

No. 05-  
IN THE  
SUPREME COURT OF THE UNITED STATES

◆  
**Jeb Bush,**  
**Governor of the State of Florida**  
*Petitioner*

v.

**Michael Schiavo**  
**Guardian: Theresa Schiavo**  
*Respondent*

◆  
*On Petition For A Writ Of Certiorari*  
*to the*  
*Supreme Court of Florida*

◆  
**PETITION FOR A WRIT OF CERTIORARI**  
◆

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**QUESTIONS PRESENTED**

1. Did the Florida Supreme Court's misapplication of the separation of powers principles enunciated in *Plaut v. Spendthrift Farm* violate the rights of the Governor and his incompetent ward under the Fourteenth Amendment to the Constitution of the United States?
  
2. Did the Florida Supreme Court violate the federal due process rights of the Governor and his incompetent ward when it gave preclusive effect to factual findings in a substituted judgment proceeding to which the Governor was not a party?

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*Bush v. Schiavo*, 2004 WL 2109983, 29 Fla. L. Weekly S515 (Fla. No. SC04-925, Sep 23, 2004) [App. 2].

## JURISDICTIONAL STATEMENT

The Supreme Court of Florida entered judgment in this case on September 23, 2004 [App. 2] and denied the Governor's motion for rehearing on October 21, 2004. [App. 3]. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(a). Petitioner seeks reversal of the Supreme Court of Florida's decision, which, as explained below, violates the rights of the Governor and his ward under the Fourteenth Amendment to the Constitution. Petitioner raised the federal claims discussed in this Petition in the Circuit Court and in the Florida Supreme Court.

## CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

### **United States Constitution, Amendment XIV §1:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Chapter 2003-418, Laws of Florida:**

Section 1. (1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:

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

(2) The Governor's authority to issue the stay expires 15 days after the effective date of this act, and the expiration of that authority does not impact the validity or the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.

(3) Upon the issuance of a stay, 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.

Section 2. This act shall take effect upon becoming a law.

### STATEMENT OF THE CASE

This case began as a declaratory judgment action challenging the facial and “as applied” constitutionality of Chapter 2003-418, Laws of Florida, adopted on October 21, 2003. [App. 4]. The Circuit Court for Pinellas County, Florida granted a summary final judgment of unconstitutionality on May 14, 2003. *Michael Schiavo v. Jeb Bush*, Fla. Sixth Judicial Cir., No. 03-008212-CI-20, 2004 WL 980028 (Fla. Cir. Ct.). [App. 1] The Governor appealed the summary final judgment on May 18, 2004, to the Second District Court of Appeal for the State of Florida. The Second District issued an order to show cause as to why the matter should not be immediately transferred to the Florida Supreme Court for resolution as an issue of great public importance. On June 16, 2004, the Florida Supreme Court accepted jurisdiction of the appeal. On September 23, 2004, the Florida Supreme Court affirmed the Circuit Court’s ruling. *Bush v. Schiavo*, 2004 WL 2109983, 29 Fla. L. Weekly S515 (Fla. No. SC04-925, Sep 23, 2004). [App. 2]. The Court denied the Governor’s motion for rehearing on October 21, 2004 [App. 3] and issued its mandate on October 22, 2004. The Governor filed a motion to recall the mandate of the Supreme Court on October 25, 2004, and the Court granted the motion on October 27, 2004. The mandate will re-issue on November 30, 2004 unless this Court grants a stay. Proceedings in the guardianship have been stayed by the Probate Court until all appeals have been exhausted.

In addition to raising federal due process issues throughout the Circuit Court proceedings below, the Governor raised federal due process rights in the proceedings before the Florida Supreme Court as follows: *July 6, 2004* Initial Brief of Appellant Jeb Bush, Governor of the State of Florida [App. 6, pp. 9-20]; *August 5, 2004* Reply Brief of Appellant Jeb Bush, Governor of the State of Florida [App. 7 pp. 6-7].

### STATEMENT OF FACTS

On September 17, 2003, the Probate Division of the Circuit Court of Pinellas County, Florida, entered an order authorizing the removal of the nutrition and hydration tube from Theresa Marie Schiavo. In relevant part, the Order provides:

**ORDERED AND ADJUDGED** that the Guardian, Michael Schiavo, shall cause the removal of the nutrition and hydration tube from the Ward, Theresa Marie Schiavo, at 2:00 P.M. on the 15th day of October, 2003.

**DONE AND ORDERED** in chambers at Clearwater, Pinellas County, Florida this 17th day of September at 3:30 o'clock, p.m. [App. 8].

The court's order was fully executed. The nutrition and hydration tube was withdrawn on October 15, 2003. The death watch over Terri Schiavo had begun.

Public reaction to the dramatic, and apparently final, chapter of this long, personal and public tragedy was intense. Though families are often divided over decisions to withdraw nutrition and hydration from a patient found to be in a persistent vegetative state (PVS), they are *not* usually divided – as the parties are here – over whether the person is actually *in* a PVS and whether the trial was tainted *ab initio* by a judicial conflict of interest.

Predictably, both the Governor and the Legislature received petitions for redress of these and related grievances, and it is undisputed that the petitions asked for executive and legislative redress of grievances arising from the actions *of the Florida courts themselves*. Among the claims raised were:

1. Terri Schiavo is not actually *in* a persistent vegetative state because she is able to interact with her visitors and caregivers.
2. Respondent, Terri Schiavo's husband and guardian, had financial and personal conflicts of interest that made it impossible for him adequately to protect her interests.
3. Terri Schiavo had never been adequately represented at any point during the substituted judgment trial, either by Respondent, her husband and guardian, by a guardian *ad litem*, or by counsel.
4. The judge in the guardianship proceeding created a judicial conflict of interest when he undertook, in violation of Florida law, FLA. STAT. § 744.309(1)(b), to serve both as judge and surrogate for the ward.
5. These conflicts of interest so tainted the fact-finding process, that permitting Terri Schiavo to die of starvation and dehydration after the execution of the order without first examining whether her rights had been determined at a fair trial would constitute a judicial deprivation of life without due process of law.

Those urging a “hands off” position pointed to the years of litigation<sup>1</sup>, to the guardianship court's substituted judgment

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<sup>1</sup> *In re Guardianship of Theresa Marie Schiavo*, 780 So. 2d 176, 177 (Fla. 2d DCA 2001) (“*Schiavo I*”); *In re Guardianship of Schiavo*, 792 So. 2d 551, 555 (Fla. 2d DCA 2001) (“*Schiavo II*”); *In re Guardianship of Schiavo*, 800 So. 2d 640, 642 (Fla. 2001) (“*Schiavo III*”); *In re Guardianship of Schiavo*, 851 So. 2d 182, 185 (Fla. 2003) (“*Schiavo IV*”), review denied; *In re Guardianship of Schiavo*, 855 So. 2d 621 (Fla. 2003); *Theresa Marie Schindler Schiavo, an Incompetent Ward, Incapacitated, by her Parents and Next Friends, Robert and Mary Schindler v. Michael Schiavo, Individually, and in his Capacity as Guardian of the Person of Theresa Marie Schindler Schiavo, Incapacitated*, 2003 WL 22469905 (M.D. Fla., Sep 23, 2003); *Advocacy*

finding that Terri Schiavo would have chosen to forego nutrition and hydration under the circumstances [App. 8], and to Florida's constitutional right to privacy. FLA. CONST. art. I § 23 .

Concerned that Terri Schiavo's rights to procedural due process, equal protection, fair trial, and adequate representation were violated by the guardianship court prior to the execution of its final order on October 15, 2003, and that allowing her to die under the circumstances would violate her rights to due process and self-determination under federal and Florida law, the Legislature created a remedy that closely resembles a clemency or *habeas corpus* proceeding. Chapter 2003-418, Florida Laws (referred to herein as "Chapter 2003-418"), was adopted on October 21, 2003. The full text of the statute has been set forth above and is attached as Appendix 4.

Acting pursuant to the authority granted by the Legislature, the Governor issued Executive Order No. 03-201 on October 21, 2003, reinstating the provision of nutrition and hydration to Terri Schiavo pending receipt of the guardian *ad litem*'s report. [App. 5].

As implemented, the remedy had features similar to clemency proceedings employed in Florida capital cases<sup>2</sup>:

- 1) Review of the facts of the case and the fairness of the judicial process by the Governor<sup>3</sup>;

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*Center for Persons With Disabilities, Inc. v. Schiavo*, 2003 WL 23305833, 17 Fla. L. Weekly Fed. D 291 (M.D. Fla., Oct 21, 2003).

<sup>2</sup> Compare FLA. CONST. art. IV § 8 (Clemency); FLA. STAT. § 22.06 (Stay of Execution of Death Sentence). FLA. STAT. 940.

<sup>3</sup> Compare FLA. STAT. § 940.03 (2004) (Application for executive clemency "may require the submission of a certified copy of the applicant's indictment or information, the judgment adjudicating the applicant to be guilty, and the sentence, if sentence has been imposed, and may also require the applicant to send a copy of the application to the judge and prosecuting attorney of the court in which the applicant was

- 2) Appointment by the chief judge of the circuit court of an independent guardian *ad litem* whose loyalties are to the ward alone<sup>4</sup>; and
- 3) A report to the chief judge and the Governor of the guardian *ad litem*'s findings and conclusions<sup>5</sup>, after which the Governor can either dissolve the stay, or seek such further relief on behalf of the ward as may be warranted under the circumstances.

Respondent challenged the facial and as applied constitutionality of Chapter 2003-418, alleging, among other things, that Chapter 2003-418 violates the separation of powers. The Governor sought a jury trial at which the facts supporting the facial and as applied constitutionality of Chapter 2003-418 and executive order could be established before an impartial fact-finder. *See* FLA. STAT. § 86.071 (permitting jury trials in declaratory judgment actions). In the Circuit Court's view, however, this case has only two material issues:

For separation-of-powers analysis, the existence of that duly entered final judgment and the Governor's subsequent interference with it are the only essential factual issues.

*Michael Schiavo v. Jeb Bush*, Fla. Sixth Judicial Cir., No. 03-008212-CI-20, 2004 WL 980028 (Fla. Cir. Ct.) [App. 1 at \*8]

The Circuit Court held that the Act was unconstitutional, retroactive legislation that “clearly attaches new legal

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convicted, notifying them of the applicant's intent to apply for executive clemency.”)

<sup>4</sup> *Compare* FLA R. CRIM. P. 3.851(b) “Appointment of Post-Conviction Counsel”; FLA. STAT. § 27.703 (specific conflicts of interest); FLA. STAT. 940.

<sup>5</sup> *Compare* FLA. CONST. art. IV § 8(a) (clemency requires approval of two members of the cabinet).

consequences to Mrs. Schiavo's previously adjudicated privacy right" [App. 1 at \*9], and that allowing the Governor to exercise the protective *parens patriae* power of the State after nutrition and hydration is withdrawn pursuant to court order constitutes a "clear" case of legislative and executive "intrusion into judicial functions." [App. 1 at \*7]. The Florida Supreme Court, relying on this Court's judgment in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), held that the Act violates separation of powers principles:

In this case, the undisputed facts show that the guardianship court authorized Michael to proceed with the discontinuance of Theresa's life support after the issue was fully litigated in a proceeding in which the Schindlers were afforded the opportunity to present evidence on all issues. This order as well as the order denying the Schindlers' motion for relief from judgment were affirmed on direct appeal. See *Schiavo I*, 780 So. 2d at 177; *Schiavo IV*, 851 So. 2d at 183. The Schindlers sought review in this Court, which was denied. Thereafter, the tube was removed. Subsequently, pursuant to the Governor's executive order, the nutrition and hydration tube was reinserted. Thus, the Act, as applied in this case, resulted in an executive order that effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary.

*Bush v. Schiavo*, 2004 WL 2109983, 29 Fla. L. Weekly S515 (Fla. No. SC04-925, Sep 23, 2004) [App. 2 at \*8].

## ARGUMENT

### **I. The Florida Supreme Court's Misapplication of the Separation of Powers Principles Enunciated in *Plaut***

***v. Spendthrift Farm* Denied the Governor His Federal Due Process Rights and Prevented the State of Florida from Protecting the Due Process And Equal Protection Rights of Incompetent Persons Whose Nutrition and Hydration have been Withdrawn by Court Order.**

**A. The Florida Supreme Court Misapplied this Court's Ruling in *Plaut v. Spendthrift Farm***

Relying on this Court's decisions in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) and *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Florida Circuit Court held that legislative authorization for the Governor to assume protective jurisdiction of an incapacitated person denied nutrition and hydration pursuant to a judicial decree prior to his or her death violates the separation of powers. In the Circuit Court's view, Chapter 2003-418 "clearly attaches new legal consequences to Mrs. Schiavo's previously adjudicated privacy right" [App. 1 at \*9], and the creation of the remedy constitutes a "clear" case of legislative and executive "intrusion into judicial functions." [App. 1 at \*7].

The Florida Supreme Court affirmed, holding that, under the principles enunciated in *Plaut* and relevant Florida cases applying them, "the Act, as applied in this case, resulted in an executive order that effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary." [App. 2]. Petitioner submits that this reasoning both rewrites the order authorizing removal of the nutrition and hydration tube, and denied the Governor and his ward a meaningful opportunity to defend their federal due process rights.

As a result of this reasoning, it is now the law in Florida that *all* due process and equal protection questions involved in substituted judgment proceedings – including those that go to the integrity of the judgment itself – merge into the final

decree authorizing the withdrawal of nutrition and hydration. In the Florida Supreme Court's view, the Legislature is now powerless to provide a means by which the Governor can exercise the protective *parens patriae* powers of the State to seek judicial review of the ward's due process and equal protection rights. The practical result is that the incapacitated ward has no means of redress for ineffective representation or where the decree is tainted by a judicial conflict of interest.

Petitioner submits that neither *Landgraf* nor *Plaut* require – or permit – such a result. Unless a substituted judgment decree effectuates *the patient's* wishes, it cannot in any meaningful way be said to have “adjudicated” her privacy right. If the trial that resolved the controversy over her privacy rights was tainted by ineffective representation, equal protection, and due process violations, the guardianship court's order is constitutionally suspect, and the Legislature must be free to adopt new remedies designed to redress those grievances. That is precisely what Chapter 2003-418 does.

**1. Chapter 2003-418 does not violate the separation of powers doctrine.**

The order of the guardianship court required that Respondent “shall cause the removal of the nutrition and hydration tube from the Ward, Theresa Marie Schiavo, at 2:00 P.M. on the 15th day of October, 2003.” The order was carried out when the tube was withdrawn. The Florida Supreme Court, however, reads the order as requiring the *death* of the ward, and effectively rewrites the order. The order the Governor is *charged* with violating (as opposed to the one entered) mandates that Respondent “shall cause the removal of the nutrition and hydration tube from the Ward, Theresa Marie Schiavo, at 2:00 P.M. on the 15th day of October, 2003” *and shall continue to withhold nutrition and hydration from her until she is dead.*

It is undisputed that Chapter 2003-418 was adopted on October 21, 2003, *six days after* the tube was withdrawn in accordance with the guardianship court's order. Unlike the

law in *Plaut*, where Congress attempted a retroactive change in the law designed to reopen a prior judgment, or the law involved in *Landgraf*, where the issue was whether a substantive change in the law should be applied retroactively to cases pending on appeal after final judgment, Chapter 2003-418 has only prospective effect. It creates a new remedy akin to a clemency or *habeas corpus* proceeding, and authorizes the Governor to assert protective jurisdiction of persons in Terri Schiavo's situation in order to ensure that *her* rights are protected before death negates them forever. FLA. CONST. art. IV § 1 ("The governor shall take care that the laws be faithfully executed ....")

Petitioner respectfully submits that neither *Landgraf* nor *Plaut* supports the proposition that the political branches must sit idly by and ignore colorable claims that a manifest injustice will occur if an incompetent ward is allowed to die before the equal protection and due process claims advanced on her behalf by the Governor can be investigated. Read together, both cases support what the Governor and the Legislature have done.

## **2. The Florida Supreme Court's Holding Limits the State's Ability to Comply with the Fourteenth Amendment**

This Court has recognized that the right of an incapacitated person "to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right ... must be exercised for her, if at all, by some sort of surrogate." *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 280 (1990). *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990), the Florida Supreme Court also recognized that "[t]he question [in substituted judgment proceedings] is who will exercise this right and what parameters will limit them in the exercise of this right." *Browning*, 568 So.2d at 12, quoting *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So. 2d 921, 924-925 (Fla. 1984).

Chapter 2003-418 authorizes the Governor to serve as proxy for incapacitated persons where family members challenge the withholding of nutrition and hydration. Because Chapter 2003-418 does not limit how such a challenge must be asserted, it necessarily includes a challenge to either the findings or the fairness of a substituted judgment proceeding that result in an order to withhold nutrition and hydration. The Florida Supreme Court's decision striking the law on separation of powers grounds creates federal constitutional problems.

One problem arises because a judicial decree authorizing withholding of nutrition and hydration will inevitably result in the death of the incapacitated ward. The only constitutional justification for such an order rests on the premise that the purpose of the order is not to cause the death of the ward, but rather to effectuate the ward's substituted judgment concerning the continuation of artificial nutrition and hydration. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 280 (1990). Where, as here, it is alleged that the decree itself violates the federal due process and equal protection rights of the ward, separation of powers cannot be a defense in an action by the State itself to protect the ward's rights.

Substituted judgment proceedings are permissible *only* in the case of persons with cognitive disabilities that make it impossible for them to make independent, fully informed choices regarding the nature and duration of their medical treatment. Since persons with severe cognitive disabilities have the same rights to procedural due process and equal protection enjoyed by others, the separation of powers doctrine guarantees that each of the three branches of state government has an *independent* role in ensuring that surrogates – whoever they may be – protect the rights of their incapacitated wards. See *Jackson v. Indiana*, 406 U.S. 715 (1972) (unjustified commitment); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (abuse & neglect in state hospitals);

*Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (irrational discrimination in zoning).

The Florida Legislature exercised its authority by enacting detailed procedures defining the duties of proxies, guardians, and surrogates. FLA. STAT., §§ 744.101 *et. seq.* (surrogates and guardians), § 765.401 (proxies). Notably, it has strictly forbidden any sort of conflict of interest on the part of a judge, proxy, or guardian. FLA. STAT. § 44.309. It has defined the procedures to be followed by persons wishing to make an advance directive or appoint a health care proxy, FLA. STAT., Ch. 765, and has defined the duties of courts called upon to ascertain the intent of an individual who, like Terri Schiavo, has been diagnosed as being in a PVS and has left no written advance directive. FLA. STAT. § 765.404.

Read together with the decisions of this Court and relevant Florida case law, these statutes define the nature and scope of the protection and process due *to the incapacitated person* when a Florida court authorizes a guardian, surrogate, or proxy to withhold or withdraw life-sustaining treatment. Florida Laws, Chapter 2003-418 merely adds an additional layer of due process protection, and guarantees that death will not extinguish the ward's rights to due process and equal protection.

The Florida courts' power is exclusively judicial. They supervise the conduct of proxies and other litigants before them and decide substituted judgment cases brought by those who seek to withhold or withdraw life-sustaining treatments. Where, as here, the judicial *process* is alleged to be tainted by conflict of interest, the Fourteenth Amendment certainly permits the Legislature and the Governor to satisfy themselves that the incapacitated ward will not be deprived of her life without due process of law.

The Governor's authority to "faithfully execute" state and federal laws protecting the rights, privileges, and immunities guaranteed to all within the jurisdiction of the State of Florida by the Fourteenth Amendment, including those whose rights

have been violated by a judicial decree entered by a Florida court, is confirmed by the Supremacy Clause. U.S. CONST. art. VI; U.S. CONST. amend. XIV § 1; FLA. CONST. art. IV § 1 (“The governor shall take care that the laws be faithfully executed, ....”). The executive can exercise either the authority he has under existing law, or, as in this case, propose new legislation that would either confer the authority needed to redress the grievance or change the law to negate the prospective effect of the questionable ruling. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (“Purely prospective application [of changes in the law] would prolong the life of a remedial scheme, and of judicial constructions of civil rights statutes, that Congress obviously found wanting”). *See generally* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-1990).

The Florida courts have blurred the distinction between the independent roles of the three branches in substituted judgment cases. This Court should grant the writ, and reaffirm the State’s power to ensure the equal protection and due process rights of persons with severe cognitive disabilities in substituted judgment proceedings.

### **B. The Florida Supreme Court Ruling Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment**

The due process issue the Legislature sought to correct focused on the guardianship judge’s simultaneous service as judge and proxy. The Legislature was no doubt also concerned about the lack of equal protection afforded the incapacitated wards in guardianship court. In the aftermath of *Schiavo* decisions, Florida law, as developed and applied by its courts, leaves without protection from judicial conflicts of interest only those whose mental disabilities are so severe

that a substituted judgment approach is the only way to protect their rights.

In the case at bar, the due process and equal protection problems are embedded in the rule, announced by the District Court of Appeal, *Schiavo I*, allowing judges to serve as surrogates, and they became a part of Florida constitutional law when the Florida Supreme Court affirmed the guardianship decision. *In re Guardianship of Schiavo*, 789 So. 2d 348 (Fla. 2001) (Table), *aff'g In re Guardianship of Theresa Marie Schiavo: Schindler v. Schiavo*, 780 So. 2d 176, 177 (Fla. 2d DCA 2001).

Because Chapter 2003-418 applies only to incapacitated individuals whose rights “must be exercised for [them], if at all, by some sort of surrogate,” most states, including Florida, have adopted statutes that prescribe detailed procedures that must be followed by guardians and surrogates, FLA. STAT., §§ 744.101 *et. seq.* (surrogates and guardians), § 765.401 (the proxy); by persons who wish to make an advance directive or appoint a health care proxy, FLA. STAT., Ch. 765; and by courts charged with the responsibility of ascertaining the intent of an individual who has left no advance directive and who, like Terri Schiavo, has been diagnosed as being in a PVS. FLA. STAT. § 765.404.

In each of these situations, the Florida Legislature has made it clear that proxies, surrogates, and the courts that supervise them must be untainted by any possible conflict of interest. FLA. STAT. § 744.309 (1)(b) provides, in relevant part:

(1) (b) No judge shall act as guardian after this law becomes effective, except when he or she is related to the ward by blood, marriage, or adoption, or has maintained a close relationship with the ward or the ward's family, and serves without compensation.

*See also* FLA. STAT. § 744.309 (3) (“The court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.”).

In the case at bar, the conflict of interest that Chapter 2003-418 sought to ameliorate is not only firmly embedded in the law of the Schiavo guardianship case, but also in the fabric of Florida constitutional law. In *Schiavo I*<sup>6</sup>, the guardianship court faced a dilemma. Respondent, Michael Schiavo, had petitioned for an order authorizing withdrawal of nutrition and hydration. Terri’s father, Robert Schindler, objected. He alleged that Respondent should be disqualified from serving as Terri’s guardian and surrogate because Mr. Schiavo stood to inherit the balance of a malpractice award against the doctor who treated Terri at the time of her brain injury.

Recognizing that “there may be occasions when an inheritance could be a reason to question a surrogate's ability to make an objective decision,” *id.*, the Court of Appeal held that *the guardianship court itself* had jurisdiction to serve as surrogate decision-maker for Terri Schiavo.

Because Michael Schiavo and the Schindlers could not agree on the proper decision and the inheritance issue created the appearance of conflict, Michael Schiavo, as the guardian of Theresa, invoked *the trial court's jurisdiction to*

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<sup>6</sup> *In re Guardianship of Theresa Marie Schiavo: Schindler v. Schiavo*, 780 So. 2d 176, 177 (Fla. 2d DCA 2001), *aff'd* without opinion *In re Guardianship of Schiavo*, 789 So. 2d 348 (Fla. 2001) (Table)

*allow the trial court to serve as the surrogate decision-maker.”*

*Schiavo I*, 780 So.2d at 178 (emphasis added).

Petitioner submits that the Due Process Clause does not permit judges to serve in the dual capacity of health-care surrogate and judge. Florida’s guardianship statutes, Florida Laws, Chapter 744, expressly prohibit such conflicts of interest. So too does Florida constitutional law. In *In re TW*, 551 So. 2d 1186, 1190 n. 3 (Fla. 1989), the Florida Supreme Court held:

... Under no circumstances is a trial judge permitted to argue one side of a case as though he were a litigant in the proceedings. The survival of our system of justice depends on the maintenance of the judge as an independent and impartial decisionmaker. A judge who becomes an advocate cannot claim even the pretense of impartiality.

Accord, *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

This is precisely the situation the Legislature attempted to remedy with Chapter 2003-418. The Florida Supreme Court allows judges to serve as proxies *only* in substituted judgment cases where there are reasonable grounds to believe that those otherwise eligible to serve will not provide their ward with effective assistance. This, Petitioner submits, violates the ward’s rights under the Due Process *and* Equal Protection Clauses. See *Tennessee v. Lane*, 124 S.Ct. 1978, 1989 & nn. 8-14 (2004) (recounting the history of discrimination against persons with disabilities); *Jackson v. Indiana*, 406 U.S. 715 (1972) (unjustified commitment); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (abuse & neglect in state hospitals);

*Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (irrational discrimination in zoning).

After *Schiavo I*, which is the law of the guardianship case to which Respondent (but not the Governor) is a party, the *only* persons in the State of Florida who are not entitled to an impartial judge are incapacitated persons whose rights must be determined in substituted judgment proceedings. Petitioner submits that a due process violation of this magnitude that exists *only* in the case of incapacitated persons also raises profound equal protection questions that extend far beyond the four corners of this particular case.

**C. This Court Should Grant the Writ and Affirm the Power of State Legislatures to Structure the Process in which Substituted Judgment Decisions are Made for Incompetent Wards.**

The Florida Legislature recognized the right of competent adults to refuse treatment, FLA. STAT. § 765.101. It also provided detailed guidelines for cases in which the right to self-determination must be made for an incapacitated person by a proxy. FLA. STAT. § 765.401. In every case, these rights are expressly made “subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession.” FLA. STAT. § 765.102(1).

In the case at bar, the Florida Legislature faced *two* “unfortunate situations” that arose because disputes among family members made it impossible for them “to protect [their] patient.” *Cruzan*, 497 U.S. at 281, quoting *In re Jobes*, 108 N.J. 394, 419, 529 A.2d 434, 447 (1987). The appearance of a conflict of interest on the part of both Respondent and Terri’s parents made it inappropriate, in the guardianship court’s opinion, for any of them to serve as Terri’s surrogate. See *Schiavo I*, 780 So.2d at 178. The Governor submits that, at that point, the guardianship court was required by both the federal Due Process Clause and

Florida law to appoint a proxy who would represent *only* Terri's interests, but it did not do so. The judge improperly tried to fill the gap by serving as both Terri Schiavo's surrogate and as the trial judge who would attempt to determine her present wishes. *Id.*

The case at bar therefore offers this Court an opportunity to clarify the ways in which the Due Process and Equal Protection Clauses of the Fourteenth Amendment shape the relationship between the separation of powers and the preservation of individual rights in a setting where the person whose rights are to be adjudicated cannot speak for herself. Because the Florida Supreme Court refused even to consider the possibility that permitting a trial court to serve simultaneously as surrogate might have tainted the fact-finding process, it is now impossible for Florida's political branches to adopt post-judgment (but pre-death) remedies that will resolve these important federal due process and equal protection issues.

In *Cruzan*, this Court recognized that “[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality,” and that a State has more particular interests at stake” when it elaborates and refines a process by which it will resolve conflicts between family members over the person’s wishes or the fairness of the proceeding in which they were determined. Writing for the majority, the Chief Justice held:

Whether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest.

*Cruzan*, 497 U.S. at 280.

Petitioner respectfully submits that this Court should grant the writ and clarify the boundary between the political and judicial branches in this important, and emerging, field of law.

**II. The Florida Supreme Court Violated the Federal Due Process Rights of the Governor and his Incompetent Ward When It Gave Preclusive Effect to Factual Findings in a Substituted Judgment Proceeding to which the Governor was Not a Party.**

The Florida Supreme Court found that the Governor violated the Florida Constitution by taking action that “effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary” [App. 2]. Although it did not address Respondent’s allegation that the Executive Order violated Terri Schiavo’s privacy rights, it did hold Chapter 2003-418 unconstitutional “as applied to Terri Schiavo.” [App. 2].

Petitioner disputed the material facts supporting both challenges and sought a jury trial, but the Circuit Court granted summary final judgment. [App. 1] In its view, only two facts are material to a finding that the Executive Order violated the principle of separation of powers: “For separation-of-powers analysis, the existence of that duly entered final judgment and the Governor's subsequent interference with it are the only essential factual issues.” *Schiavo v. Bush*, [App. 1 at p. 16].

Petitioner submits that as Governor and as the legislatively appointed proxy for his ward, Terri Schiavo, he was entitled under the Due Process Clause to a *de novo* hearing on all allegations in the complaint, including the ward’s desires regarding the provisions of nutrition and hydration. The Florida Supreme Court, by contrast, assumed that all relevant disputed fact questions were conclusively determined by the decree in the guardianship case:

When the prescribed procedures are followed according to our rules of court and the governing statutes, a final judgment is issued, and all post-judgment procedures are followed, it is without question an invasion of the authority of the judicial branch for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination in a case. That is precisely what occurred here *and for that reason* the Act is unconstitutional as applied to Theresa Schiavo.

*Schiavo v. Bush*, [App. 2] (emphasis added).

**A. The Due Process Clause of the Fourteenth Amendment Forbids Granting Preclusive Effect to Disputed Facts Developed in a Proceeding to which the Petitioner was not a Party.**

The Governor was not a party to the action that authorized the withholding of nutrition and hydration from Terri Schiavo, nor is he in privity with any of them. In the words of the Circuit Court: “[h]e was, and remains, a stranger to Mrs. Schiavo's guardianship proceeding[, whose] only colorable legal interest in Mrs. Schiavo derives from the Act that is the subject of this declaratory action.” *Schiavo v. Bush*, -- [App. 1 at p. 16] Accordingly, the Governor was not bound by the findings of fact in the guardianship case. *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996); *Hansberry v. Lee*, 311 U.S. 32 (1940). *See also Lockport v. Citizens for Community Action at Local Level, Inc.*, 430 U.S. 259, 263, n.7 (1977) (voting rights challenge by county residents not barred by county's prior suit).

Respondent challenged Chapter 2003-418 in a declaratory judgment action. Under Florida law, Respondent's burden was “to negate every conceivable basis which might support” the legislation, *Gallagher v. Motors Ins. Co*, 605 So. 2d 62, 68-69 (Fla. 1992), and the Governor was entitled to a jury

trial to resolve disputed issues of fact. FLA. STAT. § 86.071. The Governor was entitled therefore to defend not only his power to “take care” that state and federal law governing the rights of incompetent wards would be “faithfully executed,” but also to defend the Legislature’s decision to invest him with the *parens patriae* power to serve as official proxy for all incompetent wards who met the criteria set forth in Chapter 2003-418. The Governor was authorized in that capacity to defend *Terri Schiavo’s* procedural due process right to a fair substituted judgment hearing at which she was adequately represented. As this Court explained in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930):

We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff’s claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final.... Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, -- whether it has had an opportunity to present its case and be heard in its support.... [W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. *Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.*

*Id.*, at 681-682 (emphasis added).

**B. The State of Florida is Authorized by the Fourteenth Amendment to Name the Governor Proxy for the Class of Vulnerable Individuals Described by Chapter 2003-418.**

Not only did the Florida Supreme Court refuse the Governor the opportunity to defend the State's actions from Respondent's separation of powers and privacy attack, it also "reject[ed] the Governor's argument that this legislation provides an additional layer of due process protection to those who are unable to communicate their wishes regarding end-of-life decisions." *Schiavo v. Bush*, [App. 2 at \*12]. In the Florida Supreme Court's view, "chapter 2003-418's standardless, open-ended delegation of authority by the Legislature to the Governor provides no guarantee that the incompetent patient's right to withdraw life-prolonging procedures will in fact be honored." [App. 2 at \*12].

Petitioner submits that the Florida Supreme Court's approach not only "begs the question" central to this Court's analysis in *Cruzan*, 497 U.S. at 280, but it also misses the central point of the case: *i.e.* that the "choice" to be protected is that of the *incompetent patient*, not that of either the court or of any other person. If, as the Legislature intended, the Governor were to serve as Terri Schiavo's proxy for the purpose of testing the adequacy of the process, his discretion to raise her equal protection and due process interests was coextensive with hers. Granting him her discretion could not, under *Cruzan*, violate either the decree (which purported to protect her interests), or the separation of powers.

In *Cruzan*, this Court held that Missouri's imposition of heightened evidentiary requirements was *one* acceptable means by which the State might "legitimately seek to safeguard the personal element of this choice." *Id.*, at 281. This Court also implied, but did not decide, that the integrity – if not the constitutionality – of a substituted judgment order turns on the nature and quality of the representation provided by those charged with protecting those whose "'right' [to

refuse treatment] must be exercised for her, if at all, by some sort of surrogate.” *Id.*, at 280.

Effective representation is thus the *sine qua non* of the *incompetent person’s* right to procedural due process in the substituted judgment proceeding. It is also the necessary precondition for the full implementation of the substantive rights the state sought in *Cruzan* to protect with its heightened evidentiary requirement. Given the nature of a substituted judgment proceeding, inadequate representation is the one defect that neither the State, *as parens patriae*, nor the court, nor the parties can waive or otherwise avoid. Without effective representation, neither the parties, nor the State can be sure that the facts found by trial courts are a constitutionally sufficient “substitutes” for the decisions incompetent wards would have made for themselves under the circumstances.

A decree in a substituted judgment case that authorizes withdrawal of nutrition and hydration, is for all practical purposes, the functional equivalent of a judicially imposed death sentence. No doubt that is why even the dissenters in *Cruzan* recognized that *accuracy*, not finality, is the touchstone of all substituted judgment inquiries:

As the majority recognizes, (citation omitted) Missouri has a *parens patriae* interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances. Second, if and when it is determined that Nancy Cruzan would want to continue treatment, the State may legitimately assert an interest in providing that treatment. But *until* Nancy's wishes have been determined, the only state interest that may be asserted is an interest in safe-guarding the accuracy of that determination.

Accuracy, therefore, must be our touchstone. Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination.

*Id.* at 315-16, 318 (Brennan, Marshall, and Blackmun, JJ., dissenting) (emphasis in the original). Where, as here, Governor has made “a substantial showing of the denial of [a] federal right” on his own behalf and that of his ward, it was certainly within the power of the Legislature to provide a post-judgment review of the fairness of the process. *See Lochnar v. Thomas*, 517 U.S. 314, 320 (1996) (discussing the reasons for granting a stay of execution in a pending *habeas corpus* proceeding) citing *Barefoot v. Estelle*, 463 U.S. 880, 891 & n. 4 (1983) (noting that “[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause,” and discussing the grounds for such a certificate: “that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'”) (internal quotes omitted).

Furthermore, like the Florida Legislature in this case, the Justices in *Cruzan* expressly distinguished cases in which the families agree from cases like this one in which there is a real controversy over the ward's wishes. *Cruzan*, 497 U.S. at 318. Given that this dispute over the constitutional rights of the ward will affect future substituted judgment cases in Florida, and perhaps in other states, this Court should grant the writ, vacate the judgment of the Florida Supreme Court, and remand with instructions to permit the Governor to address the ward's federal claims.

The Governor respectfully submits that to do otherwise would send a profoundly disturbing message to all who love and care for those with profound cognitive disabilities. If Terri Schiavo's proxy is precluded by the substituted judgment decree from arguing that her federal due process rights were denied by ineffective representation so too is Terri Schiavo herself. This cannot be the meaning of either *Cruzan* or *Plaut*. See RESTATEMENT (2d) JUDGMENTS §42(1) ("A person is not bound by a judgment for or against a party who purports to represent him if: ... (e) The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent.").

As Justice Brennan pointed out in his dissent in *Cruzan*:

... In a hearing to determine the treatment preferences of an incompetent person, a court is not limited to adjusting burdens of proof as its only means of protecting against a possible imbalance. Indeed, any concern that those who come forward will present a one-sided view would be better addressed by appointing a guardian ad litem, who could use the State's powers of discovery to gather and present evidence regarding the patient's wishes. A guardian ad litem's task is to uncover any conflicts of interest and ensure that each party likely to have relevant evidence is consulted and brought forward--for example, other members of the family, friends, clergy, and doctors.

That is the situation in this case. Respondent argued that the findings in the guardianship proceeding must be treated as determinative. In his view, "determining Mrs. Schiavo's intent (again) is not material", and that it would be constitutionally irrelevant even if a "hundred juries" determined that the order had not comported with Terri Schiavo's wishes. (Respondent's Answer Brief, pp. 9, 16).

Given this dispute, the Executive Order does precisely what is necessary to preserve the *status quo ante* while an unbiased guardian *ad litem* examines the facts and claims by her family that the courts violated her federal due process and equal protection rights.

### **III. Conclusion**

The implications of the Florida Supreme Court's opinion for persons with disabilities are ominous. Individuals who are the subject of substituted judgment proceedings are among the most vulnerable of our citizens who cannot speak for themselves. With the passage of Chapter 2003-418, the Florida Legislature sought to address a problem that can, and most assuredly will, arise in substituted judgment cases whenever there is reason to believe that the trial was not fair or has resulted in a miscarriage of justice. The Florida Supreme Court's use of the separation of powers doctrine to invalidate a remedy that closely resembles a clemency or *habeas corpus* proceeding has, in fact, created a uniquely vulnerable class of incompetent persons. The persons described by Chapter 2003-418 are the *only* persons in Florida who have no right to seek an independent, pre-execution review of their procedural due process rights.

It has taken our nation many years to make good on its commitment to equal justice for persons with profound cognitive disabilities. Unless the State of Florida retains the power to protect the rights of its most vulnerable citizens to due process and equal protection of the laws, the Fourteenth Amendment's guarantees will apply only to those who are capable of defending them on their own.

Petitioner respectfully submits that the Writ should be granted.

Respectfully submitted,

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Date submitted: November 30, 2004