800 So. 2d 640, 641 (Fla. 2d DCA 2001), *review denied*, 816 So. 2d 127 (Fla. 2002) (unpublished table decision). By this sixth year of litigation there has been a week-long trial, a seven-day evidentiary hearing on an action to vacate the final judgment, thirteen applications for appellate review,[2] innumerable motions, petitions, hearings, and proceedings, and three suits filed in federal district

[2] 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 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 for October 15, 2003; and, 2D03-4621, petition for writ of prohibition on denial of motion to disqualify trial judge. There have been three applications to the Florida Supreme Court for discretionary review, SC01-559, SC01-2678, and SC03-1242, all of which were denied. There has been one application to the U.S. Supreme Court, application number 00A926, which was denied. The reported appellate decisions 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 551 (Fla. 2d DCA 2001); *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 800 So. 2d 551 (Fla. 2d DCA 2001); and *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 851 So. 2d 182 (Fla. 2d DCA 2003). They are referred to as *Schiavo I*, *Schiavo II*, *Schiavo III*, and *Schiavo IV*.

court.[3] This intensive judicial scrutiny of a patient's medical condition and medical treatment wishes is unprecedented in the annals of American jurisprudence.

On February 25, 1990, Theresa Schiavo suffered a cardiac arrest and was rushed to the hospital. As a result, she has been in a persistent vegetative state for the past thirteen years. In May 1998, a petition to discontinue Mrs. Schiavo's artificial life support was filed. Mr. Schiavo, his wife's guardian, placed the issue before the court for resolution, allowing all parties, including Mrs. Schiavo's parents, who objected to the petition, to present evidence concerning Mrs. Schiavo's medical condition and what her wishes would have been. *Schiavo I*, 780 So. 2d at 179. A week-long trial resulted in a February 11, 2000 order granting the guardian's petition (Exhibit A). The petition was brought, tried, and adjudicated upon the constitutional right of privacy enunciated in *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990). The trial court found "beyond all doubt that Theresa Marie Schiavo is in a persistent vegetative state" and that the medical evidence "conclusively establishes that she has no hope of ever regaining consciousness." It also found that "without the feeding tube she will die in seven to fourteen days" and that "such a death would be painless" (Exhibit A at 6). The court then considered the issue at the heart of *Browning*'s constitutional standard: the wishes of Mrs. Schiavo. The court "specifically" found that the evidence of "Terri Schiavo's oral declarations concerning her intention as to what she would want done under the present circumstances

[3] Case numbers 8:01-cv-784-E-26EAJ, 8:03-cv-1860-T-26TGW, and 8:03-cv-2167-T-23EAJ, Middle District of Florida, Tampa Division.

. . . is reliable, is creditable, and rises to the level of clear and convincing evidence." (Exhibit A at 9-10).

The court of appeal affirmed in *Schiavo I*, finding that Theresa's brain "deteriorated because of the lack of oxygen it suffered at the time of the heart attack," thus "robb[ing] her of most of her cerebrum and all but the most instinctive of neurological functions." 780 So. 2d at 177, 180. The appellate court concluded that "the evidence is overwhelming that Theresa is in a permanent or persistent vegetative state." *Id.* at 177. The court also affirmed the trial court's decision concerning Mrs. Schiavo's wishes. Beginning from the "default position" that the courts must favor life, the court nonetheless found clear and convincing evidence that Mrs. Schiavo would have chosen to withdraw artificial life-support. *Id.* at 179-80.

Subsequently, Mrs. Schiavo's parents sought again to challenge the court's decision, this time arguing that "new evidence" should be considered by the trial court. After the court of appeal authorized the parents to present this evidence in the form of a motion for relief from judgment pursuant to rule 1.540(b)(5) and subsequently clarified the scope of its remand, the trial court held a week-long evidentiary hearing on the motion in October 2002. Following that hearing, the trial court denied the motion on November 22, 2002 (Exhibit B).

In July of this year, the court of appeal considered the parents' appeal from the trial court's denial of the rule 1.540(b)(5) motion. The court of appeal noted that "[i]t is likely that no guardianship court has ever received as much high-quality medical evidence in such a proceeding" and the "extensive additional medical testimony in this

record only confirms once again the guardianship court's initial decision." *Schiavo IV*, 851 So. 2d at 185, 187. The court of appeal affirmed the trial court in all respects and instructed the trial court to reschedule the removal of artificial life support upon issuance of its mandate. *Id*. at 187. On September 17, the trial court entered an order directing the guardian to remove the "nutrition and hydration tube" on October 15, 2003 (Exhibit C). The feeding tube was removed on October 15, 2003.

On October 21, 2003, Florida Governor Jeb Bush signed into law HB 35-E. The complete text of HB 35-E is attached as Exhibit D. HB 35-E purports to give 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." HB 35-E, § 1. The statute provides no standards for determining whether to issue a stay and gives the Governor complete discretion as to the stay's duration. *Id.* § 2. The statute also purports to immunize from liability or sanction any person "for taking any action to comply with a stay issued by the Governor pursuant to this act." *Id.* Finally, the statute states that "the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court." *Id.* § 3. The statute does not make the continuation of the stay in any way dependent on the recommendation of the guardian.

HB 35-E is indisputably targeted at Mrs. Schiavo and no one else. The statute, by its terms, applies only to individuals in her precise situation as of October 15, six days

prior to the enactment of the law. Comments of legislators and the Governor make clear that this bill was enacted for one and only one purpose – to require the forced re-insertion of the feeding tube to Mrs. Schiavo, regardless of her wishes or the court's orders. In addition, HB 35-E, by its own terms, lapses after 15 days. *Id.* § 2. After that period – 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. The statute thus will apply to Mrs. Schiavo and no one else.

On the same day the statute was enacted, Governor Bush issued Executive Order 03-201, staying the withholding of artificial nutrition and hydration from Mrs. Schiavo (Exhibit E). That order directed "all medical facilities and personnel providing medical care for Theresa Schiavo, and all those acting in concert or participation with them . . . to immediately provide nutrition and hydration to Theresa Schiavo." The order prohibited any person from interfering with its effect, and directed the Department of Law Enforcement to serve the order on the facility caring for Mrs. Schiavo.

On October 21, 2003, Mrs. Schiavo was forced, against the court's order and her wishes as found by the court, to be subjected to a surgical reinsertion of a feeding tube.

ARGUMENT

I. THE LEGISLATURE'S UNPRECEDENTED INVASION OF TERRI SCHIAVO'S RIGHT TO CONTROL HER HEALTH CARE TREATMENT VIOLATES HER CONSTITUTIONAL RIGHTS.

By authorizing the Governor to compel the surgical re-insertion of her feeding tube, the Florida legislature has trampled upon Mrs. Schiavo's constitutional right to

control her own medical treatment, specifically, her right to refuse unwanted artificial life support. This right is firmly grounded in both the Florida and federal constitutions.

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." As part of this expressly enumerated right, everyone has a fundamental right to the sole control of his or her person, including the right to determine what shall be done to his or her body. *Browning*, 568 So. 2d at 10. This constitutional right of privacy, which exceeds analogous protections under federal constitutional law,[4] includes the right to self-determination with respect to medical treatment, that is, to decide for oneself whether or not to receive such treatment. *Id.* at 11, 13.

Under *Browning*, a competent individual has the constitutional right to refuse medical treatment *regardless of his or her medical condition*. *Id.* at 10 (emphasis added). Therefore, one need not be terminally ill or beyond recovery, or in any other particular physical or mental condition to exercise that right; the right is one of self-determination that cannot be diminished by the condition of the patient. *Id.* at 13. Further, the right to choose or refuse medical treatment extends to *all* decisions concerning one's health, major or minor, ordinary or extraordinary, life-prolonging, life-maintaining, life-sustaining 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.

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[4] In Article I, Section 23 of the Florida Constitution, "the people of this state exercised their prerogative" to recognize a privacy right that "offers more protection from governmental intrusion" and "is much broader in scope" than the privacy right afforded by the Federal Constitution. *In re T.W.*, 551 So. 2d 1186, 1191-92 (Fla. 1989).

Lastly, the constitutionally protected right to choose or reject medical treatment is not lost by virtue of physical or mental incapacity or incompetence. *Id.* at 12. When the patient can no longer speak, the right may be exercised by a proxy, such as a close family member or friend, upon clear and convincing evidence. A written declaration is presumptively clear and convincing evidence of the patient's wishes. Where, however, a person has not left a written declaration, oral declarations and evidence may constitute clear and convincing evidence of the patient's wishes; the surrogate must make the medical treatment choice that the patient, if competent, would have made. *Id.* at 13-16.

Because "[t]he right of privacy is a fundamental right," it "demands the compelling state interest standard." *North Florida Women's Health and Counseling Services, Inc. v. State*, 2003 WL 21546546, at *6 (Fla. July 10, 2003) (*quoting In re T.W.*, 551 So. 2d at 1192); *Browning*, 568 So. 2d at 13-14. Under this "highly stringent" level of judicial scrutiny, the government must show that the challenged enactment "serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *North Florida Women's Health*, 2003 WL 21546546, at *6. Indeed, a statute that impinges on the right of privacy is "presumptively unconstitutional." *Id.* at *9.

The right to refuse medical treatment is also firmly grounded in the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. *See Cruzan v. Director, Missouri Dep't of Public Health*, 497 U.S. 261, 279 (1990) (assuming a Fourteenth Amendment liberty interest in refusing lifesaving treatment); *id.* at 287 (O'Connor, J. concurring); *Vacco v. Quill*, 521 U.S. 793, 807 (1997) (right to refuse live-saving medical treatment is grounded on "well established, traditional rights to bodily integrity and

freedom from unwanted touching"); *Washington v. Glucksberg*, 521 U.S. 702, 7255 (1997) (reiterating that a right to refuse unwanted medical treatment "may be inferred from our prior decisions"). Infringement of such a fundamental right must be narrowly tailored to promote a compelling governmental interest. *Id*. at 721.

The Florida legislature has also codified the right to refuse treatment in Chapter 765 of the Florida Statutes.[5] It provides that a health care surrogate or proxy may effectuate the wishes of an incapacitated patient – that is, a patient currently unable to communicate her health care decision, Fla. Stat. § 765.101(8) – regarding treatment, including a wish to refuse life-prolonging procedures such as artificial nutrition and hydration, *see* Fla. Stat. § 765.101 *et seq*. The incapacitated patient's right to have her wishes carried out applies even where she has not executed a living will or other written advance directive for health care. *See* Fla. Sta. § 765.401; *see also id.* § 765.101. HB 35-E directly conflicts with these clear provisions of Florida's health care decisionmaking laws that have been on the books for more than a decade. *See* Fla. Sess. Law Serv. Ch. 92-199, Health Care Advance Directives – Life-Prolonging Procedures (1992).

A. Mrs. Schiavo Has A Fundamental Privacy Right to Refuse Unwanted Medical Treatment.

HB 35-E robs Mrs. Schiavo of her fundamental right to refuse unwanted medical treatment. The right to privacy under the Florida constitution is "intentionally phrased in strong terms" so as to make that right "as strong as possible." *Winfield v. Division of*

[5] Chapter 765 does not limit the scope of the right. Fla. Stat. § 765.106 (provisions "do not impair any existing rights . . . which . . . a patient . . . may have under the . . . State Constitution"). Nor could the legislature diminish a constitutional right by statute.

Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985) (noting that the drafters of the Privacy Clause "rejected the use of the [limiting terms such as] 'unreasonable' or 'unwarranted' before the phrase 'governmental intrusion"). The Florida Supreme Court has repeatedly recognized that this right encompasses the right to refuse unwanted medical treatment, explaining, "[w]e can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime . . . [than] the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment." *In re T.W.*, 551 So. 2d at 1192; *see also Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring) (noting the Due Process Clause of the U.S. Constitution "must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment," because "[r]equiring a competent adult to endure . . . procedures [including artificial nutrition and hydration] against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment").

It is immaterial that Mrs. Schiavo is currently incompetent, that is, unable to express her choice on her own behalf at the present time. "The right of privacy would be an empty right were it not to extend to competent and incompetent persons alike." *Browning*, 568 So. 2d at 12. Therefore, pursuant to the fundamental constitutional right of privacy, "an incompetent person has the same right to refuse medical treatment as a competent person." *Id.* at 12; *see also John F. Kennedy Mem'l Hosp., Inc. v. Bludworth*, 452 So. 2d 921, 923 (Fla. 1984) ("incompetent persons being sustained only through use

of artificial means have the same right to refuse to be held on the threshold of death as terminally ill competent persons").[6]

Indeed, the principles underlying the right to privacy apply with particular force to incapacitated patients. It is in fact the prolonged period of incapacity prior to a natural death that many such as Mrs. Schiavo would – and do – choose to avoid. Modern science can hold a person on the "threshold of death for an indeterminate period of time" by procedures which "can be accurately described as a means of prolonging the dying process rather than a means of continuing life." *Bludworth*, 452 So. 2d at 923. It would be a cruel irony for a person in a permanent vegetative state to be held in that condition indefinitely because of a current inability to articulate a desire to die a natural death where there are means of ascertaining the person's wishes. The Florida Supreme Court has recognized that in this situation "even the failure to act constitutes a choice," as it means administering treatment and prolonging the patient in her incapacitated state. "That choice must be the patient's choice whenever possible," including where the patient is incapacitated. *Browning*, 568 So. 2d at 13; *see also Cruzan*, 497 U.S. at 286 (holding that "we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone," including family members, "but the patient herself").

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[6] Incompetence also does not deprive an individual of fundamental rights under the U.S. Constitution. *See Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (holding that a severely retarded man enjoyed liberty interests in safety and bodily restraint); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (recognizing child's liberty interest in not being confined unnecessarily for medical treatment); *see also Cruzan*, 497 U.S. at 281 (incompetent patients enjoy "constitutionally protected interests" under the Due Process Clause).

Chapter 765 of the Florida Statutes expressly recognizes and provides procedures for effectuating the right of an incapacitated person not to be subjected to life-prolonging treatment against their wishes, even where there is no written advance directive. Fla. Stat. § 765.101, *et seq*. The statute creates a hierarchy of persons, including the patient's spouse, who may serve as a proxy to "exercis[e] the incapacitated patient's rights to select or decline health care" where "there is clear and convincing evidence" of what the patient's choice would have been. Fla. Stat. § 765.401. To the extent there are disputes on such issues, the Florida courts are available to adjudicate disputes over such constitutional rights, as occurred here. *See Browning*, 543 So. 2d at 16.

Mrs. Schiavo's desire to avoid indefinite artificial life-sustaining treatment has been fully and exhaustively litigated. The trial court heard extensive evidence and determined that Mrs. Schiavo would not have wanted her life prolonged any further by artificial means. *See Schiavo I*, 780 So. 2d at 178. By focusing on identifying Mrs. Schiavo's wishes, not what others wanted or might have considered to be in her "best interests," *id.* at 179, the trial court properly and effectively carried out its judicial role to ensure that Mrs. Schiavo's constitutional rights were honored. The court of appeal heard argument, not once or twice, but four times, regarding Mrs. Schiavo's case. Each time the court affirmed that "clear and convincing evidence at the time of trial supported a determination that Mrs. Schiavo would have chosen in February 2000 to withdraw the life-prolonging procedures." *Schiavo IV*, 851 So. 2d at 183; *Schiavo I*, 780 So. 2d at 180 (finding the evidence showed that Mrs. Schiavo "would wish to permit a natural death process to take its course and for her family members to be free to continue their lives").

By contrast to the careful and extensive court proceedings that at all times have sought to respect and give effect to Mrs. Schiavo's fundamental privacy right, the legislature, by enacting HB 35-E, and the Governor, by compelling the re-insertion of the feeding tube, have utterly disregarded her wishes and her rights. It is no exaggeration to say that these actions have trampled on Mrs. Schiavo's right to privacy, self-determination, and personal dignity.

B. The State Has No Compelling Interest In Authorizing the Governor to Unilaterally Override the Wishes of Mrs. Schiavo Regarding Her Own Medical Treatment and Bodily Integrity.

This case involves nothing less than "the state's power to physically force artificial life-support directly into the body of an individual claiming the right to refuse such treatment." *Quiles v. City of Boynton Beach*, 802 So. 2d 397, 399 (Fla. 4th DCA 2001), *review denied*, 825 So. 2d 935 (Fla. 2002) (unpublished table decision). Through HB 35-E, the legislature has authorized the Governor to unilaterally order the insertion of tubes into Mrs. Schiavo's body to compel nutrition and hydration, tubes that had already been removed based on clear and convincing evidence that Mrs. Schiavo would not have wished to receive such treatment. It is hard to imagine a more drastic example of "highly invasive procedures where the state sought to override a person's freedom to choose." *Id.* This invasion is unsustainable under the Florida constitution, *Browning*, 568 So. 2d at 11, and is no less shocking than other "state incursions into the body" "deemed . . . repugnant to the interests protected by the Due Process Clause," *Cruzan*, 497 U.S. at 287 (O'Connor, J. concurring). *See also Rochin v. California*, 342 U.S. 165, 172 (1952)

(holding that forcibly pumping the stomach of a criminal suspect to obtain evidence violated due process).

The government cannot meet its burden to show a compelling state interest furthered by this profoundly intrusive statute. While the State's most compelling interest is in the preservation of life, that interest does not automatically trump "an individual's right to make decisions vitally affecting his private life according to his own conscience," including the right to refuse medical treatment. *Browning*, 568 So. 2d at 14. Indeed, if the State's interest in preservation of life, without more, was sufficient to trump an individual's right to privacy, there would be no right to refuse medical treatment.

Moreover, there is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State's interest where the affliction is incurable. *Id.* at 14 (involving a patient who "could continue to live for an indeterminate time with artificial sustenance"). In the latter situation, the well-established constitutional law of Florida is that the state has no compelling interest in overriding an individual's personal and private choice regarding her own life and bodily integrity. *See id.* Because it is the individual patient, and no one else, whose fundamental right is at stake, the focus must be on the patient's wishes, not on what "the state, the family, or public opinion would prefer." *Id.* at 13; *In re Dubreuil*, 629 So. 2d 819, 821-22 (Fla. 1993) (rejecting argument that the "demands of the state (and society) outweigh the wishes" of the individual regarding life-sustaining medical care).

HB 35-E fails to further a compelling state interest both as written and as applied to Mrs. Schiavo. By definition, the statute applies solely to individuals who are "in a

persistent vegetative state," an incurable affliction, where the only question is for how long life will be prolonged. HB 35-E § 1(b); *see also* Fla. Stat. § 765.101(12) (defining "persistent vegetative state" as "a permanent and irreversible condition of unconsciousness"). As regards Mrs. Schiavo in particular, "[i]t is likely that no guardianship court has ever received as much high-quality medical evidence in such a proceeding," *Schiavo IV*, 851 So. 2d at 185, 187. That evidence "conclusively establish[ed] that she has no hope of ever regaining consciousness," Exh. A at 6, and is in a "permanent and persistent vegetative state," *Schiavo I*, 780 So. 2d at 180. There is also no lack of clarity as to Mrs. Schiavo's wishes: her desire not to have medical treatment continued under these circumstances has been established by clear and convincing evidence. *Schiavo*, 851 So. 2d at 183. Under these circumstances, the State has no compelling interest in preserving life where the individual's wishes are to the contrary. *Browning,* 568 So. 2d at 14; *Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980) (state's interest in the preservation of life does not outweigh the privacy right of a competent person suffering from an incurable affliction).

Far from having a compelling interest in forcing Mrs. Schiavo to receive unwanted treatment, the Florida Supreme Court has already established that "[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 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, HB 35-E completely disregards them and

authorizes the Governor to eviscerate those desires based on no evidence, no standards, and nothing more than the Governor's personal preferences.

The violation of Mrs. Schiavo's rights is even more egregious because of the way she has been singled out in a manner utterly contrary to the existing legal scheme in Florida. "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*, 2003 WL 21546546, at *14. The fact that HB 35-E was enacted to interfere with one person's right to privacy shows that this was anything but "comprehensive and consistent" legislating. To the contrary, HB 35-E was effective for just 15 days and was designed to apply only to Mrs. Schiavo. The one-time nature of this legislative action – besides violating a host of other constitutional provisions – exposes the paucity of governmental interests that are behind HB 35-E. Whereas the privacy rights of all other Floridians are governed by the Florida Constitution and Chapter 765, only Mrs. Schiavo is treated differently.

Indeed, the stark contrast between the statutes that apply to everyone else in Florida and that which applies to Mrs. Schiavo wholly undermines any notion that the legislature had a compelling interest in passing HB 35-E. In Chapter 765, the legislature recognized that an incapacitated person, though currently unable to communicate her wishes regarding medical treatment, has the right to have those wishes articulated by another person acting as the patient's surrogate or proxy, whether or not the patient had left written instructions. *See* Fla. Stat. § 765.401 (procedures for a proxy to "exercis[e] the incapacitated patient's rights to select or decline health care" based on what "the

patient would have chosen had the patient been competent"); *Browning*, 568 So. 2d at 16 (allowing proof of the patient's wishes through oral evidence). Chapter 765 and court proceedings such as those in Mrs. Schiavo's case accomplish one purpose: identifying and protecting the wishes of the patient whose privacy interest is at stake.

In contrast to this careful statutory scheme and the judicial proceedings that support it, HB 35-E makes no provision whatsoever for ascertaining or implementing the wishes of the patient and, instead, subjects her fate to the standardless discretion of the Governor. It is hard to fathom how the State can demonstrate a compelling interest in allowing the Governor to override a single patient's decision to refuse unwanted life-prolonging treatment when the legislature has enacted a statute specifically designed to identify and give effect to such decisions.[7] The narrow focus of HB 35-E demonstrates only one thing – that the Legislature and the Governor would prefer that Mrs. Schiavo be kept alive, regardless of her wishes. But that desire, without more, cannot possibly be a compelling interest sufficient to nullify Mrs. Schiavo's right to privacy. Indeed, that is exactly the teaching of the Supreme Court's decision in *Browning*, as well as the U.S. Supreme Court's decision in *Cruzan*. If it were otherwise, the Legislature and Executive could simply override the privacy interests of any Floridian who chose to refuse further medical treatment – competent or incompetent, with or without an advanced directive.

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[7] This inconsistent legislative treatment is more dramatic than in *North Florida Women's Health*, where the Florida Supreme Court found no compelling state interest for a law requiring minors to obtain parental consent for an abortion because of the "stark contrast" between the legislature's decision to require parental consent in this situation while permitting minors to make other, indistinguishable "life-and-death decisions" regarding themselves and their children without such consent. 2003 WL 21546546, at *14.

C. The Statute Is Not Narrowly Tailored to Further Any Arguable State Interest But Instead Affords No Protections Against Over-Intrusiveness and Impermissibly Discriminates Against Patients Who Fail to Execute Advance Written Directives.

A statute that impinges on a fundamental constitutional right must be narrowly tailored to effectuate a compelling government interest, that is, it must accomplish its goal through the least intrusive means. *North Florida Women's Health,* 2003 WL 21546546, at *6; *Glucksberg*, 521 U.S. at 721 ("[T]he Fourteenth Amendment forbids the government to infringe . . . 'fundamental liberty' interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (emphasis in original) (internal quotation marks and citation omitted)). HB 35-E fails for lack of a compelling state interest, rendering analysis of the "narrowly tailoring" requirement unnecessary. *See, e.g., North Florida Women's Health*, 2003 WL 21546546. Assuming *arguendo* there were a compelling state interest at stake, however, the statute also fails the "narrowly tailored" element of the strict scrutiny standard.

"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 it is the State's burden to show, "at a minimum, necessitate judicial approval prior to the state's intrusion into a person's privacy." *Shaktman v. State*, 553 So. 2d 148, 151-52 (Fla. 1989).

In this case, to state the relevant inquiry is to answer it: HB 35-E 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 others. No standards govern the family member's challenge to the withholding of artificial nutrition and hydration – it can be for any reason, or no reason. The Governor's power to override the individual patient's judicially-affirmed choice is utterly standardless and unreviewable.[8] The Governor does not have to justify or even explain his decision to impose a stay, and no procedures exist for contesting it. Nor are there any criteria for lifting a stay. The fundamental privacy interest of Mrs. Schiavo and others like her is completely unrepresented and unprotected.

The State may argue that the narrow tailoring requirement is satisfied by the statutory factors triggering the Governor's power to issue a stay – specifically, that the statute applies only where the patient has left no written advance directive, HB 35-E § 1(a), the patient is "in a persistent vegetative state," HB 35-E § 1(b), and a "member of th[e] patient's family has challenged the withholding of nutrition and hydration," HB 35-E § 1(d). Far from rendering the statute constitutional, these aspects of the statute only demonstrate the discriminatory nature of the law as to incapacitated patients like Mrs. Schiavo. As noted above, individuals do not lose their right to refuse unwanted treatment either because they are in a persistent vegetative state, because they have family members whose wishes are different than their own or because they have not

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[8] The startling lack of procedural safeguards is highlighted by comparing this case to a context in which the executive traditionally exercises a tremendous amount of discretion – the decision whether to commute a death sentence. In that context, the Governor, through the Florida Parole Commission, must "conduct a thorough and detailed investigation into all factors relevant to the issue of clemency." *Parole Commission v. Lockett*, 620 So. 2d. 153, 155 (Fla. 1993) (quoting Rules of Executive Clemency in Florida 16). No such requirements apply to the issuance of a stay under HB 35-E. The Governor may act without making any factual inquiry whatsoever.

expressed their wishes in writing. HB 35-E, however, would allow the Governor to stay the removal of life-prolonging nutrition and hydrations no matter what the patient had previously expressed, including through a videotape clearly expressing a desire not to be kept alive by feeding tubes. This provision also flies in the face of the practical reality that very few people memorialize in writing their choice regarding medical treatment. *See Browning*, 568 So. 2d at 15; *Cruzan*, 497 U.S. at 289 n.1 (O'Connor, J., concurring) (citing two national surveys showing that only 23% and 15% of those surveyed, respectively, had put their instructions regarding medical treatment in writing). Thus, restricting the statute's applicability to patients without advance directives potentially strips more than three-quarters of the population of their right to self-determination.

That the statute applies only to patients in a persistent vegetative state does not render it narrowly tailored. As noted above, the right to refuse unwanted medical treatment applies regardless of the condition of the patient and is particularly strong where the patient's state is incurable. The selection of the precise condition that has befallen Mrs. Schiavo, while excluding other similar conditions, such as permanent coma, severe Alzheimer's, or ALS, highlights the discriminatory nature of the statute.

The statute's grant of power to family members to trigger the Governor's unilateral and arbitrary power also directly contradicts the narrow tailoring requirement. No matter how far removed, in terms of the blood relation, and no matter what the reason, a family member may subject the patient's wishes to the Governor's unilateral stay power. The statute necessarily includes within its broad sweep, then, patients whose clearly expressed wishes contradict those of their family members, notwithstanding the

fact that the constitutional right of privacy belongs to the patient, not the family. Nor does this statute, by contrast with Chapter 765, provide a process whereby family members may be heard without arbitrarily overriding the rights of the patient. *See Schiavo I*, 780 So. 2d at 179 (describing how Mrs. Schiavo's family members, pursuant to Section 765.401, were able to present evidence and argument in the trial court regarding whether life-prolonging treatment should be discontinued).[9]

Finally, HB 35-E is far less tailored than other legislative acts that have been struck down. *See In re T.W.*, 551 So. 2d at 1195-96 (parental consent statute was not least intrusive means because it failed to provide safeguards in the form of a record hearing and right to counsel for a minor seeking a judicial bypass of parental consent); *Caddy v. State Dep't of Health*, 764 So. 2d 625, 629 (Fla. 1st DCA 2000) (state psychology board regulation banning all psychologist-patient relationships in perpetuity regardless of whether the patient was still receiving therapy from the psychologist).[10] To uphold this statute would be to sanction an unprecedented and constitutionally

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[9] The "appointment of a guardian ad litem for the patient to make recommendations to the Governor and the court," HB 35-E § 3, does nothing to save the statute. The role of a guardian ad litem is to act in the "best interests" of the ward, whether or not those interests coincide with the ward's wishes. *See, e.g., Perez v. Perez*, 769 So. 2d 389, 393-94 (Fla. 3d DCA 1999) ("Guardians ad litem are required to act in the best interests of children even if this conflicts with the children's wishes[.]") Mrs. Schiavo is constitutionally entitled to have *her* wishes respected, not to have others – including a guardian – decide they know what is best for her.

[10] HB 35-E also goes far beyond the statute upheld in *Cruzan*. There is no comparison between setting 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, substantive choice regarding treatment, not to mention a choice that has been reviewed and affirmed by court order.

insupportable intrusion into the private life choices of Mrs. Schiavo and others like her. Although HB 35-E lapses after only 15 days, unless invalidated by the courts, there is nothing to prevent the legislature from enacting similar, unconstitutional statutes any time it disagrees with a patient's judicially-affirmed decision to forego medical treatment. This lawless action must be stopped in its tracks before further damage is done to the fundamental rights of Florida's citizens.

II. HB 35-E VIOLATES FLORIDA'S STRICT SEPARATION OF POWERS AND IMPERMISSIBLY USURPS THE JUDICIAL POWER.

Even if HB 35-E did not wholly strip Mrs. Schiavo of her right to privacy in violation of both the state and federal constitutions, it would nonetheless have to be struck down as a gross violation of the "strict" separation of powers mandated by Article II, section 3 of the Florida Constitution. Indeed, by assigning to the head of the Executive Branch limitless power to make the law, enforce the law, and interpret the law, HB 35-E violates every building block of divided government that is fundamental to American democracy and the Florida Constitution. If it is not invalidated, HB 35-E would permit the wholesale destruction of judicial authority to provide final adjudications of private disputes otherwise committed to the jurisdiction of the courts and would threaten the individual liberty of Mrs. Schiavo and all Floridians.

A. The Central Concern of the Framers of the U.S. Constitution and the Drafters of the Florida Constitution Was to Ensure that the Executive, Legislative, and Judicial Powers Would Be 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 s 104); *see Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (noting that 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 of government."). The danger of placing all three types of power (the legislative, executive, and judicial) in one branch is exactly 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, F, and F*, 589 So. 2d 260, 263 (Fla. 1991) (quoting Charles de Montequieu, *L'Esprit des Lois* 70 (Robert Hutchins ed., William Benton 1952) (1748)).

These same concerns led the drafters of the Florida Constitution to choose a system of divided government. *See Kalway v. Singletary*, 708 So. 2d 267, 269 (Fla. 1998) (separation of powers is "a potent doctrine that is central to our constitutional form of state government"). The Florida Constitution, however, 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) (The Florida Supreme Court "has stated repeatedly and without exception that Florida's Constitution absolutely requires a 'strict' separation of powers."); *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978). 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.

Fla. Const. art. II, § 3; *Askew*, 372 So. 2d at 924 (the second sentence of Article II, Section 3, Florida Constitution "contain[s] an express limitation upon the exercise by a member of one branch of any powers appertaining to either of the other branches.").

The Florida Constitution's textual commitment compels the strict adherence to separation of powers. *See Department of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24, 32 (Fla. 1990) (separate opinion of Ehrlich, J.) ("the Florida Constitution 'expressly and strongly' enunciates the doctrine of strict separation of powers").[11] "[E]ach branch of government has certain delineated powers that the other branches of government may not intrude upon." *Coalition for Adequacy and Fairness v.*

[11] Interpretation of the separation of powers at the federal level informs the interpretation of the Florida Constitution, but is not dispositive. *See Chiles*, 589 So. 2d at 260.

Chiles, 680 So. 2d 400, 407-08 (1996). Legislation that purports to re-allocate the power among the branches is simply void. *Chiles*, 589 So. 2d at 268 ("the legislature cannot, short of a constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three coequal branches."). These principles serve the critical goal of protecting against the arbitrary abuse of power by one branch of government. As the Florida Supreme Court said in 1851, invalidating a statute that legislated a divorce for a specific individual, "[i]t is only by keeping these departments in their appropriate spheres, that the harmony of the whole can be preserved – blend them, and constitutional law no longer exists." *Ponder v. Graham*, 4 Fla. 23, 1851 WL 1091, at *11 (1851).

B. HB 35-E Impermissibly Assigns Judicial Power to the Executive Branch By Allowing It To Nullify A Judgment Of The Judicial Branch.

HB 35-E constitutes an egregious violation of the separation of powers – one heretofore unseen in the history of Florida. It both arrogates to the Executive Branch the power to nullify a court judgment in a particular case and usurps the power of the Judiciary to decide cases and give effect to its judgments. Because HB 35-E assigns to the Executive Branch power that is indisputably judicial in nature and gives the Governor effective oversight over the exercise of judicial power, it violates Article II, Section 3.

HB 35-E cannot be understood as anything other than a legislative measure authorizing the Governor to nullify the final judgment of a court in a specific case.[12]

[12] That the statute was applied in only one case does not make it any better or worse for separation of powers purposes. Applied to any case or any class of cases, it would violate (Cont'd . . .)

After six years of litigation, the Florida courts have finally and conclusively determined that Mrs. Schiavo is in a persistent vegetative state and that it would be her desire – a decision that is hers alone under the Florida Constitution – to forgo further efforts to maintain her life by artificial means. These factual determinations – final and conclusive after all appeals – compel one result under the Florida Constitution: Mrs. Schiavo's wishes must be honored and the measures taken to sustain her must cease. The Circuit Court in this case exercised its authority to make these determinations and to enter an order directing that the feeding tube should be removed from Mrs. Schiavo.

The fact that HB 35-E calls this power the power to "stay" in no way lessens its effect. The Governor's stay order purports to countermand the court's order; a person cannot comply both with the court's order and with the Governor's stay. HB 35-E renders that adjudication of Mrs. Schaivo's rights a nullity, subject to the unfettered and unreviewable discretion of the Governor. HB 35-E thus not only reverses the legal determination of the courts but also reverses the *factual* determinations made by the court. HB 35-E gives the Governor the power to effectively determine that Mrs. Schiavo would have wanted to be forcibly kept alive, in direct contravention to a binding judicial decree, after a conclusive litigation by all interested parties found the opposite.

In the federal system, it is beyond cavil that legislation which nullifies, suspends, or "reverses a determination, once made, in a particular case" violates the separation of powers. *See, e.g.*, *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 219, 225 (1995)

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Florida's separation of powers. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995).

(quotations omitted); *United States v. Klein*, 80 U.S. 128 (1871) (where a law purports to forbid a court from "giv[ing] the effect to evidence which, in its own judgment, such evidence should have," the legislature "has inadvertently passed the limit which separates the legislative from the judicial power"). The violation is even more flagrant given Florida's stricter conception of separation of powers. Article II, Section 3 makes clear that each branch of the government exercises a different type of power that is exclusive to it and that cannot be exercised by any other branch; nor are the other branches permitted to interfere with the appropriate exercise of power by another branch. *See Coalition for Adequacy and Fairness*, 680 So. 2d at 407 ("each branch of government has certain delineated powers that the other branches of government may not intrude upon"). Where, as here, "a statute purports to give one branch powers textually assigned to another by the Constitution," it must be struck down. *B.H.*, 645 So. 2d at 992.

Importantly, the power to oversee an act of another branch is necessarily the power to exercise the authority of that branch. For that reason, the Florida Constitution prohibits one branch from any type of oversight over the other, absent express constitutional authority for such oversight. *See Chiles*, 589 So. 2d at 269 ("The judicial branch cannot be subject in any manner to oversight by the executive branch."). Similarly, the power to "reduce," "nullify" or "change" another branch's acts also violates the separation of powers. *See Chiles*, 589 So. 2d at 265 (invalidating delegation to one branch to "reduce, nullify, or change" the actions of another branch because it "totally abandon[s]" one branch's authority and gives it over "to the total discretion of another branch of government."). The Florida Supreme Court has consistently viewed

judicial authority strictly and refused to allow any encroachments upon it. The Executive Branch has no authority (nor can be given such authority by the Legislature) to review or oversee judicial decisions. *In re Advisory Opinion to the Governor,* 213 So. 2d at 720 (the Governor "does not possess the power under the Florida Constitution to review the judicial discretion and wisdom of a Criminal Court of Record Judge while he is engaged in the judicial process."). 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. *Id.* (emphasis added).[13]

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[13] Federal courts, under the less stringent principles applicable under the U.S. Constitution, have not hesitated to strike down or call into question laws that derogated the Judicial Power, under a variety of guises, such as provisions which set aside, nullify, or suspend judgments, compel the grant of new trials, require the findings of facts contrary to final and conclusive judicial decisions, or make judgments conditional on Executive Branch actions, such as appropriation of funds. *See, e.g., Chicago & Southern Air Lines 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"); *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 647-48 (1875) ("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 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 (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 nature; and whenever it is exercised . . . it is an exercise of judicial, not legislative, authority"); *Plaut*, 514 U.S. at 225 (quoting Thomas Cooley, Constitutional Limitations, at 94-94 (1868)). ("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, (Cont'd . . .)

It cannot seriously be questioned that the power assigned to the Governor here is a form of the Judicial Power. At its irreducible minimum, the judicial power must be the power to resolve cases finally and to give force and effect to the courts' judgments. As the Supreme Court of the United States explained, the judicial power is not just "to rule on cases, but to *decide them, subject to review only by superior courts . . . with an understanding, in short, that a judgment conclusively resolves the case because a judicial power is one to render dispositive judgments." Plaut*, 514 U.S. at 218-19 (emphasis in original) (internal quotation marks and citation omitted). Since its earliest days, the Supreme Court of Florida has drawn a sharp distinction between power that is legislative and that which is judicial in nature:

> the very essence of [an exercise of the legislative power] is a rule for future cases. It must be of general and uniform application. If an act of the legislature, in terms, judicially determines a question of right, or of property, as the basis upon which the act is founded, so far the proceeding must be regarded as judicial. . .; or where the act determines matters of fact, or of right, dependent on matters of fact, it is the exercise of judicial powers.

Ponder v. Graham, 4 Fla. 23, 1851 WL 1091, at *7 (1851) (internal quotation marks and citation omitted). Laws that effectively resolve the rights of a single person are exercises of judicial, not legislative, power. *Id.* ("An act which is limited in its operation, and

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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.").

which exhausts itself upon a particular person, or his rights is, in its very spirit and terms, a judicial proceeding.").[14]

HB 35-E cannot be defended by the claim that it does not "stay" a "court judgment" but instead "stays" the removal of the feeding tube that kept Mrs. Schiavo in a persistent vegetative state. First, that is a distinction without difference. The court's order directed the removal of the feeding tube and thus any exercise of power compelling the re-insertion of the tube reverses that judgment. The power granted to the Governor under HB 35-E is no less the power to nullify a court judgment because it is termed a "stay." Indeed, Senate Staff Analysis and Economic Impact Statement of HB 35-E recognizes 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. 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.

See Senate Staff Analysis and Economic Impact Statement.

Second, it is clear that HB 35-E was intended to interfere with the workings of the court. It does not simply authorize the Governor to compel nutrition and hydration to all

[14] Notably, while HB 35-E allows the executive to wield judicial power, it grants that power without any of the safeguards of the judicial process. HB 35-E requires no public airing of the decisionmaking process, no review of any kind, and no transparency to allow the public to know the basis for the Governor's exercise of arbitrary power. In stark contrast, adversarial judicial proceedings, such as that which has already occurred with respect to Mrs. Schiavo, provide "a very public airing" of the issues; such "open proceedings are essential to assure that the public understands the legitimacy of the process." *Schiavo III*, 800 So. 2d at 645-46. HB 35-E has no such legitimacy.

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. It also purports to immunize all persons "taking action to comply with a stay" – and thereby violating the court's order – from the threat of any punishment, including the court's inherent power of contempt to enforce its judgments. *See Ex parte Earman*, 95 So. 755, 760 (Fla. 1923) (legislature may not eliminate the inherent power of contempt exercised by the courts).

Third, even if one could argue that HB 35-E does not, technically and specifically, "stay" a court judgment, it would nonetheless assign to the Governor what is indisputably Judicial Power. The power to issue stays or injunctions, especially those that operate to nullify the decisions of a court, is quintessentially a judicial power. *See Landis v. North American Co.*, 299 U.S. 248, 255 (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. Fla. Const. art. V, § 5 (powers of the Circuit Courts). The power given to the Governor is no different from such power. The Constitution, by expressly committing this power to the Judiciary, prohibits a further grant of such power – particularly one that conflicts with the judicial power – to the Executive Branch.

Nor can HB35-E be defended by analogy to the Governor's clemency power. That power, while committed to the Governor, is rooted textually in the Florida Constitution, and is specifically defined and limited therein. *See* Fl. Con. § 8. While the

governor undeniably enjoys broad discretion in the area of clemency, he does not enjoy a free-ranging power to define and grant "pardons" according to his whims. Nor does the Legislature have any authority to limit or expand this power. Moreover, the clemency context is starkly different from what is at issue here. A criminal defendant seeking clemency (even a stay of execution) has had his fundamental right to liberty adjudicated through the due process of trial, sentencing, appeal, and, many times, habeas corpus proceedings; having been adjudged guilty and duly sentenced, he enjoys only a "residual" liberty interest. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 281-82 (1998). The *grant* of a stay of execution in no way interferes with a protected liberty interest. The situation could not be more different here. Mrs. Schiavo has a fundamental right, which is the courts' duty to safeguard, to have her wishes regarding her own body and her own life respected. The grant of a stay here *infringes* on her constitutional rights without process of any kind.

In sum, HB 35-E 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 in any way by the other Branches, the judicial power – as an independent protector of civil liberties – would be emasculated and would be replaced by a tyranny of the Legislative and/or Executive Branches.[15] Indeed, HB 35-E destroys this carefully crafted separation

[15] If statutes such as HB 35-E passed muster, the Legislature could enact legislation allowing the Governor to "stay" the effect of any Florida Supreme Court judgment invalidating a statute where there was a dissenting voice or could "stay" the grant of a (Cont'd . . .)

of powers in exactly the manner the Framers feared: "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 oppressive acts on the part of those in political authority." *In re Advisory Opinion to the Governor*, 213 So. 2d at 719 (quoting 16 C.J.S. Constitutional Law § 104).[16]

C. Even if HB 35-E Was a Delegation of Non-Judicial Power, It Would Nonetheless Violate the Separation of Power Doctrine Because It Gives The Governor Standardless Discretion.

Even if the Court were to find that the power given to the Governor under HB 35-E was not judicial power, the Court would nonetheless have to invalidate the statute because it impermissibly delegates authority to the Governor without adequate standards. Florida courts have consistently held that excessive delegations of power by the legislature to another branch of government violate Article II, Section 3 because they necessarily cede to another branch the "discretion as to what the law shall be." *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 211 (Fla. 1968). In order to guard against unlawful legislative delegations, courts must scrutinize such delegations to assure that they are guided by "some minimal standards and guidelines ascertainable by reference to the

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license to permit a peaceful protest, if there was any person who objected to the views the protester intended to express.

[16] HB 35-E further fails constitutional scrutiny because it commandeers the judicial branch into the role of providing an advisory opinion. Although the Supreme Court of Florida is authorized by the Florida Constitution to issue advisory opinions in limited circumstances, the Florida courts are not authorized to issue advisory opinions outside those narrow confines. *See Sarasota-Fruitville Drainage Dist. v. Certain Lands*, 80 So. 2d 335 (Fla. 1955). HB 35-E violates this basic postulate by making the decision of the courts wholly contingent on the Governor's whim.

enactment establishing the program." *Askew*, 372 So. at 925. Legislative delegations that cede "unbridled discretion" to the executive, *Flesch v. Metropolitan Dade County*, 240 So. 2d 504, 506 (Fla. 3d DCA . 1970), permit an official to act "at whim," *State ex rel. Ware v. City of Miami*, 107 So. 2d 387, 389 (Fla. 1958), or fail to provide guidance to courts seeking to review actions taken pursuant to the delegation for consistency with the legislature's purpose, *Askew*, 372 So. 2d at 919, all violate the Florida Constitution.

HB 35-E falls woefully short of these standards for lawful delegations. It provides none of the required "definite . . . limitations" on the exercise of power that this state's courts have consistently required as a prerequisite for a valid delegation. *Bailey v. Van Pelt*, 82 So. 789, 793 (Fla. 1919). HB 35-E invests the Governor with authority to stay the withholding of life support and says nothing more. The law thus does not merely permit the executive to "'flesh out' an articulated legislative policy," but impermissibly empowers the executive to "mak[e] the initial determination of what policy should be," *Askew*, 372 So. 2d at 920. This is precisely the sort of "unbridled discretion" by the legislature permitting an official to act "at whim" that Florida courts have not hesitated to strike down. *City of Miami*, 107 So. 2d at 389 (invalidating, on nondelegation grounds, ordinance that permitted issuance of licenses for day care centers "because no guides or standards are set out or even referred to"). It is no answer that HB 35-E is limited by certain factors such as whether the patient has a "written advance directive" and has had "nutrition and hydration withheld." Those factors provide no guidance on whether to prevent the withholding of hydration and nutrition; they merely define the subject matter over which the executive enjoys absolute discretion

HB 35-E constitutes an invalid delegation for a related reason: it provides no standards for a reviewing court to determine whether action taken pursuant to its authority is valid. *Askew*, 372 So. 2d at 918. "When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law." *Askew*, 372 So. 2d 918-19; *Florida 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."). Florida courts have frequently struck down legislative delegations for just this reason. *See Askew*, 372 So. 2d at 925 (invalidating legislation that invested Administration Commission with authority to designate protected habitats without providing standards); *Conner*, 216 So. 2d at 213 (invalidating legislation that invested Commissioner of Agriculture with authority to create programs governing trade barriers without any standards).

For all these reasons, HB 35-E violates the non-delegation doctrine — a concern that is particularly important here, because where statutes operate on fundamental personal rights, a more exacting standard for legislative delegation applies. *See D.P. v. State*, 597 So. 2d 952, 955 (Fla. 1st DCA 1992).

III. HB 35-E VIOLATES A HOST OF OTHER CONSTITUTIONAL PROVISIONS.

A. HB 35-E Is a Violation of Equal Protection

For many of the same reasons articulated in Part I, *supra*, HB 35E violates the equal protection provision of the Florida Constitution (as well as the similar provision

under the U.S. Constitution). Because, under the Florida constitution, individuals have a fundamental right to refuse unwanted medical treatment, government classifications that interfere with that right must be narrowly tailored to support a compelling state interest. *See North Florida Women's Health*, 2003 WL 21546546 at *9; *Public Health Trust v. Wons*, 541 So. 2d 96, 97-98 (Fla. 1989). HB 35-E cannot possibly pass this test.

Even if HB 35-E applied to anyone other than Mrs. Schiavo, it would utterly fail to satisfy the compelling interest and narrow tailoring prongs for all of the reasons discussed in Part I, *supra*. But in singling out Mrs. Schiavo, HB 35-E is an even more egregious violation of equal protection. The State can provide no justification why every other person in Florida may have their privacy rights vindicated by means of Chapter 765 or the *Browning*-type procedures that the courts employed to determine Mrs. Schiavo's preference, but there is a separate set of rules that applies her. Only Mrs. Schiavo's decision not to prolong her life is subject to the veto of the Governor.

If nothing else, the guarantee of equal protection is that no person may be singled out to be governed by a wholly different legal regime than the rest of society, especially one which reposes arbitrary and unreviewable discretion in a single official. In this regard, HB 35-E is similar to, though far more egregious than, statutes that the U.S. Supreme Court has invalidated on federal equal protection grounds because they give courts or executive officials broad, standardless discretion to prevent persons from the exercise of their constitutional rights. *See Zablocki v. Redhail,* 434 U.S. 374, 389-91 (1978) (invalidating statute prohibiting marriage for a certain class without court approval); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (invalidating

law requiring a special permit for a group home premised on concerns that neighbors might object). This profoundly intrusive and disrespectful approach is the antithesis of a narrowly tailored restriction on a fundamental right and must be struck down.

B. HB 35-E Is an Unlawful Bill of Attainder.

HB 35-E is an unlawful bill of attainder. Fla. Const. Art. 1 § 10; *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). The Supreme Court has given "broad and generous meaning to the constitutional protection against bills of attainder." *Nixon v. Administrator of General Services*, 344 U.S. 425, 473 (1977). A law must be struck down as a bill of attainder is it (1) "singles out" a particular party, and (2) imposes a "punishment" on that party without a judicial trial. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-47 (1984).

There can be no dispute that the first element of the bill of attainder test is satisfied. HB 35-E singles out Mrs. Schiavo who alone is subject to its provisions. "The singling out of an individual for legislatively imposed punishment constitutes an attainder whether the individual is called by name or described in terms . . . which . . . operate[] only as a designation of [a] particular person." *Id.* at 847.

The legislation also fails on the second prong of the Bill of Attainder test. The concept of "punishment" is not limited to the classic sentences to death, punitive fines, or confiscation of property by the sovereign. *Nixon*, 344 U.S. at 473; *Florida East Coast*

Indus. v. State, *Dep't of Community Affairs*, 677 So. 2d 357, 362 (Fla. 1st DCA 1996). Rather, the concept of punishment includes "new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee." *United States v. Brown,* 381 U.S. 437, 475 (1965); *see also Jones v. Slick*, 56 So. 2d 459 (1952). For example, laws barring particular parties from pursuing otherwise lawful lines of business or commercial endeavors have constituted the most common variety of unconstitutional bills of attainder. *See Brown*, 381 U.S. at 448-49 (law barring Communist Party members from serving as officers of labor unions); *Lovett*, 328 U.S. at 314-17 (law preventing named individuals from being paid for government employment); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1867) (law barring those who served with the Confederacy from legal practice).

If a prohibition on an individual performing a specified profession is deemed to be a "punishment," it is axiomatic that the wholesale deprivation of a protected constitutional right is a punishment. *See Cummings v. Missouri*, 71 U.S. 277, 320 (1866) ("[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment"). Mrs. Schiavo was stripped of her constitutional rights and forced, against her wishes as determined by the court, to undergo an invasive medical procedure. That is punishment and thus HB 35-E is an unconstitutional bill of attainder.

C. HB 35-E Is an Invalid Special Law

Article III, Section 10 of the Florida Constitution requires that: "No special law shall be passed unless notice of intention to seek enactment thereof has been published in a manner provided by a general law." The enactment of HB 35-E violates this provision.

Ordinarily, a law "need not have universal application to be a general law" but it must be "based upon proper differences which are inherent in or peculiar to the class." *Schrader v. Florida Keys Aqueduct Authority*, 840 So. 2d 1050, 1055-56 (Fla. 2003). Where a law neither "materially affects the people," *id.* at 1055, of the state nor "operates universally throughout the state," it is a special law subject to Article III, Section 10. *Dep't of Business Regulation v. Classic Mile, Inc.*, 541 So. 2d 1155, 1158 (Fla. 1989).

HB 35-E is not saved because it does not mention Mrs. Schiavo by name. Where 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 subject to Article III, Section 10. *Classic Mile*, 541 So. 2d at 1157. The requirements for application of HB 35-E – a patient with no written directive determined by a court to be in a persistent vegetative state with nutrition and hydration having been withheld by a specific date – are designed to apply only to Mrs. Schiavo. *See Ocala Breeders' Sales Co. v. Florida Gaming Centers, Inc.*, 731 So. 2d 21, 25 (Fla. 1st DCA 1999) ("Whether a law is special or general depends upon whether the class it creates is open."), *aff'd*, 793 So. 2d 899 (Fla. 2001).

Indeed, HB 35-E's classification scheme is "arbitrary" because the October 15, 2003 date is "fixed so as to preclude additional [individuals] from satisfying the requirements for inclusion within the statutory classification at some future point in time." *City of Miami v. McGrath*, 824 So. 2d 143, 151 (Fla. 2002); *see also Ocala Breeders*, 731 So. 2d at 25 ("If it is possible in the future for others to meet the criteria set forth in the statute, then it is a general law and not a special law."). Unless an individual

met all conditions outlined in the bill by October 15, 2003, Governor Bush would have no authority to issue a stay. Should these circumstances occur again, Governor Bush would have no power. *See Alachua County v. Florida Petroleum Marketers Ass'n*, 553 So. 2d 327, 329 (Fla. 1st DCA 1989) (recognizing that statute is special law when additional entities will not meet criteria in the future), *aff'd*, 589 So. 2d 240 (Fla. 1991). The fact that the law can only be applied to a fixed class – those who met the criteria before October 15, 2003 – makes HB 35-E a special law.

Article III, Section 10 requires that the legislature follow statutory notice provisions before passing a special law. Florida Statute § 11.02 requires that the Florida legislature publish notice of the proposed special law for 30 days before it is introduced in the legislature. Because the legislature flouted this notice procedure, HB 35-E is unconstitutional.

D. HB 35-E Is Unconstitutionally Vague

In the event that the Court determines that HB 35-E does not nullify or suspend the court's order directing the withholding of artificial life support from Mrs. Schiavo, HB 35-E should be struck down because it is unconstitutionally vague. The due process clause of the Florida constitution, Fla. Const. art. I, § 9, prohibits the enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Brock v. Hardie*, 154 So. 690, 694 (Fla. 1934); *see also Southeastern Fisheries Ass'n v. Department of Natural Res.*, 453 So. 2d 1351, 1353 (Fla. 1984) (prohibition on vagueness derives from due process clause of the Florida constitution).

"The test of vagueness of a statute which we are bound to apply is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." *Washington v. State*, 302 So. 2d 401, 402 (Fla. 1974). A statute is also unconstitutionally vague if "its imprecision[] may also invite arbitrary and discriminatory enforcement." *Southeastern Fisheries*, 453 So. 2d at 1353.

By empowering the Governor to issue an executive order that *proscribes* the withholding of Theresa Schiavo's artificial hydration and nutrition, while a valid court order also exists that *requires* the withholding of these artificial life-sustaining measures, HB 35-E creates conflicting obligations. The petitioner has been ordered by the court to remove the feeding tube from Mrs. Schiavo, while at the same time he may be subject to arrest for doing so. *Compare* Executive Order No. 03-201 § 1C ("While this order is effective, no person shall interfere with the stay entered pursuant to this order."), *with* exhibit C. Mr. Schiavo was ordered by the court to remove Mrs. Schiavo's feeding tube, but may be subject to arrest for so doing. These conflicting obligations render HB 35-E unconstitutionally vague because they would cause a "person of common intelligence [to] speculate about the statute's meaning and be subject to penalty if the guess is wrong." *Whitaker v. Department of Ins. and Treasurer.*, 680 So. 2d 528, 531-32 (Fla. 1st DCS 1996) (citing *State v. Wershow*, 343 So. 2d 605, 608 (Fla. 1977)). Florida courts have not hesitated to strike down laws that have created such confusion over the behavior they

proscribe.[17] *Cuda v. State*, 639 So. 2d 22, 25 (Fla. 1994) (holding law that prohibited financial exploitation of elderly by "improper" means as unconstitutionally vague); *State v. Cumming*, 365 So. 2d 153, 156 (Fla. 1978) (invalidating statute that required animals to be kept in "appropriate neighborhoods" as unconstitutionally vague); *State v. Wershow*, 343 So. 2d 605, 610 (1977) (holding statute that proscribed "any malpractice . . . not otherwise especially provided" unconstitutionally vague).

[17] HB 35-E is unconstitutionally vague for a related reason: its requirement that "the chief judge of the circuit court shall appoint a guardian ad litem," H.B. 35-E § 1(3), invests the guardian ad litem with an ambit of authority so limitless that it "invite[s] arbitrary and discriminatory enforcement," *Southeastern Fisheries*, 453 So. 2d at 1353, in derogation of the due process clause of the Florida Constitution. House Bill 35-E requires nothing more than that the guardian ad litem "make recommendations to the Governor and the court," H.B. 35-E § 1(3), without any indication of the criteria that should guide that recommendation, or limits on the breadth of the guardian ad litem's authority. Florida courts have frequently struck down on vagueness grounds laws that created the same potential for the exercise of unchecked state power. *See, e.g., Brown v. State*, 629 So. 2d 841, 842 (1994) (holding statute that prohibited sale of drugs within 100 feet of "public housing facility" unconstitutionally vague); *Dickerson v. State*, 783 So. 2d 1144, 1147 (Fla. 5th DCA 2001) (holding law that prohibited sale of drugs within 1000 feet of a "convenience business" unconstitutionally vague).

CONCLUSION

For all of the reasons stated, Petitioner requests that the Court issue a declaration that HB 35-E is unconstitutional and enter a permanent injunction prohibiting its effect and any actions taken by state officials pursuant to its terms.

Dated: October 29, 2003

Respectfully submitted

George J. Felos
(Fla. Bar No. 226653)
(SPN00030478)
Felos & Felos, P.A.
595 Main Street
Dunedin, FL 34698
(727) 736-1402

Randall C. Marshall, Legal Director
(Fla. Bar No. 0181765)
American Civil Liberties Union of Florida
4500 Biscayne Boulevard -- Suite 340
Miami, FL 33137
305-576-2337

Thomas J. Perrelli (*pro hac vice* pending)
Robert M. Portman (*pro hac vice* pending)
Nicole G. Berner (*pro hac vice* pending)
Jenner & Block LLC
601 13th Street, NW, Suite 1200
Washington, DC 20005
(202) 639-6000
Cooperating Counsel with ACLU Attorneys for Guardian

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished this 29th day of October, 2003 by overnight delivery to Christina Calamas, Esq., Assistant General Counsel for Governor Jeb Bush, 400 S. Monroe Street, Suite 209, Tallahassee, Florida 32399-6536 and George LeMieux, Esq., Deputy Attorney General of the State of Florida, Office of the Attorney General – PI 01, 400 S. Monroe Street, Tallahassee, Florida 32399-6536.

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George J. Felos, Esq.
FELOS & FELOS, P.A.
595 Main Street
Dunedin, Florida 34698
(727) 736-1402
Florida Bar No. 226653
SPN 00030478
Attorneys for Guardian