IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
PROBATE DIVISION

File No. 90-2908GD-003

IN RE GUARDIANSHIP OF
THERESA MARIE SCHINDLER-SCHIAVO,

Incapacitated.

MICHAEL SCHIAVO,

Petitioner,

v.

ROBERT SCHINDLER and MARY SCHINDLER,

Respondents.

RESPONDENTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT
AND MOTION TO RECONSIDER

ROBERT and MARY SCHINDLER, interested persons in the life and welfare of their daughter, Theresa Marie Schindler-Schiavo ("Terri"), hereby respectfully submit, by and through undersigned counsel, their memorandum of law in support of the motion for relief from judgment and motion to reconsider filed on July 20, 2004 ("Respondents' Motion").[1]

I. INTRODUCTION

The Florida District Court of Appeal has ruled that Robert and Mary Schindler ("the Schindlers") have standing "at any time" to seek relief from the February 11, 2000 order of this Court. *See In re Guardianship of Schiavo (Schindler v. Schiavo)*, 792 So. 2d

[1] This memorandum of law also addresses the arguments raised in Petitioner's Memorandum in Opposition to Motion for Relief from Judgment filed on August 24, 2004.

551, 553, 558 (Fla. 2d DCA 2001) ("*Schiavo II*"). The Court of Appeal specifically stated:

> [W]e conclude that a final order entered in a guardianship adversary proceeding, requiring the guardian to discontinue life-prolonging procedures, is the type of order that may be challenged by an interested party *at any time* prior to the death of the ward on the ground that it is no longer equitable to give prospective application to the order.

Id. at 553 (emphasis added). The Court clarified that the February 11, 2000 order "is not a standard legal judgment, but an order in the nature of a mandatory injunction," which is "entirely executory" and "subject to recall" as long as the ward is alive. *Id*. at 559.

The Court of Appeal also provided guidance on how the order could be challenged, and stated that the Schindlers "should challenge the final order by a motion for relief from judgment filed in the adversary proceeding …." *Id*. at 553. It ruled that "the Schindlers have the right to seek relief from [the] judgment under rule 1.540(b)(5)," and should do so by alleging "new circumstances affecting the decision made by the trial judge as the ward's proxy in February 2000." *Id*. at 561. The new circumstances "must make it no longer equitable for the trial court to enforce its earlier decision" because, given the new circumstances, Terri "would not have made the decision to withdraw life-prolonging procedures," or "would make a different decision at this time." *Id*. at 561, 554.

On remand, the Schindlers filed a timely motion for relief from judgment pursuant to Fla. R. Civ. P. 1.540(b)(5). *See In re Guardianship of Schiavo (Schindler v. Schiavo)*, 800 So.2d 640, 642 (Fla. 2d DCA 2001) ("*Schiavo III*"). The guardianship court summarily denied the Schindlers' motion and, on appeal, its decision was reversed. *See id*. at 643, 645. The Court of Appeal ruled that "the Schindlers' motion for relief from judgment and the supporting affidavits state a 'colorable entitlement' to relief," which

"requires the trial court to permit certain limited discovery and conduct an evidentiary hearing to determine whether [the] new evidence calls into question the trial court's earlier decision that [Terri] would elect to cease life-prolonging procedures if she were competent to make her own decision." *Id.* at 641-42.

The Court of Appeal based its ruling on the assumption, which Florida courts "must" make, that patients, in exercising their right to privacy, would choose to defend life:

> This [C]ourt has repeatedly stated that, in cases of termination of life-support, *the courts must assume that a patient would choose to defend life in exercising the right of privacy.*" *See Schiavo I*, 780 So. 2d at 179; *In re Guardianship of Browning*, 543 So. 2d 258, 273 (Fla. 2d DCA 1989). *This default position requires this court to conclude that the medical affidavits are sufficient to create a colorable entitlement to relief* sufficient to warrant an evidentiary hearing on the motion for relief from judgment.

Id. at 645 (emphasis added). The Court of Appeal held further that "the Schindlers, as the proponents of the motion [for relief], must prove *only by a preponderance of the evidence* that the initial judgment is no longer equitable." *Id.* (emphasis added).

In the instant motion for relief, the Schindlers have shown a substantial change in circumstances arising after the entry of the judgment, which not only affects the decision made by the trial judge as Terri's proxy in February 2000, but also makes it no longer equitable for the guardianship court to enforce its earlier order. These new circumstances directly impact Terri's life-long religious beliefs, and her fundamental right to freedom of religious belief and expression. As explained more fully below, given the recent developments within the Holy Roman Catholic Church, Terri would *not* have made the decision to withdraw life-prolonging procedures, and would make a very different decision at this time. Respondents' motion and supporting affidavits state a colorable entitlement to relief, and they are entitled to limited discovery and an evidentiary hearing on this matter.

II. ARGUMENT

A. The Roman Catholic Church Has Now Determined That The Provision Of Food And Water Is "Not A Medical Act," And Can Never Morally Be Withheld From Persons In A Persistent Vegetative State.

In February 2000, when this Court ruled, as Terri's proxy, that she would elect not to be kept alive by life-prolonging medical procedures, the Roman Catholic Church ("the Church") had not made a clear and explicit statement on what constitutes a "life-prolonging medical procedure." Indeed, no Roman Pontiff had ever addressed the issue. A few months ago, however, on March 20, 2004, following an international symposium at the Vatican on life-sustaining treatments and the vegetative state, His Holiness Pope John Paul II, Vicar of Christ on Earth[2] according to the Catholic faith, addressed the issue, establishing the Church's position and setting forth the moral and spiritual doctrine that all Catholics must follow.

As shown in Respondents' motion, the Pope's pronouncement was unequivocal. The Roman Pontiff stated in the clearest of terms that the administration of food and water, even if by artificial means, can never be considered "a medical act:"

> I should like particularly to underline how the administration of food and water, even when provided by artificial means, *always* represents a *natural means* of preserving life, *not a medical act*. Its use, furthermore, should be considered, in principle, *ordinary and proportionate*, and as such *morally obligatory*, insofar as and until it is seen to have attained its proper finality, which in the present case consists in providing nourishment to the patient and alleviation of his suffering.

See Respondents' Motion at 4 & Exhibit A thereto (emphasis in original & other emphasis added).[3]

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[2] "Vicar" is defined as "[o]ne who performs the functions of another; a substitute." Black's Law Dictionary 1566 (6th ed. 1990; Centennial Edition (1891-1991)) ("Black's Centennial Edition").

[3] Respondents' Motion and Exhibits A-G are incorporated herein by reference.

The Pope also made it clear that even when a person is seriously ill, or disabled in the exercise of their highest functions, or in the clinical condition of a "vegetative state," he or she still must be provided with basic health care – "nutrition, hydration, cleanliness, warmth, etc." *Id.* In addition, such individuals must be provided with rehabilitative care, and appropriate treatment to prevent complications related to their confinement in bed, as well as monitored for clinical signs of eventual recovery. *See id.*

Following the Pope's pronouncement, the Secretariat for Pro-Life Activities of the U.S. Conference of Catholic Bishops confirmed its enormous significance, stating that it "profoundly changed the worldwide debate on how to respond to [the PVS] condition:"

> On March 20, [2004] speaking to participants in an international congress on the 'vegetative' state, Pope John Paul II *profoundly changed the worldwide debate on how to respond to this condition.* He issued the first clear and explicit papal statement on the obligation to provide food and water for patients in a 'persistent vegetative state' (PVS).
>
> With the Pope's statement, the Church's teaching authority has rejected each aspect of the theory that opposes assisted feeding for patients in a PVS. The Pope's speech *marks a new chapter* in the Catholic contribution to efforts against euthanasia by omission….
>
> [F]or Catholics, the most painful complication has been the lack of clear and unambiguous guidance at the level of Church teaching. The Catholic Church has long had a complex and nuanced moral tradition on life-sustaining treatment….
>
> As of March 20 this is no longer the case….

See id. at 6 & Exhibit C thereto at 1-2 (emphasis added). The Secretariat's Deputy Director and preeminent Catholic scholar, Mr. Richard M. Doerflinger, made it clear that given the Pope's March 20, 2004 pronouncement, any argument *for* the withdrawal or termination of assisted feeding is now in direct conflict with and contrary to the teachings of the Catholic Church. *See id.*

Those who are not members of the Catholic Church may not understand the sacred position the Pope holds within the Church, or the moral and spiritual significance of papal proclamations. For Catholics, the Pope is the successor to the Apostle Peter, and the supreme and infallible head of the Church. When he proclaims a doctrine of faith or morals, all Catholics are obliged to abide, and no appeal to any other judgment is allowed. According to the *Lumen Gentium*, the Constitution of the Catholic Church:

> [The] body of bishops has no authority unless it is understood together with the Roman Pontiff, the successor of Peter as its head. The Pope's power of primacy over all, both pastors and faithful, remains whole and intact. *In virtue of his office, that is as Vicar of Christ and pastor of the whole Church, the Roman Pontiff has full, supreme and universal power over the Church.* And he is always free to exercise this power. The order of bishops, which succeeds to the college of apostles and gives this apostolic body continued existence, is also the subject of supreme and full power over the universal Church, provided we understand this body together with its head the Roman Pontiff and never without this head. This power can be exercised only with the consent of the Roman Pontiff. For our Lord placed [Peter] alone as the rock and the bearer of the keys of the Church, and made him shepherd of the whole flock ….
>
> [*R]eligious submission of mind and will must be shown in a special way to the authentic magisterium of the Roman Pontiff, even when he is not speaking ex cathedra*; that is, it must be shown in such a way that *his supreme magisterium is acknowledged with reverence, the judgments made by him are sincerely adhered to, according to his manifest mind and will.* His mind and will in the matter may be known either from the character of the documents, from his frequent repetition of the same doctrine, or from his manner of speaking.…
>
> *[T]his is the infallibility which the Roman Pontiff, the head of the college of bishops, enjoys in virtue of his office, when*, as the supreme shepherd and teacher of all the faithful, who confirms his brethren in their faith, *by a definitive act he proclaims a doctrine of faith or morals*. And therefore his definitions, of themselves, and not from the consent of the Church, are justly styled irreformable, since they are pronounced with the assistance of the Holy Spirit, promised to him in blessed Peter, and therefore they need no approval of others, nor do they allow an appeal to any other judgment. For then the Roman Pontiff is not pronouncing judgment as a private person, but as the supreme teacher of the universal Church, in whom the charism of infallibility of the Church itself is individually present, he is expounding or defending a doctrine of Catholic faith….

Dogmatic Constitution of the Church, *Lumen Gentium*, Solemnly Promulgated By His Holiness Pope Paul VI, Chapter III – On The Hierarchical Structure of the Church and in Particular on the Episcopate, at 14-17 (Nov. 21, 1964) ("Constitution of the Church") (emphasis added), pertinent parts attached hereto and incorporated herein as Exhibit A.

As these sacred Catholic precepts plainly indicate, "religious submission of mind and will *must* be shown in a special way to the authentic magisterium of the Roman Pontiff, *even when he is not speaking ex cathedra*." *Id.* at 16-17 (emphasis added).[4] The Pope need only be addressing a matter of faith or morals – his authentic magisterium – for this special, religious submission of mind and will to be required.[5] When the Pope speaks on matters of faith or morals, his statements must be "acknowledged with reverence," and his judgments "sincerely adhered to, according to his manifest mind and will," "known either from the character of the documents, from his frequent repetition of the same doctrine, or from his manner of speaking." *Id.* at 17.

For Catholics, there is simply no issue: The Pope, as successor to Peter and Vicar of Christ on Earth, is the supreme and infallible head of the Church, and when he proclaims a doctrine of faith or morals – even when he is not speaking *ex cathedra* – all Catholics are obliged to submit to it. Even his "definitions" are "justly styled irreformable, since they are pronounced *with the assistance of the Holy Spirit*, promised to him in blessed Peter, and therefore they need no approval of others, nor do they allow an appeal to any other judgment." *See id.* (emphasis added).

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[4] It is undeniable that all Catholics must submit to the Pope's proclamations on faith or morals, "even when [the Pope] is not speaking *ex cathedra*." This is understood when one realizes that there have been only two occasions in the entire 2004-year history of the Catholic Church when the Roman Pontiff has spoken *ex cathedra*. *See* Affidavit of Fr. Joseph Howard at 3 (Sept. 1, 2004) ("Affidavit of Fr. Howard"), attached hereto and incorporated herein as Exhibit B.

[5] *See id.*

Now, by the Pope's very words, the use of artificial means to administer food and water to a patient in a persistent vegetative state is not to be considered a medical act, or a life-prolonging medical procedure. It is, rather, a natural means of preserving life, one that now must be considered by Catholics as "*ordinary and proportionate*, and as such *morally obligatory*." *See* supra at 4 (emphasis added).

As Fr. Gerard Murphy testified before this Court on January 24, 2000: "A Catholic is *mortally bound* to take advantage of *ordinary* [means], [whether] proportionate or disproportionate."[6] Fr. Murphy, who this Court found to be "completely candid,"[7] would now conclude, after the Pope's pronouncement, that the use of artificial means to administer food and water is ordinary and proportionate, and that Terri, as a Catholic, is "mortally bound to take advantage" of it. Fr. Murphy's use of the words "mortally bound" underscores the imperilment of one's soul if one does not take advantage of ordinary means to preserve life.

Fr. Murphy's testimony on the moral obligation to take advantage or ordinary means to preserve life was consistent with the affidavit of The Most Rev. W. Thomas Larkin, Bishop Emeritus of the Catholic Diocese of St. Petersburg, Florida, which also was submitted in this case. Bishop Larkin testified that the Florida Catholic Bishops' Pastoral Statement of April 1989 on "Life, Death and the Treatment of Dying Patients" represented the authentic teaching of the Catholic Church at that time on the subject of providing nutrition to the sick, helpless, and those with mental and physical disabilities. *See* Affidavit

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[6] *See* Testimony of Fr. Gerard Murphy at 12-13, *In re Guardianship of Schiavo* (*Schindler v. Schiavo*), No. 90-2908GD-003 (Jan. 24, 2000) ("Testimony of Fr. Murphy") (emphasis added).

[7] *See* Order Denying the Respondents' Motion for Rehearing at 3 (Feb. 28, 2000) ("Order Denying Rehearing") ("In the Order of February 11, 2000, the court mentioned Father Murphy on only one occasion, that being on page 3 in the second full paragraph. By that reference, the court simply found Father Murphy to have been 'completely candid' as opposed to other witness[sic] who were not quite so creditable [sic].").

of The Most Rev. W. Thomas Larkin at 1-2 (Feb. 21, 2000) {"Affidavit of Bishop Larkin"). That Pastoral Statement, which was attached to Bishop Larkin's affidavit as an exhibit, again made it clear that Catholics "have an obligation to take all *ordinary means* to protect and preserve [their] own life and the lives of others; [but] we are not obligated to use extraordinary means …." *See id.* & attachment thereto at 2.

Prior to the Pope's March 20, 2004 pronouncement, the Church had a complex and nuanced moral tradition on life-sustaining treatments,[8] apparently initiated in 1953 by Pope Pius IV. Fr. Murphy briefly explained the Church's teaching as it existed in January 2000:

> [Mr. Felos:] Father, in the Catholic [C]hurch, do papal teachings or pronouncements hold primacy as compared to the teachings and pronouncements of bishops or cardinals?
>
> [Fr. Murphy:] Yes. The Pope sets the tone.
>
> [Mr. Felos:] Are there any papal pronouncements or teachings in the area on use or removal of artificial life support?
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> [Fr. Murphy:] In 1953 Pope Pius the IV met with a group of physicians who considered those questions in conference. Pius was almost prophetic in foreseeing what would happen fifty – forty years later. The teaching that he taught was that Catholics are mortally bound to respect life and to care for life, but not at all costs. He introduced the concept of extraordinary versus ordinary means. A Catholic is mortally bound to take advantage of the ordinary, proportionate or disproportionate.

See Testimony of Fr. Murphy at 12-14. Fr. Murphy continued to explain that the Church took various factors into consideration in determining whether a medical treatment was ordinary as opposed to extraordinary, or proportionate as opposed to disproportionate. *See id.* Fr. Murphy explained that balancing various emotional, psychological, medical and financial factors in each individual case was essentially the Church's practice, "then you make your moral decision based upon those issues." *See id.* at 13-14. After March 20, 2004, these analyses are no longer needed with regard to the provision of food and water.

[8] *See supra* at 5; Affidavit of Fr. Howard at 2.

The Church has now decided that the administration of food and water, even by artificial means, is always "*ordinary and proportionate*, and as such *morally obligatory*." *See* supra at 4 (emphasis added).

Determining whether a particular medical treatment is ordinary or extraordinary, and thus morally obligatory or not, has led to a great deal of confusion within the Church.[9] The Pope's proclamation of March 20, 2004 changed the prior teaching by eliminating such analyses with regard to the provision of food and water. The Pope finally clarified, for once and for all, that the administration of food and water, even by artificial means, is *not* a medical act, but rather "a natural means" of preserving life and, as such, Catholics must always consider it to be "ordinary and proportionate," and thus "morally obligatory." *See id.* at 4-5; Affidavit of Fr. Howard at 2-3.

The U.S. Catholic Church has confirmed that the Pope's pronouncement "profoundly changed the worldwide debate" on the obligation to provide food and water for patients in a 'persistent vegetative state.' It is also a significant new development that profoundly affects this case, and calls into question the trial court's earlier decision that Terri would elect to cease the artificial administration of food and water if she were competent to make her own decision. Given the Pope's pronouncement, the Court's decision, as Terri's proxy, now directly conflicts with her identity as a Catholic, and her fundamental right to freedom of religious belief and expression. According to the Pope, Catholics may no longer consider the artificial administration of food and water to be a "medical act," which they may morally deny or refuse. Instead, Catholics must now consider it a natural and "ordinary" means of preserving life, which, in the Pope's words, is "morally obligatory," and which, in Bishop Larkin's words, Catholics "have an obligation

[9] *See, e.g., id.*

to take," and of which, in Fr. Murphy's words, "[a] Catholic is mortally bound to take advantage."

B. Terri Is A Faithful Catholic, And Has Lived Her Entire Pre-Adult And Adult Life In Conformance With The Teachings Of The Catholic Church.

Terri is known to be a faithful Catholic,[10] and she publicly demonstrated this fact to the world in one of her last known acts. Just hours before collapsing, Terri attended weekly mass with her family, and publicly pronounced her adherence to the Catholic Church by orally reaffirming, in communion with all those present, The Apostle's Creed:

> I believe in God, the Father almighty, creator of heaven and earth.
>
> I believe in Jesus Christ, his only Son, our Lord. He was conceived by the power of the Holy Spirit and born of the Virgin Mary. He suffered under Pontius Pilate, was crucified, died, and was buried. He descended to the dead. On the third day he rose again. He ascended into heaven, and is seated at the right hand of the Father. He will come again to judge the living and the dead.
>
> I believe in the Holy Spirit, the holy Catholic Church, the communion of saints, the forgiveness of sins, the resurrection of the body, and the life everlasting.
>
> Amen.

See, e.g.,"Favorite Catholic Prayers" Prayer Book, Prayer 17.

"The word 'creed' has been defined as confession or articles of faith, formal declaration of religious belief, any formula or confession of religious faith, and a system of religious belief." Black's Law Dictionary 370 (6th ed. 1990; Centennial Edition (1891-1991)). By her profession of these articles of faith, which was witnessed by her mother and

[10] *See* Respondents' Motion at 8-9 & Exhibits E, F & G thereto; *see also* Second Affidavit of Robert Schindler, Sr., Second Affidavit of Mary Schindler, Affidavit of Robert Schindler, Jr., and Affidavit of Suzanne Schindler-Carr, attached hereto and incorporated herein as Exhibits C-F, respectively.

father,[11] Terri formally declared and reaffirmed her Catholic beliefs, and her adherence to the Catholic Church and its teachings.

It is not a coincidence that Terri was at mass, reaffirming her beliefs, just hours before she collapsed that fateful Sunday morning. In fact, Terri attended mass regularly, often with her parents, and occasionally with others.[12] Although Terri's husband testified in January 2000 that Terri did not go to church "very often,"[13] he apparently was unaware of Terri's regular attendance on Saturday evenings with her parents while he was at work. *See* Respondents' Motion at 8 & n.6.[14]

One need only look at Terri's life to conclude that she is, and always has been, a faithful Catholic. First, as this Court recognized, Terri "was reared in a normal, Roman Catholic nuclear family." Order at 1 (Feb. 11, 2000) ("Order"). As faithful Catholics, Terri was baptized in December 1963, received her first Holy Communion in May 1972, went to Catholic elementary, middle and high schools, and, shortly thereafter, married Michael Schiavo in a Nuptial Mass, after they received prenuptial counseling from Terri's parish priest, and Michael, as a non-Catholic, was granted a dispensation from the Church. *See* Respondents' Motion at 8 & Exhibit F thereto. According to Terri's sister, marriage

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[11] *See* Second Affidavit of Robert Schindler, Sr. at 1-2, and Second Affidavit of Mary Schindler at 1-3.

[12] *See* Respondents' Motion at 8, Exhibit E thereto at 1-2 & Exhibit F thereto at 4-6; *see also* Affidavit of Robert Schindler, Jr. at 2; Affidavit of Suzanne Schindler-Carr at 1; Testimony of Mary Schindler at 343-44 (Jan. 25, 2000).

[13] Testimony of Michael Schiavo at 36-37 (Jan. 24, 2000).

[14] Michael Schiavo's January 2000 testimony on this point also conflicts with the January 1991 "Psychosocial History" admission report prepared by Mediplex Rehab in Bradenton upon information supplied by Michael and Terri's mother. According to that report, "Terri is a catholic, [and] she and Mike *frequently* attended church." Psychosocial History Admission Report at 2, Mediplex Rehab-Bradenton, FL (Jan. 30, 1991) (emphasis added), attached hereto and incorporated herein as Exhibit G.

outside of the Catholic Church was never an option for Terri. *See* Affidavit of Suzanne Schindler-Carr at 1.

Terri received the Catholic Holy Sacraments, honored the Catholic holy days of obligation, sacrificed during the Lenten season, celebrated Catholic holy days, reminded her brother to attend mass regularly and not to receive communion without confession, all in her normal custom of obedience to the teachings of the Church. *See id.*; *see also* Affidavit of Robert Schindler, Jr. at 2. Terri's Catholic faith played a central and fundamental role in her life, and, as shown by her public profession of faith just hours before her collapse, Terri continued to be a faithful Catholic right up until the time that she became incapacitated.[15]

When Terri did become incapacitated, the Catholic Church continued to recognize her as a faithful member, one still entitled to receive the Holy Sacraments of the Church. Terri's diocesan monsignor, Msg. Malanowski, with authority and faculties from the diocesan bishop, made a special point of caring for Terri's spiritual well being and immortal soul.[16] Monsignor Malanowski has continued to visit Terri over the past four years, praying for her, blessing her, anointing her, and providing her with the sacrament for the sick.[17] As Msg. Malanowski's actions confirm, the Catholic Church recognizes that Terri has been and continues to be a faithful member. Although she is now incapacitated, she still has a fundamental constitutional right to express her Catholic beliefs, and exercise her Catholic faith.

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[15] *See* Respondents' Motion at 8, Exhibit E thereto at 2 & Exhibit F thereto at 4; *see also* Affidavit of Robert Schindler, Jr. at 2.

[16] *See* Affidavit of Monsignor Malanowski, attached hereto and incorporated herein as Exhibit H.

[17] *See id.*

C. Terri Has A Fundamental Constitutional Right To Freedom of Religious Belief And Expression, And She Would Choose To Exercise Her Beliefs In Conformance With The Teachings Of Her Church.

The United States Supreme Court has declared freedom of religion to be a fundamental right, one that occupies a preferred position in our constitutional hierarchy. *See Follett v. Town of McCormick*, 321 U.S. 573 (1944) ("'Freedom of press, freedom of speech, freedom of religion are in a preferred position.' [citation omitted]"). Indeed, our constitutional traditions firmly establish that a person has a fundamental right to live according to his or her beliefs, free from unreasonable interference by the government. *See Public Health Trust v. Wons*, 541 So. 2d 96 (Fla. 1989). Accordingly, an individual's freedom to adhere to a religious organization or form of worship cannot be restricted by law. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940).

This freedom is guaranteed by the First Amendment to the United States Constitution, one of the hallmarks of our Bill of Rights, which provides, *inter alia*, that Congress shall make no law prohibiting the free exercise of religion. U.S. Const. amend. I. This guarantee is also made applicable to the states through the Fourteenth Amendment. *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002). Accordingly, the Florida Constitution also provides that there shall be no law prohibiting or penalizing the free exercise of religion. Fla. Const. art. I, § 3. In fact, no prohibition exists in either the Florida or Federal Constitution against a person worshipping God at any time, or at any place they may see fit. *See Fenske v. Coddington*, 57 So. 2d 452 (Fla. 1952). There is simply no doubt that freedom of religion, as guaranteed by the federal and state constitutions, is an absolute and fundamental right. *See Reynolds v. United States*, 98 U.S. 145 (1878).

Given these guarantees, a person has the right to believe and profess whatever religious doctrine they may so choose. *See Employment Division v. Smith*, 494 U.S. 872,

877, *reh'g denied*, 496 U.S. 913 (1990). One's rights embrace the freedom to believe as well as the freedom to act. *See Cantwell*, 310 U.S. at 303-04. The first is absolute. The second remains subject to reasonable limitations for the protection of society. *Id.* Conduct based on religious beliefs may be subject to reasonable limitations if the protection of society, public health, morals, safety or convenience is at stake. *See id.*; *Hord v. City of Fort Myers*, 13 So. 2d 809 (Fla. 1943). Laws, however, may not restrict religious beliefs, only religious practices, and then only in limited instances. *See Town v. State ex rel. Reno*, 377 So. 2d 648 (Fla. 1979).

The Supreme Court has also held that the First Amendment prevents courts from resolving internal church disputes that require the adjudication of questions of religious doctrine. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107-08 (1952). It is not within the judicial function and competence of the civil courts to determine such matters, and, instead, civil courts must defer to the interpretations of religious doctrine made by the highest ecclesiastical tribunals. *See United States v. Lee*, 455 U.S. 252, 256 (1982); *Milivojevich*, 426 U.S. at 709. Thus, the First Amendment also provides churches with the power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *See Milivojevich*, 426 U.S. at 724-25; *Kedroff*, 344 U.S. at 116.

A free exercise violation occurs when governmental action burdens the religious adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion, or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. *See United States v. Turnbull*, 888 F.2d 636, 638-39 (9th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990); *Graham v. CIR*, 822 F.2d

844, 850-51 (9th Cir. 1987) (citations omitted), *aff'd sub nom.*, *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1988). The interference must substantial, and with a tenet or belief central to the religious doctrine. *See id.*

In 1998, the State of Florida went even further, and enacted the Religious Freedom Restoration Act ("RFRA"). Under RFRA, the government cannot substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability. Fla. Stat. § 761.03(1). The term "government," as used in the statute, includes any branch, department, agency or official acting under color of law of the state, a county, municipality, or other subdivision. *Id.* at § 761.02(1). Moreover, governmental regulation includes both statutory law and court action initiated through civil lawsuits. *See Malicki*, 814 So. 2d at 347. The government may only substantially burden a person's exercise of religion if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *Id.* at § 761.03(1)(a) & (b).

Under RFRA, the exercise of religion includes any act or refusal to act that is substantially motivated by a religious belief in some tenet, practice or custom of a larger system of religious beliefs. *Id.* at § 761.02(3). A person whose religious exercise has been substantially burdened in violation of the statute may assert that violation in a judicial proceeding and obtain appropriate relief. *Id.* at § 761.03(2).

As this recitation of constitutional law plainly shows, Terri has a fundamental, absolute and preferred constitutional right to adhere to her Catholic beliefs. Moreover, her right to adhere to those beliefs cannot be restricted by law. She has both the freedom to believe, as well as the freedom to act on those beliefs, as long as her acts do not interfere with the protection of society. The government may not pressure Terri to

commit an act forbidden by her religion, and it may not prevent her from engaging in conduct that her faith mandates. Furthermore, under RFRA, the government cannot substantially burden Terri's exercise of religion, even if the burden results from a rule of general applicability. This includes government action either through statutory law or judicial action.

Thus, there is no question that Terri is entitled, under federal and state law, to freely worship according to her Catholic faith, and to freely exercise her Catholic beliefs. As shown above, Terri has adhered to the Catholic faith and its teachings throughout the course of her life. One of her last acts – only hours before her collapse – confirmed for everyone that she is still a faithful Catholic and still adheres to the doctrines and teachings of the Church. By her very identity and life, Terri would never choose to violate a papal pronouncement on a moral doctrine of the Church. Nor may the guardianship court, through its February 11, 2000 order, force her to commit an act that is now forbidden by her religion, or prevent her from choosing to engage in conduct that her Catholic faith now mandates.

D. The Pope's Recent Pronouncement Substantially Changes The Circumstances Of This Case, And Makes It No Longer Equitable For The Guardianship Court To Enforce Its Earlier Order.

By the Pope's pronouncement of March 20, 2004, the use of artificial means to administer food and water to a patient in a persistent vegetative state is not to be considered a medical act, or a life-prolonging medical procedure. It is, rather, a natural means of preserving life, one that is "*ordinary and proportionate*, and as such *morally obligatory*" for Catholics. *See supra* at 4 (emphasis added). Given this new papal pronouncement, and the new moral obligation that it imposes, Terri, as a faithful Catholic, would *not* have made the decision to terminate the artificial administration of food and water in February 2000,

and she would *not* choose to do so today. These new circumstances make it no longer equitable for the trial court to enforce its earlier decision because to do so would force Terri to commit an act now forbidden by her religion, and prevent her from engaging in conduct that her Catholic faith now mandates. Such government action is strictly prohibited by constitutional and statutory law, and would be a gross violation of Terri's fundamental right to freedom of religious belief and expression. Terri would never choose, on her own accord, to commit an act forbidden by her Catholic faith, nor would she refuse to engage in conduct that her Church has morally commanded.

Interestingly, this outcome is not inconsistent with a desire not to be kept alive by life-prolonging medical procedures. The Catholic Church has simply now made it clear that the administration of food and water, even by artificial means, is *not* a life-prolonging medical procedure, but rather a natural and ordinary means of preserving life, and thus, morally obligatory.

At the time that Terri allegedly made her oral medical directives, the State of Florida agreed with the Catholic Church's position. Prior to 2000, the State of Florida did not include the administration of food and water in its designation of life-prolonging medical procedures. *See* Fla. Stat., § 765.101(10) (2000). The Florida statute was not amended to include the administration of food and water as a life-prolonging medical procedure until *more than ten years after* Terri allegedly made her oral medical directives. Given the state of the law at the time when Terri allegedly made her oral directives, she could not lawfully have included the artificial administration of food and water as a life-prolonging medical procedure.

In its February 11, 2000 order, the guardianship court decided to include the artificial administration of food and water among the life-prolonging medical procedures

that Terri would have allegedly refused, based upon a then-recent Florida Supreme Court decision, but one still made *after* Terri's alleged oral directives. This Court noted that "[the Florida Supreme Court in *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990)] also found that all life support measures would be similarly treated and found no significant legal distinction between artificial means of life support." Order at 6. Relying upon that finding, the guardianship court, as Terri's proxy, decided to include the artificial administration of food and water among the life-prolonging medical procedures that Terri would have allegedly refused. But there is no hint in the record that Terri wished to include the administration of food and water in her alleged directives. Indeed, at the time Terri allegedly made her oral directives, it would not have been within the law to do so.

While the state may make no distinction between artificial means of life support, as of March 20, 2004, the Catholic Church most certainly does, and, as a faithful Catholic, Terri would as well. Now, by the Pope's very words, the use of artificial means to administer food and water to a patient in a persistent vegetative state is not to be considered a medical act, or a life-prolonging medical procedure, but rather a natural means of preserving life, one that now must be considered by Catholics as "*ordinary and proportionate,* and as such *morally obligatory.*" *See* supra at 4 (emphasis added). Terri would never commit an act that is morally forbidden by her religion, nor refuse to do something that her Catholic faith mandates. This Court, as Terri's proxy, must make the decision that Terri would make. It cannot force her to commit an act forbidden by her religion, nor prevent her from adhering to the mandates of her Catholic faith.

As a court of equity, the guardianship court must always ensure that manifest justice is done. As shown herein, it is no longer equitable for the guardianship court to enforce its February 11, 2000 order given the papal statement of March 20, 2004 and

Terri's religious beliefs. To do so would not only be inequitable, it would be contrary to Terri's fundamental constitutional guarantees.

E. The Arguments Asserted In Petitioner's Opposition To Respondents' Motion For Relief Are Erroneous, And Contrary To Law, And Should Be Rejected By This Court.

Petitioner asserts a hodgepodge of erroneous arguments in his opposition to Respondents' motion ("Opposition"). He argues that the motion is facially deficient, there is no change in circumstances, the Pope's pronouncement was not *ex cathedra*, there is no change in church policy, the affidavits are legally insufficient, Terri's religious beliefs are irrelevant, and, finally, that the movants cannot meet their burden. Respondents address each of these points *seriatim*, and show that they are erroneous and contrary to law, and should be rejected by this Court.

Petitioner claims first that the motion is facially deficient, *i.e.*, that it does not set forth a basis for relief. *See* Opposition at 1-2. However, Respondents' motion, memorandum of law in support of the motion, and fifteen sworn affidavits, all constituting Respondents' motion, properly set forth a basis for relief. As the District Court of Appeal stated in *Schiavo III*, all Respondents must show is "a 'colorable entitlement' to relief," which then "requires the trial court to permit" certain limited discovery and an evidentiary hearing. *Schiavo III* at 641-42. To state a "colorable" claim, one simply must show that their claim is "arguably supported" by law. *See Dunn v. The Florida Bar*, 726 F. Supp. 1261 (M.D. Fla. 1988). Respondents have provided abundant legal support for their claims, certainly enough to show that they are supported by law.

Petitioner also claims that the motion is facially deficient because it fails to demonstrate that the Pope's pronouncement was *ex cathedra*, which, according to Petitioner, is necessary for it to be morally and spiritually obligatory. *See* Opposition at

3-4. In support of this profound doctrinal conclusion, Petitioner cites the New Advent Catholic Encyclopedia. Had Petitioner bothered to research beyond the encyclopedia, he would have found that this is not accurate. According to the *Lumen Gentium*, the Dogmatic Constitution of the Church, the Pope does not have to be speaking *ex cathedra* for his pronouncements to be morally and spiritually binding on Catholics. *See supra* at 5-9. As quoted above, the *Lumen Gentium* specifically addresses this point:

> [*R]eligious submission of mind and will must be shown in a special way to the authentic magisterium of the Roman Pontiff, even when he is not speaking ex cathedra*; that is, it must be shown in such a way that his supreme magisterium is acknowledged with reverence, [and] the judgments made by him are sincerely adhered to, according to his [the Pope's] manifest mind and will….

See id. at 5 (emphasis added). The Church's Constitution expressly states that "religious submission of mind and will must be shown," when the Pope speaks on matters of faith or morals, "even when he is not speaking *ex cathedra*." Petitioner is simply wrong on this point, and his citation to a Catholic encyclopedia carries no weight against the Church's Constitution.

Contrary to Petitioner's argument, the Pope need not have spoken *ex cathedra* for his March 20, 2004 pronouncement to be morally and spiritually binding. Indeed, the Pope, himself, stated that his judgment was "morally obligatory:"

> I should like particularly to underline how the administration of food and water, even when provided by artificial means, *always* represents a *natural means* of preserving life, *not a medical act.* Its use, furthermore, should be considered, in principle, *ordinary and proportionate*, and as such *morally obligatory* ….

See supra at 4 (emphasis added). Further, as discussed above, because the administration of food and water, even by artificial means, must now be considered an "ordinary" means for preserving life and not a medical act, even Bishop Larkin and Fr. Murphy agree that it is morally obligatory. As Fr. Murphy testified: "A Catholic is *mortally bound* to take

advantage of *ordinary* [means] ...."[18] Bishop Larkin agreed: Catholics "have an obligation to take all *ordinary means* to protect and preserve [their] own life and the lives of others ...."[19] Despite Petitioner's assertions to the contrary, there is little doubt that Terri, as a Catholic, is morally and mortally obligated to accept ordinary means to preserve her life.

Petitioner next argues that even if the Pope's pronouncement is morally and spiritually binding, the Respondents have failed to demonstrate that it constitutes a change in church policy. *See* Opposition at 4-6. This, however, is also untrue. Respondents have shown that the Secretariat for Pro-Life Activities of the U.S. Conference of Catholic Bishops confirmed the enormous significance of the Pope's March 24, 2000 pronouncement by stating that it "*profoundly changed the worldwide debate* on how to respond to [the PVS] condition," and "*marks a new chapter* in the Catholic contribution to efforts against euthanasia by omission..., and that "[a]s of March 20 [the lack of clear and unambiguous guidance at the level of Church teaching] is no longer the case...." *See supra* at 4-5; Respondents' Motion at 6 & Exhibit C thereto at 1-2 (emphasis added). The Secretariat's Deputy Director, Mr. Richard M. Doerflinger, also made it clear that given the Pope's March 20, 2004 pronouncement, any argument *for* the withdrawal or termination of assisted feeding is now in direct conflict with and contrary to the teachings of the Catholic Church. *See id.*

Petitioner's argument that the Pope's statement is "in line" with previous Church positions does not indicate that it was not a substantial new development, only that it comports with other Church teachings. Petitioner's argument that some commentators, ethicists and theologians disagree that there is now a moral obligation to accept the

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[18] *See* Testimony of Fr. Gerard Murphy at 12-13 (emphasis added).

[19] *See* Affidavit of Bishop Larkin & attachment thereto at 2.

artificial administration of food and water as an ordinary means for preserving life also is not probative. The Pope's words are what matters to Terri, not what any commentator, ethicist or theologian may believe. The Court is called upon to make the decision that Terri would make for herself, not the decision that others, wholly unconnected to her, might or might not make for her.

Petitioner next argues that Respondents' affidavits are legally insufficient because they are contrary to the law of this case, which is, according to Petitioner, that Terri is not a practicing Catholic. *See* Opposition at 6-8. Petitioner obviously misunderstands the "law of the case" doctrine. The Florida Supreme Court recently reaffirmed that under the doctrine of the "law of the case," all *questions of law* decided by the highest appellate court must be followed. *See Owen v. State*, 862 So. 2d 687 (Fla.), *reh'g denied* (2003); *see also Florida Dep't of Transp. v. Juliano*, 26 Fla. L. Weekly S784 (Fla. 2001) (the "law of the case" doctrine requires that *questions of law* actually decided on appeal must govern) (emphasis added); *Lincoln Nat'l Health and Cas. v. Mitsubishi Motor Sales*, 778 So. 2d 392, *reh'g denied, rev. denied, Mitsubishi Motor Sales v. Lincoln Nat'l Health and Cas.*, 805 So. 2d 808 (Fla. 5th DCA 2001) (*points of law* adjudicated in a prior appeal become the "law of the case") (emphasis added). Whether or not Terri is a practicing Catholic is a factual issue, not a question of law. Consequently, the "law of the case" doctrine does not apply.

Nor was this a "factual finding" made by the guardianship court. The only factual finding made in the February 11, 2000 order regarding Terri's religious practices was that she "was reared in a normal, Roman Catholic nuclear family." Order at 1. The confusion stems from a question asked of Petitioner at the trial. Petitioner testified that Terri did not

go to church "very often,"[20] but, at that time, he was apparently unaware of Terri's regular attendance on Saturday evenings with her parents while he was at work. *See* Respondents' Motion at 8 & n.6. From that, the District Court of Appeal noted in dicta that Terri did not attend mass regularly or have a religious advisor, s*ee In re Guardianship of Schiavo*, 780 So. 2d 176, 180 (Fla. 2d DCA 2001) ("*Schiavo I*"), and Petitioner has latched onto the Court of Appeal's statement and mischaracterized it as a rule of law in this case.

Even if this comment by the Court of Appeal was considered the "law of the case," the Florida Supreme Court has held that where subsequent court proceedings develop different facts, the law of the case doctrine will not preclude a different conclusion. *See Steele v. Pendarvis Chevrolet, Inc.*, 220 So. 2d 372 (Fla. 1969); *Parker Family Trust I v. City of Jacksonville*, 804 So. 2d 493 (Fla. 1st DCA 2001) (law of the case doctrine has no application when a subsequent hearing or trial develops different facts). Further, the law of the case doctrine is not to be invoked where it would defeat justice. *State v. McBride*, 28 Fla. L. Weekly S401 (Fla. 2003). Instead, appellate courts have the authority to reconsider and correct erroneous rulings where a prior ruling would result in a manifest injustice. *Juliano*, 26 Fla. L. Weekly at S784. As Respondents have shown, Terri is known to be a faithful Catholic, and she publicly demonstrated this fact to the world in one of her last known acts. *See supra* at 9-12.

Petitioner argues next that Respondents' affidavits are time-barred, however this also is erroneous. *See* Opposition at 7. Respondents seek relief under Fla. R. Civ. P. 1.540(b)(5) which, as the Court of Appeal stated in *Schiavo II*, "has long permitted a party to challenge a judgment without time limitation" if it is no longer equitable to give it prospective application. *Schiavo II* at 559. The Court concluded that "this ground should

[20] *See* Testimony of Michael Schiavo at 36-37.

apply to an order of a guardianship court that requires the termination of life-prolonging procedures." *See id.*; *see also supra* at 1-2.

Petitioner's next argument is baffling. He apparently misconstrues Respondents' motion as being based upon evidence existing at the time of the judgment, rather than a substantial change in circumstances arising afterwards. *See* Opposition at 7-8. In their motion, Respondents have shown a substantial change in circumstances arising after the entry of the judgment – the Pope's pronouncement of March 20, 2004 – that affects the decision made by the trial judge as Terri's proxy in February 2000, and makes it no longer equitable for the guardianship court to enforce its earlier order. Petitioner seems confused on this point; nevertheless both parties agree that a motion based upon Fla. R. Civ. P. 1.540(b)(5) must establish matters arising after the entry of judgment, and Respondents' motion for relief does just that.

Petitioner argues next that Terri's religious beliefs are irrelevant because she left oral directives "covering the subject medical treatment choice." *See id.* at 8-9. This, however, is patently false. As discussed above, Terri's alleged medical directives did not, and, given the state of the law in Florida, could not, "cover" the artificial administration of food and water. However, more to the point, even if her alleged oral directives *did* cover the artificial administration of food and water, given the Pope's March 20, 2004 pronouncement, Terri would *not* have made the decision to withdraw such procedures, and would make a very different decision at this time. The Pope's March 20, 2004 pronouncement, making the artificial administration of food and water "morally obligatory" for Catholics, profoundly changes the circumstances of this case, and makes Terri's religious beliefs very relevant. As a faithful Catholic, Terri would never choose to violate a papal pronouncement on a moral doctrine of the Church. Nor

may the guardianship court, through its February 11, 2000 order, force her to commit an act that is now forbidden by her religion, or prevent her from choosing to engage in conduct that her Catholic faith now mandates.

Finally, Petitioner argues that Respondents cannot meet their burden of proof because Terri lacks the necessary thought processes to change her mind, and it would be "sheer speculation" to conclude that the Pope's pronouncement would affect her behavior. *See id.* at 9-11. Terri's incapacity is of no consequence, however, because the guardianship court acts as her proxy in this proceeding, and must make the decision that she would make for herself if she were capable. Nor is it speculation that the Pope's March 20, 2004 pronouncement would affect Terri's behavior. As discussed, the evidence shows that Terri is and always will be a faithful Catholic, and would never choose to commit an act forbidden by her Catholic faith, nor refuse to engage in conduct that the Catholic Church has morally commanded.

In their motion for relief, the Schindlers have shown a substantial change in circumstances arising after the entry of the judgment, which not only affects the decision made by the trial judge as Terri's proxy in February 2000, but also makes it no longer equitable for the guardianship court to enforce its earlier order. These new circumstances directly impact Terri's life-long religious beliefs, and her fundamental right to freedom of religious belief and expression. Given the recent developments within the Holy Roman Catholic Church, Terri would *not* have made the decision to withdraw life-prolonging procedures, and would make a very different decision at this time. Respondents' motion, memorandum of law in support, and sworn affidavits state a colorable entitlement to relief, and Respondents are entitled to limited discovery and an evidentiary hearing on this matter.

III. CONCLUSION

WHEREFORE, for all of the foregoing reasons, Respondents respectfully request discovery and an evidentiary hearing on the matters raised in these motions, revocation of the Guardian's authority to continue the action challenging Terri's Law, vacation of the Court's February 2000 judgment, as Terri's proxy, that she would choose to terminate the artificial administration of food and water.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law in Support of Motion for Relief from Judgment and Motion to Reconsider, with attachments, was served via U.S. mail, postage prepaid, this 2nd day of September, 2004, upon George J. Felos, Esq., Felos & Felos, 595 Main Street, Dunedin, FL 34698, and Gyneth S. Stanley, Esq., 209 Turner Street, Clearwater, FL 33756.

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Patricia Fields Anderson, Esq.