No. ___

In the Supreme Court of the United States

THERESA MARIE SCHIAVO, Incapacitated,
ex. rel. ROBERT AND MARY SCHINDLER,
her Parents and Next Friends

Applicant,

v.

MICHAEL SCHIAVO,
Guardian: Theresa Schiavo, Incapacitated,
THE HONORABLE GEORGE W. GREER, and
THE HOSPICE OF THE FLORIDA SUNCOAST, INC.,

Respondents.

EMERGENCY APPLICATION FOR STAY OF ENFORCEMENT OF THE JUDGMENT BELOW PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEAL OF THE UNITED STATES FOR THE ELEVENTH CIRCUIT

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EMERGENCY MOTION FOR STAY

TO: THE HONORABLE JUSTICE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND JUSTICE FOR THE ELEVENTH CIRCUIT.

Pursuant to FED. R. CIV. P. 27(a) and SUP. CT. R. 23, Applicants, Robert and Mary Schindler, individually and as next friends of their daughter, Theresa Marie Schiavo, hereby apply for an order staying further withholding of nutrition and hydration from Theresa Marie Schiavo that was initiated by Defendant at approximate on Friday, March 18, 2005, at 1:45 P.M. (EST) pursuant to the order of the Probate Division of the Circuit Court of Pinellas County, Florida, pending the filing and final disposition of Petitioner's Petition to this Court for a Writ of *Certiorari* to the Florida Court of Appeal, Second District. In support of this Motion for Stay, Applicants state as follows:

STATEMENT OF THE CASE

1. On February 25, 2005, the Probate Division of the Circuit Court of Pinellas County, Florida, entered an order mandating the removal of nutrition and hydration from Theresa Marie Schiavo in order to cause her death. In relevant part, the Order provides:

> The Court is persuaded that no further hearing need be required [before Respondent, Michael Schiavo, can act] but that a date and time certain should be established so that last rites and other similar matters can be addressed in an orderly manner. Even though the Court will not issue another stay, the scheduling of a date certain for implementation of the February 11, 2000 ruling will give [Applicants Robert and Mary Schindler] ample time to appeal this denial, similar in duration to previous short-time stays granted for that purpose. Therefore, it is
>
> **ORDERED AND ADJUDGED** that the Motion for Emergency Stay filed on February 15, 2005, is DENIED. It is further
>
> **ORDERED AND ADJUDGED** that absent a stay from the appellate courts, the guardian, Michael Schiavo, shall cause the removal of nutrition

> and hydration from the Ward, Theresa Schiavo, at 1:00 P.M. on Friday, March 18, 2005.
>
> **DONE AND ORDERED** in Chambers at Clearwater, Pinellas County, Florida at 2:50 p.m. this 25th day of February.
>
> February 11, 2000, Order.

2. In the week leading up to March 18, 2005, the state courts dismissed or denied every attempt to stay the enforcement of the death order, including: 1) the thwarted attempt by the Florida Department of Children and Families to intervene to protect its right to investigate a hotline report of abuse and neglect of Terri and 2) the attempt by the House of Representatives to stay enforcement pending an investigation of the House Committee on Government Reform. This Court also denied an Application for Emergency Stay Pending the Filing of a Writ of Certiorari filed by the Schindlers relating to their state court claims of violation of Terri's religious liberty rights.

3. Theresa Schiavo's feeding tube was removed at 1:45 p.m. on Friday, March 18, 2005, and she is dying of starvation and dehydration. If the tube is not reinserted by Order of this Court, Terri will die before this Court is able to consider the merits of the Petition for Writ of *Certiorari*.

4. A miraculous event occurred during the weekend after Terri's feeding tube was removed which fundamentally alters the manner in which Terri's claims are to be viewed by the federal courts when Congress, in a bi-partisan and dramatic fashion, thundered the message through P. L No. 109-3, that the United States of America must stand for life, accuracy, and fairness in the process afforded to an innocent, incapacitated woman.

5. Public Law No. 109-3 was enacted by Congress and signed by President Bush just after 1:00 a.m., on March 21, 2005. Two hours after the Act's adoption, the

Schindlers filed a complaint with the Middle District of Florida alleging the violation of Theresa Schiavo's rights and seeking a temporary restraining order to restrain the Respondents from further withholding Theresa Schiavo's nutrition and hydration.

6. A hearing on the Schindlers' TRO motion was held that same afternoon of March 21 and the Honorable Judge Whittemore issued his decision denying the motion in the early morning of March 22, 2005.

7. Applicants filed their Notice of Appeal to the Eleventh Circuit on March 22,; the Eleventh Circuit issued its decision affirming the District Court's Order shortly after 2:00 a.m., March 23. Applicant's Petition for Rehearing En Banc was filed and denied later that day. Without a stay from this Court, Terri will die a horrible death in a matter of days.

REASONS FOR GRANTING A STAY

8. When a final judgment or decree of any court is subject to review by the United States Supreme Court on writ of *certiorari*, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to permit a party to obtain a writ of *certiorari* from the Supreme Court. 28 U.S.C.A. § 2101(f).

9. The decision to grant or deny such a stay pending certiorari rests in the court's sound discretion. *Barnes v. E-Systems,* 501 U.S. 1301 (1991), later proceeding (US) 1991 US LEXIS 4097.

10. A stay may be granted when: (1) there is a reasonable probability that four justices will vote to grant *certiorari*; (2) there is a fair prospect that a majority of the justices will find the decision below erroneous; and (3) a balancing of the equities weighs in the petitioner's favor. *Araneta v. United States,* 478 U.S. 1301 (1986).

11. There is a reasonable probability that four justices will vote to grant certiorari, and a fair prospect that a majority of the justices will find the decision below erroneous because both Applicants *and* their daughter, Terri Schiavo *herself*, have been denied federal due process and equal protection rights P. L. No. 109-3 intended to given them in federal courts.

ARGUMENT AND AUTHORITIES

I. The Extraordinary Relief Authorized by the All Writs Act is Required to Preserve Terri Schiavo's Federal Rights During the Federal Litigation Authorized by P.L. 109-3.

On Sunday, March 20, 2005, the United States Congress convened an historic session to take up the petition for redress of grievances of Robert and Mary Schindler, the parents of Theresa Marie Schiavo, an incapacitated person whose nutrition and hydration has been removed pursuant to an order of the Probate Court of Pinellas County, Florida. Representative James F. Sensenbrenner, Chairman of the House Judiciary Committee, introduced S. 686 (P. L. No. 109-3) with the following words:

> On March 16, the House passed legislation to avert the tragedy now unfolding in Florida. The House bill, H.R. 1332, The Protection of Incapacitated Persons Act of 2005, passed the House by voice vote. Earlier today, I introduced H.R. 1452, For the Relief of the Parents of Theresa Marie Schiavo. The Senate-passed legislation now before us is identical to that bill.
>
> Mr. Speaker, while our federalist structure reserves broad authority to the States, America's Federal courts have played a historic role in defending the constitutional rights of all Americans, including the disadvantaged, disabled, and dispossessed. Among the God-given rights protected by the Constitution, no right is more sacred than the right to life.
>
> The legislation we will consider today will ensure that Terri Schiavo's constitutional right to life will be given the Federal court review that her situation demands. Unlike legislation passed by the Senate a day after House passage of H.R. 1332, the legislation received from the Senate today is not a private bill. *Also, and of critical importance, S. 686 does not contain a*

> *provision that might have authorized the Federal court to deny desperately needed nutritional support to Terri Schiavo during the pendency of her claim.*
>
> Unlike earlier Senate legislation, S. 686 also contains a bicameral and bipartisan commitment that Congress will examine the legal rights of incapacitated individuals who are unable to make decisions concerning the provision or withdrawal of life-sustaining treatment. Broad consideration of this issue is necessary to ensure that similarly situated individuals are accorded the equal protection under law that is both a fundamental constitutional right and an indispensable ingredient of justice.
>
> Cong. Rec. H1701 (March 20, 2005) (emphasis added)

In the Senate, Senator Frist, made the same basic point: that both the House and the Senate were in agreement that Terri Schiavo's federal constitutional and statutory rights should be litigated *de novo* in a federal court, and that the remedy proposed – and agreed to – by both Houses of Congress would be meaningless if the jurisdiction conferred on the United States District Court for the Middle District of Florida were not preserved by an order that re-establishes the nutrition and hydration withdrawn pursuant to the Florida court's order.

> Mr. FRIST. Mr. President, *the Congress has been working nonstop over the last 3 days* to do its part to uphold human dignity and affirm the culture of life. I am pleased to announce that the House and Senate Republican leadership have reached an agreement on a legislative solution. The Senate has come in today to pass an adjournment resolution which we will send shortly to the House of Representatives. Procedurally, this action will have the effect of bringing the House into session so they can either pass compromise legislation by unanimous consent on Sunday or place this legislation on the suspension calendar for consideration early Monday morning. The Senate will be prepared to reconvene as soon as the House passes this new legislation.
>
> It has been more than 24 hours since Terri Schiavo's feeding tube was removed. *Under the legislation we will soon consider, Terri Schiavo will have another chance.* It is a simple bill, only two pages long. It allows Terri's case to be heard in Federal court. More specifically, it allows a Federal district judge to consider a claim "by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life."

> *I am pleased with our progress thus far, and I am committed as leader to see this legislation pass and give Terri Schiavo one last chance at life.*

Cong. Rec. S3095 (Saturday, March 19, 2005) (emphasis added).

In the case at bar, the majority below denied relief under the All Writs Act because, in its view, the District Court had not abused its discretion in finding that Petitioners had shown insufficient likelihood of success on the merits of *three* of their federal claims – an alleged denial of due process because of inadequate representation and lack of an impartial judge, an equal protection claim alleging that persons with severe cognitive disabilities are denied equal protection by the procedures authorized by the Florida courts in Terri Schiavo's case, and a claim under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc-1. *See Schiavo ex rel. Schindler v. Schiavo,* --- F.Supp.2d ----, 2005 WL 641710(M.D.Fla. Mar 22, 2005) (NO. 8:05-CV-530-T-27TBM) (App. 1) (rejecting the Due Process, Equal Protection, and RLUIPA counts), *aff'd* Schiavo v. Schiavo, 2005 WL 665257 (11th Cir.(Fla.) Mar 23, 2005) (NO. 05-11556)at 4 & n 4 (App. 2).

Two things are striking about the panel's approach to the questions presented for review by this Court. First, the panel is strikingly selective as it picks legislative history that supports its conclusion that P. L. NO. 109-3preserves the discretion of the district courts to limit access to the jury. Second, the panel appears not only to believe that there is *no* set of facts that will entitle Terri Schiavo to relief under the Constitution and laws of the United States, and that, even if there were, the length of time required for a full trial by jury is somehow inconsistent with the majority's sensibilities.

The most important "legislative history" is the language of the statute itself:

> *After a determination of the merits of a suit brought under this Act*, the District Court shall issue such declaratory and injunctive relief as may be necessary to protect the rights of Theresa Marie Schiavo under the Constitution and laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

P. L. NO. 109-3§3 (emphasis added). In choosing to rely on a colloquy between Senators Frist and Levin concerning the discretion of the district courts, the panel majority not only ignores the plain meaning of the statute, it ignores equally important legislative history that supports relief under the All Writs Act. On Thursday, March 17, 2005, a committee of the House subpoenaed Terri Schiavo and her caretakers in an attempt to exercise legislative oversight before her death, but was rebuffed by the guardianship court on Friday, March 18. On Saturday, March 19, 2005, Senator Frist introduced S. 686 with the observation that the House and Senate took the time to adopt separate bills and then spent *three days* negotiating a compromise bill that specifically provides for a hearing on the merits. On Sunday, March 20, 2005, the House and Senate convened in an extraordinary, and unprecedented, Sunday session to pass a bill that *expressly* provides that there will be a full trial on the merits. It strains credulity to assert that Congress intended by this language to confer discretion on the trial court to destroy the jurisdiction created by the P. L. NO. 109-3by standing idly while Terri Schiavo starves and dehydrates pursuant to the order of a Florida court. Were that the Congressional intent, giving the Schindler family the right to seek review of that order would be little more than a cruel hoax..

The Eleventh Circuit panel relied on a Senate colloquy for the position that "Congress considered and specifically rejected provisions that would have mandated, or permitted with favorable implications, the grant of the pretrial stay." *Schiavo v. Schiavo*,

No. 05-11556, slip. op. at 5. There are two major problems with the inferences the panel it drew from this colloquy.

The first, and most important, is that the colloquy did not take place on the floor of the Senate, and was therefore not available to the Members during the House debate. It was added later as part of the "revise and extend" privilege extended to members of the House and Senate.

Second, the panel's reading of the intent of the *Senate* is both incomplete, and directly contradicted by the floor statement of the Act's House manager, Judiciary Committee Chairman James Sensenbrenner, who stated:

> [O]f critical importance, S. 686 does not contain a provision that might have authorized the Federal court to deny desperately needed nutritional support to Terri Schiavo during the pendency of her claim. ... [W]hat this bill does is it requires the reinsertion of the feeding tube for so long as it takes for a Federal Court to determine whether or not her Federal constitutional or statutory rights are violated. And that is reasonable, because she should not be allowed to die while the courts are determining what her legal rights are and whether anybody has violated them.

151 Cong. Rec. H1701, H1707 (daily ed. Mar. 20, 2005).

At the center of this dispute over "Congressional intent" concerning the preservation of the status quo is the panel's reading of a provision in the *predecessor* bill to P.L. 109-3, which was passed by the Senate as S. 653. That proposal before the Senate provided:

> Upon the filing of a suit or claim under this Act, the District Court shall issue a stay of any State court order authorizing or directing the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain the life of Theresa Marie Schaivo pending the determination of the suit.

At the instance of Senator Levin, the version of the bill separately introduced and passed by the Senate replaced "shall" with "may." Nonetheless, the remarks of Rep.

Sensenbrenner quoted above indicate that the House *refused to agree* to the modified provision, precisely because it feared that including it inclusion would give discretion to the District Court to deny a stay pending determination of the suit, discretion the House believed would not otherwise exist.

The bicameral compromise, adopted as S. 686, omitted the provision entirely. As a result, the only thing left to interpret is the plain language of the statute itself, which clearly presupposes that Terri Schiavo will be alive to participate in the trial of the federal claims that will be filed in her name, and that the doctors, rehabilitation specialists, and others who will need to examine her to ascertain her *present* ability to consent to, or refuse, necessary medical care will be able to do so.

Petitioners agree that "Congress meant no change in the rules it did not mention," Schiavo v. Schivao, 2005 WL 665257 (11th Cir.(Fla.) Mar 23, 2005) (NO. 05-11556) at 7 (App. 2), but those rules include far more than the panel's view that district court judges have discretion to review the facts supporting a request for a preliminary injunctions.

The first of these is mootness. If Terri Schiavo dies, her federal claims become moot, and the entire exercise of Congressional authority under Article III §1 and Amendment XIV §5 – authorization of federal court review of her present condition and federal claims against the State of Florida – was a colossal waste of both Congress' and this Court's time. The All Writs Act provides that the district courts have the power to issue all writs necessary to preserve their jurisdiction under P.L. 109-3. That jurisdiction exists for *at least* thirty days, P. L. NO. 109-3§4, in order to give Terri Schiavo and her family enough time to develop their federal claims "for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to

the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life." P. L. NO. 109-3§2. Petitioners, who are suing on behalf of themselves *and their daughter* cannot possibly develop their claims "against any other person who was a party to State court proceedings relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain the life of Theresa Marie Schiavo, or who may act pursuant to a State court order authorizing or directing the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life" without having Terri Schiavo *alive* and available to participate in the proceedings to the extent that she is able to do so. U.S. Const. Amend. Cf., U.S. Const. Amend. VI, VII, IX, XIV.

The Federal Rules of Civil Procedure do not permit the District Court to draw factual conclusions based on the pleadings alone. *See* F.R.Civ.P. 12(b)(6), 56. The Rule 201(b) of the Federal Rules of Evidence expressly forbids the taking of notice of any fact "subject to reasonable dispute," and, though it is not directly applicable here, the admonition of Rule 704 (opinion on the ultimate issue) is certainly relevant. The District Court, by contrast, treated the issues of judicial independence and inadequate representation as issues of *law*, and, in effect, dismissed the complaint under Rule 12(b)(6) because, in his view, no set of facts could adduced before the trier of fact that might lead them to conclude that the trial was tainted with structural defects.

This Court's case law is replete with admonitions that such allegations are questions of fact. Appellants cited the cases in which this issue arose and the factual circumstances that created the problem. *Tumey v. Ohio,* 273 U.S. 510, 523 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57

(1972); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 822-825 (1986) (same); *Johnson v. Mississippi*, 403 U.S. 212, 215-216, (1971) (per curiam) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracy v. Gramley*, 520 U.S. 899, 905 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); *In re Murchison*, 349 U.S. 133 (1955)(judge violated due process by sitting in the criminal trial of defendant whom he had indicted); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). *Compare*, *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991) (opinion of the Court, per Rehnquist, C.J., and Scalia, O'Connor, Kennedy, and Souter, JJ.) (describing the lack of an impartial judge as one of several "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial."); *American Bonding Company of Baltimore, Md. v. American Surety Co. of New York*, 127 Va. 209, 103 S.E. 599 (1927) ("…it is clear that the judicial position of the commissioner imposed upon him duties which were inconsistent with the obligations which had been assumed by him as the guardian ad litem of an infant who had a substantial interest in his report as commissioner.")

The District Court's conclusion, by contrast, simply relies on its conclusion that as long as the Florida courts followed *Florida* law, there is no federal issue. This is not the law, either under the Federal Rules of Evidence, P.L. 109-3, which explicitly requires a hearing on the merits *de novo*, or the Due Process Clause. Notwithstanding the express

language of the statute, the panel holds that a full hearing on the merits where evidence can be adduced, witnesses confronted and cross-examined, and a jury convened is unnecessary because the District Court retains the discretion under the law to dismiss the complaint – for that is the effective result here – on the basis of its view that the claims raised to date have little, if any, merit.

> The dissent bemoans the fact that the merits of the plaintiffs' claims will never be litigated in federal court. The district court's finding regarding the first-prong injunctive relief factor reflects that those claims lack merit, or at least that the possibility of any merit is too low to justify.
>
> *Schiavo, ex rel Schindler v. Schiavo*, No. 05-11556 at 3 n. 2.

This is so, in its view, because a full trial will simply take too long:

> In arguing that an injunction should be issued, the dissent refers to "a situation where a few days' delay" is all that is necessary. That is not this situation. To afford the plaintiffs the pretrial discovery and full jury trial of all issues they demand would require a delay of many months, if not longer.
>
> *Schiavo, ex rel Schindler v. Schiavo*, No. 05-11556 at 4 n. 4.

Given Congress' explicit instructions concerning trial "on the merits" and the Seventh Amendment's guarantee of trial by jury, we are not told by the majority *why* "a delay of many months, if not longer" is inconsistent with Terri Schiavo's rights, or with the proper administration of justice. All we are told is that:

> There is no denying the absolute tragedy that has befallen Mrs. Schiavo. We all have our own family, our own loved ones, and our own children. However, we are called upon to make a collective, objective decision concerning a question of law. In the end, and no matter how much we wish Mrs. Schiavo had never suffered such a horrible accident, we are a nation of laws, and if we are to continue to be so, the pre-existing and well-established federal law governing injunctions as well as Pub. L. No. 109-3 must be applied to her case.

In sum, the panel's conclusion is that "well-established federal law governing injunctions" overrides the plain language of P.L. 109-3, the clear intent of Congress that

Terri Schiavo be alive during the litigation of her claims, and the irreparable damage to both the jurisdiction created by P. L. NO. 109-3and to Terri's rights that are already ensuing if this injunctions does not issue. (See affidavit of Dr. William Polk Cheshire dated March 23, 2005, attached to "Notice to Court Pursuant to Section 415. 1055(9) F.S. and Petition/Motion for Intervention in Probate Division File No. 901-2908GD-003, Circuit Court of the Sixth Judicial Circuit in and For Pinellas County Florida) (App. 4) (alleging, among other things, that Terri Schiavo may not be in a persistent vegetative state, and that the neglect she suffered may have contributed not only an erroneous decree, but also to a present condition of pain and suffering on the part of Terri Schiavo).

II. The Purposes of the P. L. NO. 109-3– the Purposes of the All Writs Act – and the Dissents Below

There were two dissenting opinions in the Eleventh Circuit. Judge Wilson "strongly" dissented from the original panel decision (App. 2) and Judge Tjoflat dissented from the denial of rehearing *en banc*. (App. 3) Appellants respectfully submit that the position taken by the dissents more closely approximates the language of the statute and the intent of the All Writs Act than does the panel opinion.

The All Writs Act, 28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The purpose of the Act is to allow courts "to protect the jurisdiction they already have, derived from some other source." *Klay v. United Healthcare, Inc*., 376 F.3d 1092, 1099 (11th Cir. 2004). In the case at bar, that source is P. L. NO. 109-3§2.

This case has attracted worldwide attention – including that of the United States Congress, the President, and the political branches of the State of Florida – for two reasons. The first is the most obvious one. As the panel opinion and every other court to deal with this case has recognized: the situation in which the members of Terri Schiavo's family finds themselves is a human tragedy of enormous proportions with "real-time" life and death consequences. Just as in a capital punishment case, Terri's life hangs in the balance, and could well be over within hours of this Court's decision.

A. The Ineffective Assistance and Judicial Independence Claims

That problem, however, however, is not the reason this case in before this court. It is the *second* reason that brings us here. Petitioners Robert and Mary Schindler, have alleged – *among other claims* – that neither they, nor their daughter got a fair trial. The elements of such a case involve a wide range of procedural defects that would create a "structural" defect. *Among* the claims that Appellants are prepared to prove to a jury are:

- *That her guardian's had personal interests that were adverse to those of Terri Schiavo, in that*:
  - He was abusive, not only to Terri, but to other women.
  - He objected to even the most rudimentary forms of rehabilitation, such as protective equipment, a sunlit room, or opportunities to be taken outside for a breath of fresh air.
  - Upon learning that the nursing home staff objected on medical grounds to the entry of a DNR order, he transferred Terri to another facility.
  - That others overheard him say that he wanted "that bitch" (Terri) to die.
  - The deprivation of rehabilitation would cause an increase in the amount he would inherit from the malpractice settlement in the event of Terri's death.
  - He arranged for the payment of his lawyer, Mr. Felos, from the funds of the guardianship, even though Terri may have been eligible for counsel at no expense through the state's Court Appointed Special Advocates (CASA) program.
  - The obligations of his new family – a girlfriend and two children born while he remained "married" to Terri – gave him a personal interest in ending Terri's nutrition and hydration.

- *That her guardian's counsel had personal and professional interests that were adverse to those of Terri Schiavo, in that*:
  - The guardian's attorney, George Felos, is closely associated with the "Right to Die" movement.
  - The guardian's attorney, George Felos, acquired a financial interest in the outcome of the case during the pendency of the guardianship.
  - The guardian's attorney, George Felos, blocked the admission and development of evidence that would prove Terri's current condition.
  - The guardian's attorney, George Felos, has very effectively represented *Michael's* personal interests, but not Terri's constitutional right to self-determination.
  - The guardian's attorney, George Felos', zealous representation of Michael's personal interests led him to object to the appointment of any guardian ad litem who would question Michael's preconceived notions of Terri's condition or desires.
  - The guardian's attorney, George Felos', engaged in conduct during the trial that would raise questions concerning the zeal with which he was representing Terri's interests, as opposed to Michael's or his own.

Notwithstanding the plain language of the complaint and habeas petition, the District Court's denial of the writ presupposed that the *only* question relevant to the entry of a preliminary injunction was whether Judge Greer's actions compromised his independence. On that point, the District Court it was emphatic: a review of the *procedural history of the trial court litigation in light of Florida law* – not the record and not the facts – was a legally and constitutionally adequate substitute for the "de novo [determination of] *any* claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act" This, Appellants submit, is plain error.

B. The Claim that the Proceedings Below Violated Terri Schiavo's Right to Self-Determination Under *Cruzan*

In *Bullington v. Missouri*, 451 U.S. 430, 442-443 (1981), this Court drew a distinction between a cases in which only trial errors are alleged and cases in which the reversal of the conviction is based on insufficiency of the evidence.

> There is an important exception, however, to the rule recognized in [*North Carolina v.*] *Pearce*. A defendant may not be retried if he obtains a reversal of his conviction on the ground that the evidence was insufficient to convict. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). The reasons for this exception are relevant here:
>
>> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its cases. As such, it implies nothing with respect to the guilt or innocence of the defendant....
>>
>> *The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial*, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it can assemble.... Since we necessarily accord absolute finality to a jury's *verdict* of acquittal--no matter how erroneous its decision--it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." Id., at 15-16, 98 S.Ct., at 2149-2150 (emphasis in original).

If, as in *Bullington*, a jury finds, on the record of the de novo hearing required by P. L. NO. 109-3§2, that Terri Schiavo's *present* condition can be ameliorated through therapy and training, and that she could, over time, be taught to speak, there would, by definition, be no prejudice to her interests. The burden would then shift to the Appellant, Michael Schiavo, to prove, to the same jury, that Terri Schiavo *herself* would consider the *present* state of medical arts, diagnostics, and rehabilitation therapy irrelevant to her fully informed choice of whether to accept or reject continued nutrition and hydration.

C. The First Amendment Free Exercise Claim

In the proceedings below, Plaintiffs made a proffer of testimony regarding *another* of Terri Schiavo's federal constitutional claims: the guardianship court's violation of her First Amendment right to free exercise of religion. The colloquy between counsel for the Schindler family, Mr. David Gibbs and Judge Whittemore is instructive:

MR. GIBBS: Your Honor, Terri, throughout the record, was a faithful Catholic. And there have been some fairly dramatic developments in the teachings of the Roman Catholic Church as to whether providing food and water is what the Catholic Church would call morally obligatory or not.

And, Your Honor, we believe that at this point we are receiving multiple statements out of the Vatican, and in the year 2004 with the words of the Pope, that at this point it is a mortal sin, it is a complete violation of both her federal statutory and her United States constitutional rights to religious liberty and free exercise for her to be put in a position of refusing nutrition and hydration in light of what her church -- which I don't believe there's any contest as to her background being Roman Catholic.

She was from a child a Catholic. All the different protocols and trainings, and she was a Catholic at the point of her collapse in 1990. So was married to Michael Schiavo as a Catholic. And we are now in a position where a court has ordered her to disobey her church and even to jeopardize her eternal soul.

THE COURT: Well, we're [sic] in the record do I find that? There is a statement by the Schindlers that she was Roman Catholic or Catholic, that Mr. Schiavo was not. What other evidence do I have before me to support the contention that whatever has occurred violated her rights under the 1st Amendment?

MR. GIBBS: Well, Your Honor, to force someone -- a disabled person does not lose their 1st Amendment religious liberty or free exercise rights. And for her to be forced to violate the clear teachings of her church and to jeopardize her spiritual state, number one, creates incredible distress for the parents, but we believe is a violation of her protected rights. And Your Honor, again, on any of these issues, great deals of evidence, lots of testimony, can be brought forward.

THE COURT: Is it not the burden, Mr. Gibbs, for you to establish a substantial likelihood of success today?

MR. GIBBS: Yes, Your Honor. But as pled.

THE COURT: As pled. I have two statements that she was brought up in the Catholic Church.

MR. GIBBS: Yes, Your Honor.

THE COURT: That her husband is not Catholic. And there's a statement attributed to -- a fairly recent statement attributed to Pope John Paul, II. What evidence do we have that she would have embraced, followed, what-have-you as a tenet of her religious beliefs that which was spoken by Pope John Paul, II?

MR. GIBBS: What we have is her lifelong demonstration of commitment to the Roman Catholic Church.

THE COURT: *Where is that in the record before me*? I'm not being facetious. I'm looking for it.

MR. GIBBS: *Your Honor, it would have to be provided to you or could be provided to you. I mean, if it would assist this Court in making its determination, her father is here. He will gladly provide testimony* as to her christening as a Catholic, her attendance of Catholic schools, her regular attendance at Catholic masses, her Catholic wedding. The fact that actually the day before she collapsed, she attended mass with her family.

I don't believe there is a significant contention that she's not a practicing Catholic. And we believe that to take a practicing Catholic, even at a disabled state, and force them to disobey a mandate of the church --

THE COURT: How would you suggest, if you were to have a trial on the merits, that you would establish that she is being burdened and prevented from exercising her religious beliefs?

MR. GIBBS: That there are few things more important in religion than how one dies. And that to somehow put her in a state of complete obedience to what the church has proclaimed, and that the Catholics, Your Honor, put the Pope actually speaking for God, speaking for Jesus Christ, where he issues morally obligatory statements, he is viewed as the Vicar of Christ.

And for them to knowingly disobey could well create additional damnation of their soul, or in sense of purgatory, it would damn them to much more significant times of suffering eternally, and so when you look at when someone dies in disobedience to their sincerely held religious beliefs, we believe that is a significant issue of 1st Amendment proportions, and it's something that should well be looked at by this court.

THE COURT: I see, once again, your memo in support dwelled on the due process violations. Do you have any particularly enlightening cases from the 11th Circuit or the United States Supreme Court that I might review in that regard as to counts – really Counts Three and Four, I guess it would be; wouldn't it?

MR. GIBBS: Yes, Your Honor. And if I could put forward again, we would be more than delighted to provide this Court with any additional testimony, evidence, briefing --

THE COURT: Well, you know, I misspoke. It's Counts Four and Five. Today is the day for the hearing.

MR. GIBBS: Yes, Your Honor.

THE COURT: It is your burden to establish to my satisfaction the substantial likelihood of prevailing on the merits. I would like some case law to give me guidance. I have none, other than some cases on the

If you have cases, how long would it take you to have them cited and furnished to the Court?

MR. GIBBS: Shortly after this hearing. We could probably have it to you within an hour. I mean, I can cite some basic Supreme Court cases regarding religious liberty that I believe this Court would be familiar with. Oregon versus Smith, the Supreme Court standard in 1990. And, Your Honor, we can get you a litany of others.

And, *Your Honor, I offered -- and I should clarify -- would this Court like for Mr. Schindler to testify in any respect to assist this Court in determining the Roman Catholic beliefs or practices of his daughter, Terri, he is here. I have not talked to him, but he would gladly step forward under oath and answer any questions of this Court and any questions of opposing counsel that would be at all helpful.*

THE COURT: *I'm not suggesting that that would not be important or relevant at some point, but I think for purposes of today's hearing, I'm going to consider the papers that are before me in accordance with the local rules.*

I don't think the motion will turn on that aspect today. If it were to, I would, of course, consider testimony and evidence.

MR. GIBBS: Your Honor, do you have any additional questions on point number one, the substantial likelihood that we will prevail on the merits as pled?

Transcript of Motion for Temporary Restraining Order Before the Honorable James D. Whittemore, United States District Judge, 21 March 2005, Tampa Florida at 28-32

This particular colloquy (and there are others) makes it clear that the District Court believed that the hearing on the motion for a temporary injunction *was* the hearing required by Congress. In his own words: "Today is the day for the hearing." (Transcript of Preliminary Injunction Hearing at 32).

From the context, three things are clear.

1. Judge Wittenmore is skeptical of the central holding of Court's ruling in *Cruzan*, to the effect that incapacitated patients do not lose their right to self-determination simply because a proxy must make the decision for them. Though he asked the following question: "*How would you suggest, if you*

were to have a trial on the merits, that you would establish that she is being burdened and prevented from exercising her religious beliefs?", he declined to accept testimony that would tend to prove it.

2. At least in Judge Whittemore's view, Terri Schiavo's family was not going to be able to litigate *any* of its constitutional and statutory claims unless it could first convince the court *on the record of the motion for a preliminary injunction whose purpose was to keep Terri Schiavo alive* that they would *win* the case on both the facts *and* the law.

3. Judge Whittemore's non-treatment of the Equal Protection count is equally telling. There is no case in this Court, or anywhere else, that imposes the burden of pleading and proof of the entire claim at the pleading and preliminary injunction level.

The result is that Terri Schiavo is, *once again*, being penalized by the judges hearing her case for being the first incapacitated person in the history of the State of Florida to have been involved in a "substituted judgment" proceeding where there is a significant difference of opinion over whether she can actually communicate her wishes. If she can – and this is a matter of hotly disputed fact that is totally unsuitable for resolution on a motion for a preliminary injunction – neither Michael Schiavo, nor the State of Florida, may take *any* action that would deprive her of either necessary medical care, or (obviously) her life without her consent. Under this Court's decision in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 280 (1990) and the Florida Supreme Court's decision in *In re Guardianship of Browning*, 568 So.2d 4, 12

(Fla.1990), either action would violate her rights to privacy and self-determination under the Florida and United States Constitutions, respectively.

III. The Purpose of P. L. NO. 109-3is Not to Stave Off Death Through Endless Relitigation of the Facts, but is Rather to *Preserve* Terri Schiavo's Fundamental Right to Self-Determination by Providing Her Parents with the Opportunity to Plead and Prove that Terri's Wishes Were Determined in a Proceeding in which She Was Not Represented Effectively and in which the Trial Judge Compromised His Judicial Independence.

As recently as this afternoon, the State of Florida's Department of Children and Families sought to intervene in the guardianship case, (App. 4), and to prove – as a matter of fact – that Terri Schiavo is *not* in a PVS, and that her medical records show that she *can feel pain*. (App. 4). Appellants, once again, moved to recuse Judge Greer, but were rebuffed. The result was an injunction against any attempt, by any person, to hydrate her until Judge Greer finished his considerations of the implications of the new evidence placed before him by an eminent neurologist, Dr. William Polk Cheshire, Jr., M.D., who is not only in practice at the Mayo Clinic in Florida, but also an appointed volunteer with the Florida statewide Adult Protective Services team. (App. 4)

The concerns of Congress, the Governor, and the Florida Legislature must therefore be seen in the context of this case. When parties to litigation raise significant federal questions that call into question the integrity *of the judicial process* by which the alleged "facts" regarding Terri Schiavo's alleged "substituted judgment" concerning nutrition and hydration were found, it would be surprising – if not appalling – were the political branches to fail in their efforts to provide some sort of statutory redress of this real and substantial grievance *involving the Florida judiciary*. The Fourteenth Amendment explicitly affirms the power of both Congress and the States to provide, by statute, for the protection of the constitutional rights of every person subject to their

respective jurisdiction. U.S. Const. amend. XIV §§ 1, 5 (Citizenship and Enforcement Clauses). It was adopted to redress the grievances of the nation in the wake of one of the most egregious *judicial* violations of separation of powers, federalism, civil, and human rights in American history: the decision of the United States Supreme Court in *Dred Scott v. Sandford*., 60 U.S. (19 How.) 393 (1856).

With evidence available to both Judge Greer *and* Judge Whittemore, it is incomprehensible that the Eleventh Circuit panel could start its analysis with the statement that:

> There is no provision in Pub. L. No. 109-3 addressing whether or under what conditions the district court should grant temporary or preliminary relief in this case. There is no more reason in the text of the Act to read in any special rule about temporary or preliminary relief than there would be to read in a special rule about deciding the case before trial on Fed. R. Civ. P. 12(b)(6) or summary judgment grounds.

Appellants submit that the panel's interpretation of the law is wrong for two reasons: 1) it misreads P.L. 1090-3; and 2) it misapplies the standards that would be applicable to this case were this case pending on a motion to dismiss under Fed. R. Civ .P. 12(b)(6) or summary judgment, Fed. R. Civ. P. 56.

P. L. NO. 109-3§2 provides that

> The suit [on behalf of Theresa Marie Schiavo] may be brought against any other person who was a party to State court proceedings relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain the life of Theresa Marie Schiavo , or who may act pursuant to a State court order authorizing or directing the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

Given the nature of the grievances alleged against the Florida court system, it provides specific rules that should govern the deliberations of the District Court. In such a suit,

1. [“T]he District Court shall determine *de novo* any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act,”
2. “[N]otwithstanding any prior State court determination and”
3. “[R]egardless of whether such a claim has previously been raised, considered, or decided in State court proceedings.”
4. “The District Court shall entertain and determine the suit without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted.”

The District Court did not “determine de novo any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act.” (It refused evidence.) It took into account the prior procedural history in complete disregard of the Congressional admonition that it was to hear the evidence de novo “notwithstanding any prior State court determination,” and it clearly ruled that the Florida courts had given enough process, even though it was not to consider the issue except in context of the evidence adduced at the de novo hearing: “regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings.”

IV. Public Law 109-3 Is a Constitutional Exercise of Congressional Remedial Power under Article III §1 and Section 5 of the Fourteenth Amendment.

In *Faw v. Marsteller*, 6 U.S. 10, 31 (1804), Chief Justice John Marshall examined what the Court considered, at the time, to be “an extraordinary case, which is completely entitled to the extraordinary relief furnished by the act” in question. In the case at bar, the Eleventh Circuit concedes that this is “an extraordinary case,” but rejects the proposition that the family of Terri Schiavo is *even marginally* “entitled to the extraordinary relief furnished by the act” in question, P.L. 109-3, because it does not believe that there is any set of facts that would support the allegations of the amended complaint.

In effect, the District Court's ruling treats the opposition to the motion for a temporary injunction designed to preserve the jurisdiction of the court under P. L. No. 109-3as a motion to dismiss under F.R. Civ. P. 12(b)(6), but refuses to apply the presumption that the pleadings must be taken as true, and viewed in a light most favorable to Plaintiffs. Public Law 109-3 amplifies and expands that presumption by mandating that "[t]he District Court *shall entertain and determine* the suit without any delay *or abstention in favor of State court proceedings*, and regardless of whether remedies available in the State courts have been exhausted." P. L. No. 109-3§2 (emphasis added). By holding that "[Appellants] Complaint necessarily requires a consideration of the of the state court proceedings *to determine whether there is a showing of due process violations*," Order of March 22, 2005, *Schiavo, ex rel Schindler v. Schiavo*, No. CV-05-00530-T, at 5 (emphasis added), and holding – without any review of facts -- the District Court has denied the remedy Congress has provided.

As Chief Justice Marshall held in *Faw*, "[i]n inquiring to what extent this relief ought to be afforded, or, in the words of the law," whether she is entitled to a trial "de novo [of] any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act, notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings," this Court should "perceive no other guide, by which its opinion ought, in this case, to be regulated," but the standard set out by Congress itself.

V. Section 5 of the Fourteenth Amendment Authorizes the Congress to Take Remedial Actions that are, in the Words of this Court, both "Congruent" and "Proportional" to the Nature of the Violation to be Remedied.

The legislative history of this case makes clear that Congress was concerned that Terri Schiavo might "fall between the cracks" of existing federal law. Were she a convicted criminal subject to a death sentence, she would fall squarely within the ambit of the *habeas corpus* statutes, 42 U.S.C. §2254. But Terri Schiavo is no criminal. She is a severely disabled adult who cannot, at present, speak for herself.

As a result, the Applicant is in the legal custody of the State of Florida, which has ordered her husband, Defendant Michael Schiavo, to withhold all nutrition and hydration – even by mouth – and even though affidavits were submitted by medical professionals who offered to testify that Terri could, in fact, absorb food and water by mouth, and even though Plaintiffs have pled *and are prepared to prove* that Terri Schiavo can, with appropriate rehabilitation, *speak for herself*.

The United States District Court for the Middle District of Florida, however, disagreed, and held that Terri Schiavo was not a "person in custody" as that term is used in the habeas corpus statute. Thus, the initial legislative proposals to remedy the gap in federal law would have defined persons in Terri Schiavo's situation as "persons in custody" under 42 U.S.C. § 2254. See "Incapacitated Persons Legal Protection Act of 2005", introduced in the House as H. R. 1151, and in the Senate as S.539 (109th Cong. 1st Sess.) (which would have added a new §2256 to Title 42, defining "custody pursuant to the judgment of a State court, as the case may be, when an order of such a court authorizes or directs the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain the person's life."

As a practical matter, however, making a person subject to an order authorizing or directing the withholding of medical treatment necessary to sustain the person's life

would be a mixed blessing. All federal *habeas* actions must comply with the Antiterrorism and Effective Death Penalty Act. *Cf. Breard v. Greene*, 523 U.S. 371 (1998), a statute *designed* to raise procedural hurdles that are simply inapposite in cases such as this one.

The only alternatives left to Congress to redress the alleged grievances of the Schindler family were 1) general legislation; or 2) more specific legislation that solves only the immediate problem while reserving Congress' right to revisit the issue in the future. Sections 6-9 of P. L. NO. 109-3speak to both concerns:

> SEC. 5. NO CHANGE OF SUBSTANTIVE RIGHTS.
>
> Nothing in this Act shall be construed to create substantive rights not otherwise secured by the Constitution and laws of the United States or of the several States.
>
> SEC. 6. NO EFFECT ON ASSISTING SUICIDE.
>
> Nothing in this Act shall be construed to confer additional jurisdiction on any court to consider any claim related--
>
> (1) to assisting suicide, or
>
> (2) a State law regarding assisting suicide.
>
> SEC. 7. NO PRECEDENT FOR FUTURE LEGISLATION.
>
> Nothing in this Act shall constitute a precedent with respect to future legislation, including the provision of private relief bills.
>
> SEC. 8. NO AFFECT ON THE PATIENT SELF-DETERMINATION ACT OF 1990.
>
> Nothing in this Act shall affect the rights of any person under the Patient Self-Determination Act of 1990.
>
> SEC. 9. SENSE OF THE CONGRESS.
>
> It is the Sense of Congress that the 109th Congress should consider policies regarding the status and legal rights of incapacitated individuals who are incapable of making decisions concerning the provision, withholding, or withdrawal of foods, fluid, or medical care.

The result of *three days* of extended negotiations between the House and the Senate was

P. L. NO. 109-3§§1-4

> SECTION 1. RELIEF OF THE PARENTS OF THERESA MARIE SCHIAVO
>
> The United States District Court for the Middle District of Florida shall have jurisdiction to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.
>
> SEC. 2. PROCEDURE.
>
> Any parent of Theresa Marie Schiavo shall have standing to bring a suit under this Act. The suit may be brought against any other person who was a party to State court proceedings relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain the life of Theresa Marie Schiavo, or who may act pursuant to a State court order authorizing or directing the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life. In such a suit, the District Court shall determine de novo any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act, notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings. The District Court shall entertain and determine the suit without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted.
>
> SEC. 3. RELIEF.
>
> After a determination of the merits of a suit brought under this Act, the District Court shall issue such declaratory and injunctive relief as may be necessary to protect the rights of Theresa Marie Schiavo under the Constitution and laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.
>
> SEC. 4. TIME FOR FILING.
>
> Notwithstanding any other time limitation, any suit or claim under this Act shall be timely if filed within 30 days after the date of enactment of this Act.

The bill thus solves each of the problems identified in the March 18, 2005, ruling of the District Court denying Terri's habeas corpus petition on the grounds that she is not

1) a "person in custody; 2) abstention (an alleged *Rooker-Feldman* problem); 3) standing problem, and 4) time to prepare and mount a trial on the merits.

VI. Article III Section 1 Confers Power on Congress to Define the Subject Matter Jurisdiction of this Court.

Congress chose to remedy the lack of a forum (aside from this Court on *certiorari*) by creating a special jurisdictional rule for the United States District Court for the Middle District of Florida. Section 5 of the Fourteenth Amendment clearly give the Congress power to authorize review of state court proceedings for violations of federal claims, and Article III §1 provides that: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts *as the Congress may from time to time ordain and establish*." (emphasis added).

The Middle District of Florida was established by Act of Congress, 28 U.S.C. §89, and has the general jurisdiction conferred on all federal district courts by Title 28 of the United States Code. Section 1 of Public Law 109-3, which became law on Monday March 21, 2005, confers specific jurisdiction on that court:

> The United States District Court for the Middle District of Florida shall have jurisdiction to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

Congress has utilized bills of this type on other occasions. In *Edwards v. United States*, 286 U.S. 482, 52 S.Ct. 627 (1932), the Supreme Court answered a question from the United States Court of Claims concerning the validity of the President's signature on a bill that conferred specific jurisdiction on the Court of Claims to adjudicate certain claims against the United States. Act March 5, 1931, 46 Stat. 2163. Although the question

certified by the Court of Claims dealt only with the duration of the time period in which the President could exercise the veto power[1], *see* 286 U.S. at 485, the Court's discussion clearly states that both the Attorney General and the Congress agreed that Congress had the constitutional authority to use the private bill process to confer jurisdiction to resolve specific cases or controversies:

> *No difference of opinion between the parties as to the validity of the measure*, as thus approved, *is disclosed in the argument at bar*. The President approved the bill upon the advice of the Attorney General (36 Op. Attys. Gen. 403) who, in accord with the plaintiff, submits that the certified question should be answered in the affirmative. In view of the opinion at one time expressed by the Judiciary Committee of the House of Representatives (H. R. Report No. 108, 38th Cong., 1st sess., June 11, 1864), the Attorney General advised the Judiciary Committee of that House of the pendency of the present cause, and we granted to Mr. Sumners, the chairman of that Committee, at his request, leave to appear as amicus curiae. He has stated to the Court that the Judiciary Committee of the House of Representatives is now of the opinion that the President has the power asserted and he has presented an argument in support of the President's action.

282 U.S. at 485 (emphasis added).

In *Herbert v. United States*, 39 F.Supp. 267 (E.D. La. 1941), Congress also conferred specific subject matter jurisdiction:

> An Act Conferring jurisdiction upon the United States District Court for the Eastern District of Louisiana to hear, determine, and render judgment upon the claims of Anna Lee Hebert, Mrs. Nicholas Hebert, Mr. and Mrs. Dossie E. Worrell, Mr. and Mrs. C. B. McClure, and W. F. Cobb.', and approved June 25, 1938, joined in this action against the United States of America..
>
> Act June 25, 1938, Chap. 662, 52 Stat. 1398 (75th Cong. 3d Sess.)

Had there been any jurisdictional problem under Article III, the United States – the defendant – would have raised the question, but, just as in *Edwards*, it did not do so.

[1] "'Did the Act of March 5, 1931 (46 Stat. 2163), becomes law when it was approved by the President on March 5, 1931, after the final adjournment on March 4, 1931, of the Congress which had passed it?" 286 U.S. at 485

Congress has plenary power to define the jurisdiction of the lower courts, and certainly has power to confer the power to "to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo" that arises under the Constitution and laws of the United States. U.S. Const. art. III §2.

VII. Public Law 109-3 Does Not Violate the Rights of Theresa Marie Schiavo

Public Law 109-3 confers specific jurisdiction on this court

> to hear, determine, and render judgment on a suit or claim *by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States* relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

In order to prevail on a claim that P.L 109-3 is unconstitutional, Michael Schiavo would need to allege and prove that a law *conferring jurisdiction* on this court is an unconstitutional violation of "*a right of Theresa Marie Schiavo* under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life." (emphasis added).

In this case, plaintiffs Robert and Mary Schindler have raised five claims in the District Court that go to the heart of Terri's federal claims. The chart below summarizes *some* , but not all, of those claims[2]:

FEDERAL CLAIM	**EXAMPLES OF RELEVANT FACTS TO BE PRESENTED TO THE JURY**

[2] For a list of all of the claims made in the District Court, see Amended Complaint filed March 22, 2005. Due to the need to obtain a stay to preserve the federal rights of Appellant, Terri Schiavo, counsel submit the claims raised here do precisely what the law requires, and no more: give *notice* of the nature of the claims presented. Congress gave Mr. and Mrs. Schindler thirty (30) days to file their claims, but Terri's impending death will make it impossible for the court to hear and resolve any of them.

FEDERAL CLAIM	EXAMPLES OF RELEVANT FACTS TO BE PRESENTED TO THE JURY
Cruzan: Self-Determination under Amend. XIV	• That Terri has a present ability to communicate for herself on a basic level. • That Terri spoke to her rehabilitation team as early as 1990, but that the GAL did not follow it up or order tests to see what she can do. • That Terri actually communicates to her Mother. • That Michael's story that Terri wants to die was not developed until nearly five years after Terri's brain injury. • That Terri's best friends/family testified that she would want treatment. • That experts will testify that Terri can be taught to swallow. • That Terri has not been allowed by her guardian to have a swallowing *test* since 1992. • That experts will testify that Terri can be taught to speak. • That a functional MRI [fMRI] can tell us the level of Terri's brain functioning. • That there is no evidence in the record that Terri would not want an fMRI. • That Terri's religious beliefs are founded on the Catholic faith. • That Terri would abide by the Holy Father's teachings. • Terri's proxy-guardian, Judge Greer, never met with her to attempt to communicate with her or determine her wishes.
Due Process: Impartial Judge	• Contrast proper role of the Judge in Florida Guardianships. • Actions of Judge Greer on the record. • Disparate treatment of parties in the record. • Statements made by the court on the record indicating bias. • Refusal to acknowledge mistakes made in judging the credibility of key witnesses to Terri's wishes. • Refusal to permit swallowing tests after 1992. • Approval of Guardianship Plans with no provision for therapy, socialization, stimulation, or rehabilitation. • Denial of family's request to feed Terri by natural means. • Approval of guardian's decision to warehouse Terri at Hospice, rather than a rehabilitative medical care center. • Approval of guardian's restriction of visitors, travel

Federal Claim	**Examples of Relevant Facts to be Presented to the Jury**
	outside the Hospice, and even social interaction within the Hospice. • Absolute ban on photos, videos, and audio recordings of Terri after 2002. • Refusal to safeguard Terri's physical needs by pressing the guardian to provide her with an operative wheelchair.
Due Process: Ineffective Representation by Guardian	• That Michael may have been physically abusive prior to Terri's incapacity. • That according to the GAL his attitude changed after the malpractice case. • That according to the Hospice nurse he tried to inject her with insulin during the pendency of the guardianship. • That there is evidence that Terri was going to divorce Michael Schiavo and feared him. • That Michael was challenged by the nursing staff after he put on a DNR order, and how he responded by changing the nursing home. • That he denied her all rehabilitation after a certain date. • That an audit by counsel of her rehabilitation account might cast doubt on his credibility as a witness. • According to one of the experts, Michael was unqualified to be a guardian due to his lack of objectivity, his lack of veracity, and questions about his stewardship of the financial accounts. • That Michael's financial duties and ties to his new family negatively impacted his representation of Terri. • That Terri's friends may testify of seeing bruising consistent with spousal abuse. • That Michael attempted to block routine treatment of Terri for a urinary tract infection with the intention of causing her death. • Terri's proxy-guardian, Judge Greer, never met with her to assess her true condition, attempt to communicate with her, or determine her wishes.
Due Process: Ineffective Representation by Counsel	• The guardian's attorney, George Felos, is closely associated with the "Right to Die" movement. • The guardian's attorney, George Felos, acquired a financial interest in the outcome of the case during the pendency of the guardianship. • The guardian's attorney, George Felos, blocked the admission and development of evidence that would

FEDERAL CLAIM	EXAMPLES OF RELEVANT FACTS TO BE PRESENTED TO THE JURY
	prove Terri's current condition. • The guardian's attorney, George Felos, represents Michael's interests, not Terri's, and thus had a conflict of interest. • The guardian's attorney, George Felos', representation of Michael caused him to object to the appointment of a truly independent GAL. • The guardian's attorney, George Felos', engaged in conduct during the trial that would raise questions concerning the zeal with which he was representing Terri's interests, as opposed to Michael's or his own.
Free Exercise	• Impact on Terri's current wishes in light of the Holy Father's comments regarding mandatory nature of nutrition and hydration for PVS patients. • Terri's sincerely held beliefs and practicing faith as a devout Catholic. • Denial of Extreme Unction in 2003. • Terri attended church regularly with her family and not with Michael.
Equal Protection	• Florida's differential treatment of persons with cognitive ability and those who, like Terri, who are alleged to be in a PVS. • Judges may not act as proxies for persons without disabilities or unborn children, but may do so for persons alleged to be in PVS.

Under Public Law 109-3, the Terri Schiavo's parents have standing to allege that the rights of their daughter, Theresa Marie Schiavo, were violated by the State of Florida.

> Any parent of Theresa Marie Schiavo shall have standing to bring a suit under this Act. The suit may be brought against any other person who was a party to State court proceedings relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain the life of Theresa Marie Schiavo, or who may act pursuant to a State court order authorizing or directing the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

As long as there is an allegation of the requisite injury-in-fact, Congress clearly has the power to confer standing by statute. In *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973), the Court held:

Recent decisions by this Court have greatly expanded the types of 'personal stake(s)' which are capable of conferring standing on a potential plaintiff. Compare *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939), and *Alabama Power Co. v. Ickes*, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938), with *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970), and *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). But as we pointed out only last Term, 'broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.' *Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972). Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, [ ] federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.

VIII. Defendant Michael Schiavo's Claim that these State Courts have Previously Litigated the Claims is Irrelevant Under the Terms of the Jurisdictional Statute Because Congress Has Required Federal Court Review of Terri Schiavo's Constitutional Claims

In the case at bar, and in the habeas corpus proceeding pending before Judge Moody (Case No. 05-cv-00522-JSM-TGW), Plaintiffs have alleged significant injuries to the person and to the rights of their daughter, Theresa Marie Schiavo, and both they *and Terri Schiavo*, are entitled to a full trial – *de novo and on the merits* – of *each* of those claims "notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings." PL 109-3 §2.

Defendant, Michael Schiavo's claim that the state courts have already decided the claims are foreclosed by the jurisdictional statute in several respects. The first is that the language of the jurisdictional statute itself eliminates any claim that the abstention doctrine insulates the prior litigation from a *de novo* review on the merits:

> The District Court shall entertain and determine the suit *without any delay or abstention in favor of State court proceedings*, and regardless of whether remedies available in the State courts have been exhausted.
>
> PL 109-3 §2 (emphasis added)

The order of the Eleventh Circuit vacating Judge Moody's order dismissing the habeas corpus petition confirms this reading of the statute:

> The motion for remand contained in Petitioner's supplemental letter brief of March 20, 2005 is granted, the judgment of the district court, including its March 18, 2005 order denying the petition for a writ of habeas corpus is vacated, *and the case is remanded to the district court with instructions for it to permit the Petitioner to file an amendment raising any claim or claims they wish to pursue under the special legislation signed into law by President Bush earlier today*, Act of March 21, 2005, Pub.L. No.[109-3]

Schiavo, ex rel Schindler v. Greer, No. 05-11517 (Eleventh Circuit, March 21, 2005) (emphasis added).

Second, Plaintiffs have raised a series of federal claims arising under 42 U.S.C. § 1983 and other federal civil rights statutes such as the Americans with Disabilities Act that have not been litigated de novo and on the merits in this or any court, and which will expire when Terri dies. The All Writs Act explicitly provides that a federal court can issue any writ necessary to preserve its jurisdiction. A temporary injunction restraining the enforcement of the order issued by Judge Greer is thus necessary to preserve the jurisdiction conferred by P.L. 109-3. It will, quite simply, lapse when Terri dies.

IX. The Petition for Habeas Corpus Pending in the District Court Raises Claims Not Before this Court and Provides an Additional – and Remedially Distinct – Form of Relief Available to Theresa Marie Schiavo

Plaintiffs are *also* entitled to amend their Petition for Habeas Corpus in No. 05-cv-00522-JSM-TGW, which is a direct challenge to the constitutionality of Terri Schiavo's continuance in the custody of the State of Florida: The Supreme Court's recent decision *Wilkinson v. Dotson*, --- S.Ct. ----, 2005 WL 516415 (March 7, 2005), draws clear distinctions between the relief available in *habeas corpus* and that which is available under 42 U.S.C. § 1983.

In *Wilkinson* two state prisoners challenged Ohio's parole procedures under 42 U.S.C. § 1983. In an extensive discussion of the differences between the two remedies, the Court drew a bright line between proceedings that challenge "the fact or duration of [a person's] confinement" in which a person Must seek federal habeas corpus relief (or appropriate state relief)", *see* 2005 WL 516415, and those cases in which the remedy "does not mean immediate release from confinement or a shorter stay in prison."

> These cases, taken together, indicate that a state prisoner's § 1983 action is barred (absent prior invalidation)--no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)--*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.
>
> *Wilkinson v. Dodson*, 2005 WL 516415 at *5 (emphasis in the original)

In the habeas case, Terri Schiavo and her parents (as next friends) are *explicitly* seeking review of the procedures that led to the Ward's confinement by Respondent, Judge Greer, and the guardian he appointed, Respondent, Michael Schiavo, under the authority granted to him by the State of Florida. By citing the *Rooker-Feldman* doctrine – which is inapplicable to habeas corpus proceedings – the Judge Moody inadvertently made it clear that Defendant is missing the all-important distinction recognized by the Supreme Court in *Wilkinson: i.e.* that that "success in [the habeas] action [would] necessarily demonstrate the invalidity of [Terri Schiavo's] confinement or its duration."

Were there any doubt about the bright line between the 1983 claims involved in this case and the challenge to the confinement raised in No. 05-cv-00522-JSM-TGW drawn by the majority in *Wilkinson v. Dotson*, it is resolved by the concurring opinion filed by Justices Scalia and Thomas:

> It is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a "quantum change in the level of custody," Graham v. Broglin, 922 F.2d 379, 381 (C.A.7 1991) (Posner, J.), such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody. That is what is sought here: the mandating of a new parole hearing that may or may not result in release, prescription of the composition of the hearing panel, and specification of the procedures to be followed. … *[T]he prisoner who shows that his sentencing was unconstitutional is actually entitled to release, because the judgment pursuant to which he is confined has been invalidated; the conditional writ serves only to "delay the release ... in order to provide the State an opportunity to correct the constitutional violation."* Hilton v. Braunskill, 481 U.S. 770, 775, 107 S.Ct. 2113, 95 L.Ed.2d

> 724 (1987); see *In re Bonner,* 151 U.S. 242, 259, 262, 14 S.Ct. 323, 38 L.Ed. 149 (1894) (conditional writ for proper resentencing). By contrast, the validly sentenced prisoner who shows only that the State made a procedural error in denying discretionary parole has *not* established a right to release, and so cannot obtain habeas relief--conditional or otherwise. Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release.
>
> *Wilkinson v. Dodson*, 2005 WL 516415 at *8 (emphasis added) (Scalia and Thomas, JJ. Concurring).

CONCLUSION

The implications of the judicial death order which was the outcome of this litigation are ominous for all persons with disabilities. Individuals who are the subject of substituted judgment proceedings are among the most vulnerable of our citizens who cannot speak for themselves. 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 through 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.

The issues in this case are therefore matters of national concern, not only because they are significant roadblocks in the fight for equality for persons with severe disabilities, but also because the decision in this case will affect future substituted judgment cases in Florida and in other states.

Under these circumstances, the effects of a failure to grant a stay would be to deny Applicants and Mrs. Schiavo effective relief in this case because Mrs. Schiavo will die before the Court has the opportunity to consider the merits of Applicants' Petition for a Writ of *Certiorari*. A stay is further justified by the irremedial finality of the commencement of a slow and painful execution at 1:45 p.m. on March 18 through a court

order to terminate Mrs. Schiavo's assisted feeding. Applicants and their daughter are already suffering irreparable injury, and the equities clearly favor granting a stay because a stay is the only means of sparing Mrs. Schiavo's life while her due process rights as a disabled American citizen may be reviewed by this Court. Applicants submit that Your Honor should grant the stay pending the filing and determination of their Petition for a Writ of *Certiorari*.

Mrs. Schiavo's life literally hangs in the balance. Mr. and Mrs. Schindler therefore pray that this Court expedite its consideration of the matters raised herein and make its Order effective immediately after the law takes effect with the signature of the President.

A woman is dying from dehydration and starvation. President Bush recognized this emergency situation where every minute counts by re-arranging his schedule to be in Washington D.C. immediately upon passage of this bill. We would respectfully request that this Court honor the good and noble intentions of the U.S. Congress and the personal sacrifice of the President with the same commitment to save life. I implore this Court to move immediately to save the life of Terri Schiavo upon the passage of this law, even if that occurs later today or at 12:01 a.m. Monday morning. A tragedy of unbelievable proportions would occur if the Act is passed into law and this Court does not respond in time to save Terri Schiavo's life.

I plead with you to move immediately on this matter. It is expected that Terri Schiavo's innocent life will be placed in the hands of this most honorable Court. On behalf of her parents, we respectfully plea for the life of their daughter whom they love more than life itself.

Respectfully submitted,

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