MEMORANDUM OF LAW
BY: Dorothy Timbs, J.D., Legislative Counsel, Robert Powell Center for Medical Ethics
DATED: February 15, 2005
RE: WHY HB 701 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE AS APPLIED BY THE FLORIDA SUPREME COURT IN BUSH V. SCHIAVO TO STRIKE DOWN TERRI'S LAW I

In *Bush v. Schiavo*[1], the Florida Supreme Court struck down Terri's Law I on the ground that it violated the separation of powers doctrine. The Court offered two primary reasons for this infirmity. First, Terri's Law I encroached on the power of the judicial branch by interfering with a final judicial determination in a case. Second, Terri's Law I violated the "non-delegation" doctrine by giving the Governor the ability to exercise unfettered discretion in applying Terri's Law I without meaningful judicial review.[2] Thus, this memo will explain how HB 701differs in these respects from Terri's Law I.

Encroachment on the Judicial Power

In *Bush v. Schiavo*, the Florida Supreme Court expressly drew a parallel between the Florida Constitution's separation-of-powers provision, Article II, Section 3, as elucidated by *Trustees Internal Improvement Fund v. Bailey*[3], and the U.S. Constitution's correlative separation of powers doctrine, as elucidated in *Plaut v. Spendthrift Farm, Inc*[4]. Relying heavily upon these cases, the Court reasoned that Terri's Law I encroaches on the power and authority of the judicial branch.[5] In *Plaut*, the Supreme Court held that Congress cannot, without violating the doctrine of separation of powers, enact new law that requires federal courts to reopen final judgments entered before the enactment. [6] However, the Court also recognized certain specific exceptions to this rule, citing prior decisions and stating, "nothing in our holding today calls them into question."[7] One such exception directly applies to HB 701: the general prohibition against reopening final judgments by an act of the legislature does not apply to injunctive orders with prospective effect.[8] For this exception, *Plaut* cited *Wheeling & Belmont Bridge Co. v. Pennsylvania*[9].

In *Wheeling*, the United States Supreme Court had previously determined that a bridge of low elevation inhibited interstate commerce on the Ohio River. Based on this final judgment, the Court then issued an order requiring the Wheeling & Belmont Bridge Company to cease the maintenance or construction of such a bridge unless it complied with minimum standards of elevation. Subsequently, the bridge was blown down by a

[1] 885 So.2d 321 (2004).
[2] *Id.* at 332.
[3] 10 Fla. 238, 250 (1863).
[4] 514 U.S. 211, 221-222 (1995)(cited in *Bush v. Schiavo*, 885 So.2d 321,330 (2004)).
[5] *Bush v. Schiavo*, 885 So.2d 321, 329-330 (2004.)
[6] *Plaut*, 514 U.S. at 228.
[7] *Id.* at 232 (recognizing decisions upholding legislation altering final judgments of non-Article III courts or administrative agencies, or prospective effect of injunctions entered by Article III courts.)
[8] *Id.* (citing *Wheeling & Belmont Bridge Co. v. Pennsylvania*, 59 U.S. 421 (1856)).
[9] 59 U.S. 421 (1856).

violent storm, and the Wheeling Bridge Company prepared to rebuild the bridge according to the original standards (in violation of the injunction). Congress then passed a law declaring such a bridge to be lawful in its present position and elevation. Based on this legislation, the Bridge Company requested that the Court dissolve the injunction. Reasoning that its previous determination that the bridge inhibited interstate commerce by obstructing the Ohio River was modified by the congressional act, the Supreme Court granted the company's request.[10]

Thus, under *Wheeling*, which *Plaut* refused to "call into question," the general rule forbidding legislative enactments from disturbing final judicial determinations is not absolute; the general rule does not apply where legislative enactments alter the prospective application of injunctions.

The United States Supreme Court has carefully delineated, affirmed and reiterated this exception on a number of occasions. In *System Federation No. 91, Railway Employes' Dep't, AFL-CIO, v. Wright*[11], the Court explained, "There is … no dispute but that a sound judicial discretion may call for the modification of the terms of an injunction decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have arisen." In *Rufo v. Inmates of the Suffolk County Jail*[12], the Court emphasized, "A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law." Although the case dealt with a consent decree, the Court noted, "A consent decree ... is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other decrees and judgments."[13]

Viewing the injunction exception from another angle, the Court has noted that "when an intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive"[14].

Following the Supreme Court, the federal circuit courts of appeal have also articulated this exception. The first circuit stated in *Inmates of Suffolk County Jail v. Rouse*[15], "This exception for legislation that alters the prospective effects of injunctions is not new: its roots burrow deep into our constitutional soil." (holding that the Prison Litigation Reform Act's provision requiring the termination of prospective relief under a

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[10] In *Wheeling*, the injunction was executory, defined as "not fully accomplished or completed, but contingent upon the occurrence of some event or in the performance of some act in the future." *Black's Law Dictionary* (3rd ed. 1991). The Court explained that the injunction was executory since it depended upon the bridge's continuing to be an unlawful obstruction over the Ohio River. Thus, when Congress declared otherwise, the injunction was rightly dissolved. *Wheeling*, 59 U.S. at 431.

[11] 364 U.S. 642, 647 (1961).

[12] 502 U.S. 367, 388 (1992).

[13] *Id.* at 378.

[14] *Landgraph v. USI Film*, 511 U.S. 244, 273 (1994)(declining to retroactively apply the statutory right to a jury-trial, where the statute did not contain express or implied intent on the part of Congress to apply it retroactively.)

[15] 129 F.3d 649 (1st Cir. 1997).

consent decree was constitutional). The court further discussed the injunction exception discussed in *Plaut*, concluding, "although a judgment at law is impervious to legislative assault, a forward-looking judgment in equity can succumb to legislative action if the legislature alters the underlying rule of law."[16] Significantly, six other circuits upheld the application of the same statutory provision against separation of powers challenges in similar contexts.[17]

Bush v. Schiavo explained the general rule that the legislature cannot disturb final judgments by passing new legislation without specifically mentioning the exceptions listen in *Plaut.* Given the opinion's heavy reliance upon *Plaut*, however, it would be strange if the Florida Supreme Court, in an appropriate case, refused to follow *Plaut* on the exceptions as well. The Florida Court began its analysis by stating, "these proceedings are relevant only to the extent that they occurred and resulted in a final judgment directing the withdrawal of life-prolonging procedures."[18] However, many of the aforementioned cases demonstrate that the crucial inquiry is not whether the order to remove the Terri's feeding tube was a final judgment. The crux of the matter is whether that order is *injunctive in nature.* It can hardly be disputed that an order to remove a feeding tube is anything *but* injunctive. Money damages are not sought after- the crux of this litigation centers upon the Court's order to remove Terri's feeding tube. For this reason, the "final judgment" that seemed so airtight in *Bush v. Schiavo* becomes more easily likened to a "cease and desist" order. The injunction exception applies and HB 701[19] therefore does not offend separation of powers doctrine on this basis.

HB 701 renders non-delegation concerns irrelevant.

The second primary basis supporting a violation of separation of powers in *Bush v. Schiavo* was that Terri's Law I violated the non-delegation doctrine by delegating the legislative power to the Governor.[20] By allowing the Governor to issue a one-time stay to prevent the withholding of nutrition and hydration under certain circumstances, Terri's Law I violated the principle of non-delegation.[21] The Court went to great lengths to illustrate the danger and unconstitutionality of delegating too much authority to various offices of the executive branch, concluding that Terri's Law I's failure to include criteria for issuing or lifting a stay resulted in absolute, unfettered discretion, rendering the Governor's decision virtually unreviewable. [22]

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[16] *Id.* at 656.
[17] *Hadix v. Johnson*, 133 F.3d 940, 943 (6th Cir.), cert. Denied 118 S.Ct. 2368 (1998); *Dougan v. Singletary*, 129 F.3d 1424, 1426-27 (11th Cir. 1997); *Imprisoned Citizens Union v. Tom Ridge*, 169 F.3d 178 (3rd Cir. 1999); *Benjamin v. Jacobson*, 124 F.3d 162, 173 (2d Cir.1997); *Gavin v. Branstad*, 122 F.3d 1081, 1087 (8th Cir. 1997); *Plyler v. Moore*, 100 F.3d 365, 371 (4th Cir. 1996).
[18] *Bush v. Schiavo*, 885 So. 2d. 321, 328 (2004).
[19] Section 8 of HB 701 states that "this act shall apply prospectively in litigation pending on the effective date of this act and shall supersede any court order issued under the law in effect before the effective date of this act to the extent that the court order conflicts with this act and would otherwise be applied on or after the effective date of this act. This act shall apply with respect to every person living on or after the effective date of this act."
[20] *Id. at* 332.
[21] Ch. 2003-418, Laws of Fla.
[22] *Id.* at 334.

Unlike Terri's Law I in *Bush v. Schiavo*, the Court's concerns regarding non-delegation do not apply to HB 701, which does not delegate any authority to the Executive. Instead, HB 701 straightforwardly amends Ch. 765 of the Florida Statutes by defining important terms such as "express and informed consent" and "reasonable medical judgment." HB 701 also strikes an appropriate balance between the judicial and legislative branches by deferring to the judicial authority to decide cases, while fulfilling the legislative mandate to create law. Moreover, HB 701 is anything but standardless, as the Court held Terri's Law I to be in *Bush v. Schiavo.* To the contrary, HB 701 *creates* standards. It does so by creating guidelines to assist those trial courts who, as the Florida Court readily acknowledged, are "called upon to make many of the most difficult decisions facing society … [t]hese decisions literally affect the lives or deaths of patients."[23]

For these reasons, HB 701 would likely withstand separation of powers challenges such as those launched in *Bush v. Schiavo*.

[23] *Bush v. Schiavo*, 885 So.2d 321, 332 (2004).