**UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**

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| THERESA MARIE SCHINDLER SCHIAVO,<br><br>Ex rel.<br><br>ROBERT SCHINDLER and MARY SCHINDLER<br><br>*Plaintiffs,*<br><br>vs.<br><br>MICHAEL SCHIAVO<br>JUDGE GEORGE W. GREER, and<br>THE HOSPICE OF THE FLORIDA<br>SUNCOAST, INC.<br><br>*Defendants.* | Civ. Act. No. 8:05-CV-530-T-27TBM |

**OPPOSITION TO MOTION FOR INJUNCTION**

This case comes to the Court after eight years of painstaking and transparent litigation. Litigation included a week-long trial, a seven-day evidentiary hearing on an action to vacate the final judgment, fourteen appeals -- and innumerable motions, petitions, and hearings, in the Florida courts regarding Mrs. Schiavo's wishes as to her own medical treatment; five suits filed in federal district court, including one in which this Court just three days ago correctly denied Appellants' petition for injunctive relief; and an enactment of unconstitutional state legislation to overturn the judgment of the courts, which legislation was struck down by the Florida Supreme Court in a decision that the United States Supreme Court refused to review.

This massive and intensive judicial scrutiny of a patient's medical condition and intent is unprecedented in the annals of American jurisprudence. Legislative attempts to override this exceedingly careful judicial process have been rightly rejected by the courts. The enactment of new federal legislation – which itself is unconstitutional for the reasons discussed below – authorizing the Schindlers to file suit in this Court has changed none of the facts, nor does it authorize this Court to re-assess Mrs. Schiavo's rights under the Florida Constitution. Rather, it authorizes the Court only to consider the Schindlers' federal claims. Those, claims however. this Court recognized but three days ago are meritless. As the Court concluded then, the Schindlers have no "substantial likelihood of success" on the merits of their claims, which have been repeatedly rejected before and have no basis in fact or law. *See Schiavo v. Greer*, No. 8:05-cv-522, at 3 (Mar. 18, 2005).

Finally, the Court must recognize the egregious invasion of Mrs. Schiavo's rights that the Schindlers ask it to perpetrate. Theresa Schiavo's feeding tube has now been removed (for the third time) pursuant to the "properly rendered final judgment" rendered on February 11, 2000 by the probate division of the Florida circuit court. That court concluded as a factual matter, and by clear and convincing evidence, that Mrs. Schiavo -- who has been in a persistent vegetative state since 1990 -- "would elect to cease life-prolonging procedures if she were competent to make her own decision." *Schiavo*, 2004 WL 2109983 at *1-*2, *5. An order by the Court to reinsert the feeding tube would require invasive surgery to force re-insertion of the feeding tube upon Mrs. Schiavo yet again, in contravention of her wishes. Thus, the order that the Schindlers request is not an attempt to simply preserve the status quo – it is itself a new and more gruesome invasion of Mrs. Schiavo's rights. The Court should not countenance it by entering an injunction.

## BACKGROUND

Defendant provides this following background on the extensive litigation in this case so that the Court may know the full scope of the proceedings that have already occurred.

*The Guardianship Proceedings*

Theresa Schiavo suffered a cardiac arrest on February 25, 1990. Since that time, she has been in a persistent vegetative state, "robbed . . . of . . . all but the most instinctive of neurological functions"; most of her cerebrum "is simply gone and has been replaced by cerebral spinal fluid." *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 780 So. 2d 176, 180, 177 (Fla. 2d DCA 2001) ("*Schiavo* I"). Independent medical experts appointed by the Florida circuit court, as well as the independent guardian ad litem appointed pursuant to the Florida statute which was ultimately struck down, found that Mrs. Schiavo has lost all cognitive abilities. *See In re Schiavo*, __ So.2d __, 2005 WL 600377, at *1, *4 (Fla. 2d Dist. March 16, 2005) (*Schiavo V*"); *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 851 So.2d 182, 184-85, 187 (Fla. 2d Dist. 2003) ("*Schiavo IV*"). The evidence was, in a word, "overwhelming." *Schiavo I*, 780 So. 2d at 177. As the Florida Supreme Court stressed, this "is not simply a coma. [Mrs. Schiavo] is not asleep. . . . Medicine cannot cure this condition." *Bush v. Schiavo*, 885 So.2d 321, 325 (Fla. 2004).

Her husband, Defendant in this case, has served and continues to serve as her guardian. In May 1998, believing that his wife would not wish to be artificially kept alive in her current state and recognizing that Mrs. Schiavo's parents (the Schindlers) disagreed as to her wishes, Mr. Schiavo filed a petition to discontinue Mrs. Schiavo's artificial life support. In that court proceeding, all parties, including the Schindlers, were able to present evidence concerning Mrs.

Schiavo's medical condition and what her wishes would have been. *Schiavo I*, 780 So. 2d at 179. During the course of the litigation the Schindlers, who opposed the cessation of artificial hydration and nutrition, "were afforded the opportunity to present evidence on all issues" and vigorously litigated all questions related to Mrs. Schiavo's wishes. *Bush v. Schiavo*, 885 So. 2d at 331.

The Florida court found by clear and convincing evidence that it was Mrs. Schiavo's wish, as expressed to multiple witnesses, that she not be kept alive artificially. *Schiavo I*, 780 So. 2d at 180. The guardianship court concluded that, pursuant to the Florida Constitution's right to privacy, Mrs. Schiavo's had a right to have her wishes vindicated and ordered her feeding tube removed on October 15, 2003, to effectuate that right. *See id.* at 177. The Schindlers were afforded numerous opportunities to challenge this decision, and did so, but the guardianship court's finding was repeatedly upheld by the Florida courts. As the Florida District Court of Appeal observed just a few days ago, "[u]ltimately this case . . . is about Theresa Schiavo's right to make her own decision, independent of her parents and independent of her husband. . . . the trial judge [made] a decision that the clear and convincing evidence shows the ward [Mrs. Schiavo] made a decision for herself." *Schiavo V*, 2005 WL 600377, at *4.

Throughout these proceedings, Mrs. Schiavo's parents, Plaintiffs here, have repeatedly raised federal constitutional arguments to support their claims that the adjudication of Mrs. Schiavo's rights under the Florida Constitution violated the federal Constitution. The Florida courts have repeatedly rejected claims that the Florida procedures deprive Mrs. Schiavo of due process or that they violated the First Amendment's Free Exercise clause.

*The Florida Statute*

Six days after the second removal of her feeding tube, on October 21, 2003, without hearings and in the face of staff warnings of unconstitutionality, the Florida Legislature enacted Chapter 2003-418, which granted the Governor of Florida the power to issue a "one-time stay to prevent the withholding of nutrition and hydration from a patient, if, as of October 15, 2003," the patient "has no written advance directive," the court "has found that patient to be in a persistent vegetative state," "that patient has had nutrition and hydration withheld," and "a member of that patient's family has challenged the withholding of nutrition and hydration." Ch. 2003-418 § 1. The Act indisputably targeted Mrs. Schiavo and no one else. By its terms, it applied only to individuals in her precise situation as of October 15, 2003, six days prior to the enactment of the law, and included a sunset provision that caused the Act to lapse after only 15 days. *Id.* § 2. During its brief existence, the Act -- known publicly as "Terri's Law" -- was applied to Mrs. Schiavo and no one else.

On the same day the Act was signed, Governor Bush issued Executive Order 03-201, staying the withholding of artificial nutrition and hydration from Mrs. Schiavo. The order compelled reinsertion of the feeding tube, prohibited any person from interfering, and directed law enforcement officials to serve the order on the facility caring for Mrs. Schiavo. Pursuant to the order, Mrs. Schiavo was removed by armed men from her residence at a local hospice on October 21, 2003, and brought to a hospital, without the consent of her husband and duly appointed guardian and in direct conflict with the guardianship court's final judgment, to force the surgical reinsertion of a feeding tube.

Following an action filed by Mr. Schiavo, the State version of "Terri's Law" was invalidated as a violation of the separation of powers. On September 23, 2004, the Florida

Supreme Court unanimously upheld the circuit court's decision. Among other things, the Florida Supreme Court found that the Act exceeded the authority of the Florida Legislature by "effectively revers[ing]" a "properly rendered final judgment." *Schiavo*, 885 So. 2d at 331. The Governor of Florida sought review by the United States Supreme Court, alleging a variety of purported federal constitutional claims on behalf of himself and Mrs. Schiavo. The United States Supreme Court denied certiorari.

In the wake of the denial of certiorari, the Florida courts re-affirmed their prior judgment, holding that Mrs. Schiavo's rights required that she be removed from nutrition and hydration. The Second District Court of Appeal, which has heard this case from its inception, issued a clear decision finally (at that time) bringing litigation involving Mrs. Schiavo's rights to an end. *See Schiavo V.*

*The Recently Enacted Congressional Legislation*

On March 21, 2005, Congress enacted legislation purporting to authorize the Schindlers to file suit in this court to litigate only issues of federal law under the U.S Constitution or "laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life." Of note, the statute does not authorize or compel this Court to enter any form of preliminary relief, such as the injunction sought by the Schindlers here. Indeed, Congress expressly considered and rejected provisions authorizing such a "stay" prior to litigation of the merits. Indeed, Congress rejected two versions of the bill that included provisions that either would have required or specifically authorized the district court to enter a stay prior to re-adjudication of the merits. *See, e.g.*, S. 653 (authorizing but not requiring issuance of a stay prior to adjudication on the merits). The current proposed statute contains no

such provision, authorizing an injunctive relief only after re-adjudication of Mrs. Schiavo's rights. That was confirmed on the Senate Floor in a colloquy between Senate Majority leader Frist and other members of the Senate.

## ARGUMENT

### I. There Is No Basis for an Injunction to Force Mrs. Schiavo to Undergo Surgery to Reinsert the Feeding Tube Against Her Wishes.

The Schindlers have not made a showing that would justify the extraordinary relief they seek here – a preliminary injunction to compel Mrs. Schiavo to undergo a surgical procedure against her will.

To obtain such an extraordinary injunction, they would have to show a "substantial" likelihood of success on the merits. If they are unable to make such a showing, the Court need proceed no further. As the Eleventh Circuit has repeatedly made clear, "[i]f the movant is unable to establish a likelihood of success on the merits, a court need not consider the remaining conditions prerequisite to injunctive relief." *Johnson & Johnson Vision Car, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1247 (11th Cir. 2002). Even if such a showing were possible, the Schindlers would have to show that they will suffer irreparable harm, that such harm in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and an injunction would not disserve the public interest. *Id.* at 1246-47.

In this case, the Schindlers' application for injunctive relief fails at the first step, because they cannot establish a likelihood of success. Nor, even if it were proper under these circumstances for this Court to consider the other factors for injunctive relief, do the Schindlers satisfy those factors.

### A. The Schindlers Have No Likelihood of Success on the Merits.

There is no likelihood that the Schindlers will succeed on the merits of their claims. For that reason, the Court should deny the motion for an injunction to compel Mrs. Schiavo to undergo surgery again.

*First*, the claims suggested by the Schindlers' complaint – alleged violations of Mrs. Schiavo's rights under the First and Fourteenth Amendments (including RLUIPA, regarding the free exercise of religion) – represent nothing more than yet another attempt to re-litigate meritless arguments which have been litigated in, and rejected by, both federal and state courts. Whether or not the Court can be compelled to rehear these claims – as discussed below that in itself is a violation of Mrs. Schiavo's rights – the Court cannot conclude that there is a likelihood of success on the merits of those claims, which have been soundly rejected.

The Florida Courts repeatedly gave the Schindlers the opportunity to raise these claims, and in each case after giving them a full and fair opportunity to be heard, found that Mrs. Schiavo's federal and state constitutional rights had been fully protected and, indeed, that vindication of her rights under the State Constitution required removal of the feeding tube, pursuant to her wishes. The Schindlers have also sought federal court intervention numerous times in the past, and have been rightly rejected. And the Governor of Florida sought certiorari review by the United States Supreme Court, alleging a variety of alleged federal constitutional claims on his own and Mrs. Schiavo's behalf, and review was denied. There is no basis for gainsaying the fully litigated and final state court determinations made after 8 years of litigation as well as repeated denials of certiorari by the United States Supreme Court. Thus, there is nothing before the Court to suggest that the Schindlers have any chance of success, even if these

issues were relitigated.

*Second*, the sole issues that the Schindlers may raise, even assuming the validity of the statute, are federal claims regarding the propriety of the Florida proceedings that determined Mrs. Schiavo's wishes. There is no constitutional or statutory provision that limits or prevents an individual from making the choice at issue here, nor any provision that prevents a state from permitting that choice as Florida has done here. [1] *See Cruzan v. Director, Missouri Dep't of Public Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (noting that "the Constitution has nothing to say about" limiting end-of-life decision regarding medical care).

Because the statute only authorizes relitigation of federal issues, the Court must take as a given that, under Florida law, allowing Mrs. Schiavo to choose to be removed from artificially-imposed feeding and hydration is fully consistent with, and indeed, compelled by Florida law. The Court must also take as given that the removal of the feeding tube in this case, even though validated by adjudication of Mrs. Schiavo's rights in state court, is not state action. *See Cobb v. Georgia Power Co.*, 757 F.2d 1248, 1251 (C.A.11 1985) ("[O]ne who has obtained a state court order or judgment is not engaged in state action merely because it used the state court legal process."). The fact that state court proceedings were required to validate that right does not transform Mr. Schiavo or the hospice workers who removed the feeding tube into state actors. *See Dahl v. Akin*, 630 F.2d 277 (5th Cir.1980) (no state action when a father challenged action by his daughter and her husband to use state court proceedings to confine him to a mental hospital).

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[1]The statute authorizes only claims under the Constitution or under "laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life." To date, the Schindlers have never identified any federal statute addressing the withholding of such treatment. Rather, this issue has been left to the states.

To prevail, the Schindlers must somehow find a "right" in the U.S. Constitution to have the state of Florida forcibly keep Mrs. Schiavo alive. No such right exists. The only place the Schiavo's have pointed to under federal law is the Due Process Clause, on which most of the Schindlers' claims in the past have depended, which provides that "no State shall . . . deprive any person of life, liberty, or property without due process of law." The Supreme Court has repeatedly rejected attempts by litigants, however, to morph the Due Process Clause into a general or free-floating obligation on the state to take affirmative steps of this nature. In *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), the U.S. Supreme Court rejected arguments that the Due Process Clause required a state agency to protect a child from harm. As the Court held, "[t]he Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *Id.* at 195. The Court also rejected the precise argument made here – that there existed some "special relationship" in *DeShaney* that created a requirement under the Due Process Clause that the state affirmatively prevent some consequence to a particular citizen. The Due Process Clause thus does not provide any basis for the Schindlers to force the state of Florida to impose their preferred outcome over Mrs. Schiavo's wishes, as adjudicated by the Florida courts. The choice, under both the federal and state constitutions, is Mrs. Schiavo's to make.

Nor can the Schindlers evade these limitations on the Due Process Clause by pointing to the Constitution's requirements of procedural due process. As is obvious from the 8 years of litigation involving Mrs. Schiavo's rights and her wishes, there has been an "unprecedented" level of due process in this case to ensure that Mrs. Schiavo's rights are protected and vindicated. The Schindlers repeatedly raised these issues in the Florida courts, arguing among other things,

violations of procedural due process based on, among other things, lack of separate counsel for Mrs. Schiavo, lack of access to the courts for her, and lack of notice to her of the proceedings. Those arguments were all rejected as frivolous. Mrs. Schiavo has always been represented by counsel through her husband, the guardian, and to the extent there were any concerns that the opposing point of view – that she would have wanted to be forcibly fed indefinitely in a persistent vegetative state – was unrepresented, the Schindlers themselves, with a raft of lawyers, have aggressively and intensively argued that position. Moreover, three different independent guardians have been appointed over the years. Those guardians have, in every case, confirmed the conclusions of the Florida courts and have found assertions made by the Schindlers casting doubt on Mr. Schiavo's behavior as guardian to be baseless.

For all of these reasons, there simply is no basis on which to conclude that the Schindlers can show a "substantial likelihood of success on the merits." Thus, imposing an injunction here would simply serve to further violate Mrs. Schiavo's rights.

**B. The Balance of the Harms Counsels Against Compelling Mrs. Schiavo to Endure a Surgical Procedure Against Her Will.**

The stay equities weigh against entry of an injunction. At bottom, the Schindlers seek to force feeding, hydration, and other extreme measures on Mrs. Schiavo. Such an extraordinary injunction would not "protect" any right of Mrs. Schiavo – the only person whose rights are at issue here – but would instead perpetuate the deprivation of her rights under the Florida and U.S. Constitutions to be removed from feeding and hydration, as she desired. Mrs. Schiavo has already been in a persistent vegetative state for fifteen years; the litigation over her wishes has spanned more than half that time. There is, quite simply, nothing left to litigate, no equity in

favor of the Schinders, and no basis for am injunction.

### C. The All Writs Act does not provide authority for an injunction here.

Nor does the All Writs Act, 18 U.S.C. § 1651(a), provide any basis for an injunction in this case, as suggested by the United States. The All Writs Act is available *only* in situations not covered by another statute or provision. *See Pennsylvania Bureau of Correction v. U.S. Marshals Service*, 474 U.S. 34, 43 (1985) ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling."). Thus, a district court may not evade the traditional requirements of an injunction by purporting to issue what is, in effect, a preliminary injunction under the All Writs Act. *See Florida Med. Ass'n v. U.S. Dep't of Health, Educ. & Welfare*, 601 F.2d 199 (5th Cir.1979) . Where, as here, a party seek injunctive relief under other statutes, as the Schindlers have, the All Writs Act is simply not available.

The fact that the Schindlers are *not entitled* to an injunction under other statutes does not, however, miraculously transform the All Writs Act into a cure-all for claims that cannot survive under other statutes. *Id.* ("Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate."). The All Writs Act also provides no basis for interfering with state court proceedings or overturning the judgment of a state court, as the Schindlers seek to do here. *See Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1103 (11th Cir. 2004) (reversing use of All Writs Act as an abuse of discretion).

## II. The Statute Violates Numerous Constitutional Provisions

The extraordinary statute enacted by Congress – essentially creating one set of procedures for Mrs. Schiavo and a different set for every other American and effectively suspending a state court adjudication of her federal and state constitutional rights – is unprecedented in American history. The statute runs afoul of constitutional norms for numerous reasons, including:

- The statute intrudes on one of the most personal and fundamental rights – the right to refuse medical treatment forced on a person by the government – without any rational basis. *See Vacco v. Quill*, 521 U.S. 793, 807 (1997) (right to refuse live-saving medical treatment is grounded on "well established, traditional rights to bodily integrity and freedom from unwanted touching").
- The statute nullifies a court judgment that fully and finally adjudicated Mrs. Schiavo's rights under the state and federal constitutions. *See Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995) (discussing concern of the Framers about the dangers of trial by legislature and the limitations on Congress to prevent such legislation).
- The statute operates retroactively to strip Mrs. Schiavo of her rights, including her right of repose in an adjudication of her constitutional rights. *See Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (explaining fears that legislature could use retroactive statutes "as a means of retribution against unpopular groups or individuals").
- The statute singles out one person for burdens imposed on no one else. *See Zablocki v. Redhail*, 434 U.S. 374, 389-91 (1978) (invalidating statute prohibiting marriage for a certain class without court approval); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (invalidating law requiring a special permit for a group home premised on concerns that neighbors might object).

All of these aspects of the statute, individually, render it constitutionally suspect. Together, they make the statute blatantly unconstitutional and one of the most egregious invasions into the rights of any person in American history. A contrary conclusion would mean that *no* rights of any American are inviolable and that Congress may nullify any court judgment for any reason, under the guise of compelling the parties to relitigate a prior final judgment.

The issue in this case is whether Congress can suspend the operation of the federal and state constitutions with respect to a single citizen. That is precisely the effect of the statute, which forces Mrs. Schiavo – after 8 years of litigating her rights and having them fully and finally adjudicated in the state of Florida – to start all over again, forced by the government to remain subject to extraordinary measures to keep her alive – all against her will as adjudicated by the courts. Nothing could be more repugnant to the Constitution of the United States. This Court should invalidate the statute because it violates Mrs. Schiavo's rights under the Due Process and Equal Protection Clause, and is an example of extreme legislative overreaching in excess of Congress' powers under Article I and Section 5 of the 14th Amendment, and in violation of the Tenth Amendment.[2]

**A. The Statute Violates Mrs. Schiavo's Rights Under the Due Process Clause.**

Mrs. Schiavo, no less than any other person, has a fundamental right to refuse medical treatment under the federal as well as her own state's constitution.[3] *See Cruzan v. Missouri Dept.*

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[2]Defendant believes that the statute may violate the federal constitution for additional reasons, but is providing this truncated discussion given the short time frame.

[3]While the phrase "medical treatment" is employed here for purposes of shorthand, there is no "treatment" for Mrs. Schiavo. Her condition, as found conclusively by the Florida courts after exhaustive and painstaking medical and legal scrutiny, and as reflected in the leading independent medical authorities on persistent vegetative states, is untreatable. Artificial nutrition

*Of Health*, 497 U.S. 261, 278 (1990) ("[A] constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."). Her federal constitutional right is grounded in "well-established, traditional rights to bodily integrity and freedom from unwanted touching." *Vacco v. Quill*, 521 U.S. 793, 807 (1997); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting the Supreme Court's own assumption that "the Due Process Clause protects the tradition right to refuse unwanted lifesaving medical treatment"). This liberty interest goes to the core of every citizen's personhood: "The liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water." *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring).

No one else may decide for Mrs. Schiavo – not the state, and not her family – because this right is hers, and hers alone: "[W]e do not think," the Supreme Court has explained, that "the Due Process Clause requires the State to repose judgment on these matters with *anyone but the patient herself*." *Cruzan*, 497 U.S. at 286 (emphasis added). For that reason, the statute, which gives the Schindlers the "right" to force re-examination of her wishes and unwanted surgery on Mrs. Schiavo, is "presumptively unconstitutional," and must satisfy strict scrutiny. *Harris v. McRae*, 448 U.S. 297, 312 (1980); *see also Glucksberg*, 521 U.S. at 721 (stating with respect to identical Fourteenth Amendment due process standard that the Constitution "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest" (emphasis in original)). There is no question that the statute fails to meet this exacting standard.

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and hydration serve only to prolong her physical existence – against her will – not to cure or improve in any way her irreversible brain damage and deterioration.

Mrs. Schiavo's wishes – to be permitted to go in peace, to not have unwanted medical treatment – were exhaustively and conclusively resolved through nine years of litigation. It has been found by clear and convincing evidence that she is in an incurable persistent vegetative state, and that she would not want artificial nutrition and hydration continued.[4] No one decided for her – not her husband and guardian, Mr. Schiavo, and not the Florida guardianship court. Rather, the guardianship court found as a matter of fact that Mrs. Schiavo herself would not want her life artificially prolonged. The standard under which the court made this finding – clear and convincing evidence – represents not only Florida law, but the consensus of the states of our federal union regarding the appropriate evidentiary standard in these cases. *See Woods v. Commonwealth of Kentucky*, 142 S.W.3d 24, 44 (Ky. 2004) (citing cases). Having so found, the Florida guardianship court ordered the only course of action consistent with Mrs. Schiavo's fundamental right: that the feeding tube keeping her alive artificially be removed. This decision, rendered pursuant to Mrs. Schiavo's rights under the Florida Constitution, also vindicated Mrs. Schiavo's federal constitutional right, because the state constitution, like the federal one, safeguards the right of every person to refuse medical treatment.

Nor does Mrs. Schiavo's present inability to express her own wishes alter in the slightest her fundamental right to have her previously expressed wish honored. Incompetence does not deprive a person of fundamental rights under the United States Constitution. *See Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (holding that a severely retarded man enjoyed a liberty interest in bodily safety and freedom from restraint); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (recognizing a child's liberty interest in not being confined unnecessarily for medical treatment);

[4] "It is likely that no guardianship court has ever received as much high-quality medical evidence in such a proceeding." *Schiavo IV*, 851 So. 2d at 185, 187.

*see also Cruzan*, 497 U.S. at 281 (incompetent patients enjoy "constitutionally protected interests" under the Due Process Clause). The Florida courts recognized and honored Mrs. Schiavo's same right under that state's constitution.

Now, at the eleventh hour, Congress purports to give third parties the right to re-litigate Mrs. Schiavo's case, and, if the Schindlers prevail on their application for an injunction, a federal court the right to order the forced surgical re-insertion of a feeding tube. But *any* prolongation of Mrs. Schiavo's life against her wishes profoundly and irremediably violates her liberty interest in the integrity of her own person. As the Supreme Court observed in *Cruzan*, it is a fundamental precept of Anglo-American common law (and this precept underlies the constitutional liberty interest) that unwanted medical treatment constitutes an "*assault*" on another person. *Cruzan*, 497 U.S. at 269 (emphasis added); *see also id.* at 288 (O'Connor, J., concurring) ("A seriously ill or dying patient whose wishes are not honored may feel a captive of machinery required for life-sustaining measures . . . . Such forced treatment may burden that individual's liberty interests as much as any state coercion."). The grotesqueness of the bodily intrusion sought to be perpetuated here is only heightened by the fact that, if the feeding tube is surgically re-inserted, it will be the third time that Mrs. Schiavo will have been permitted, as is her right, to be relieved of the medical intervention she does not want, only to have the tube forced upon her once again.

The federal statute retroactively overrides Mrs. Schiavo's exhaustively adjudicated fundamental right. All factual and legal issues bearing on that right were fully and fairly litigated. That litigation resulted in a final judgment of the Florida guardianship court; the Schindlers attacked that judgment repeatedly in both state and federal court, and the judgment stood; the Governor of Florida intervened, and the state statute pursuant to which he acted was

declared unconstitutional; the independent guardian ad litem appointed pursuant to that same state statute concluded that he could not observe any "consistent, repetitive, intentional, reproducible interactive and aware activities" on the part of Mrs. Schiavo, and that the order directing removal of the feeding tube was based on clear and convincing evidence of Mrs. Schiavo's wishes and was "firmly grounded within Florida statutory and case law"; and the United States Supreme Court denied review not once, but three times, as to claims that the federal constitution required re-opening Mrs. Schiavo's case.[5]

If Mrs. Schiavo's case could be re-opened, then the liberty interest in refusing medical treatment – to determine one's own bodily integrity – would have no meaning. The fundamental right to refuse medical treatment necessarily includes a right of reliance and repose with respect to an already adjudicated right to refuse treatment, *i.e.*, the right to have one's wishes respected and effectuated once they have been determined. Were this not the case, Mrs. Schiavo – and, indeed, any citizen – could be subjected to a potentially interminable re-examination of the question of whether she is entitled, at long last, to the effectuation of her wish. The re-examination Congress purports to authorize cannot and does not merely maintain the status quo – rather, with each passing moment, it wreaks a new and greater intrusion on Mrs. Schiavo's liberty.

### B. The Statute Violates Mrs. Schiavo's Rights Under the Equal Protection Clause.

By singling her out, the statute also violates the Equal Protection Clause. Even if there was a compelling interest, Congress may only legislate by addressing such interests through

[5] *See supra* 3-6 (regarding numerous state and federal court proceedings, denials of certiorari review, and findings of the guardian ad litem appointed pursuant to the unconstitutional Florida law).

comprehensive and consistent legislation. It cannot impose one set of burdens on Mrs. Schiavo that do not apply to anyone else. Indeed, enactment of a statute designed to apply solely to one person demonstrates that Congress was not seeking to advance any compelling interest, but was instead seeking merely to interfere with the rights of that person because Congress does not agree with her choice. Whereas the privacy rights of all other Floridians (and all other Americans) are governed by one set of rules and procedures, only Mrs. Schiavo is treated differently. The narrow focus of the proposed statute demonstrates only one thing – that Congress would prefer that Mrs. Schiavo be kept alive, regardless of her wishes. But that desire, without more, cannot possibly be a compelling interest sufficient to nullify Mrs. Schiavo's rights. Indeed, that is exactly the teaching of the U.S. Supreme Court's decision in *Cruzan v. Director, Missouri Dep't of Public Health*, 497 U.S. 261 (1990). If it were otherwise, Congress could simply override the privacy interests of any citizen who chose to refuse further medical treatment – competent or incompetent, with or without an advanced directive.

### C. The Statute Exceeds the Legislature's Authority Under Article I and Section V of the Fourteenth Amendment.

The statute also directly violates core notions of separation of powers and federalism by effectively suspending a final court judgment that adjudicated Mrs. Schiavo's state and federal constitutional rights. The Supreme Court held that Congress cannot enact any legislation which nullifies, suspends, or "reverses a determination, once made, in a particular case." *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 219, 225 (1995) (quotations omitted); *see United States v. Klein*, 80 U.S. 128 (1871) (where a law purports to forbid a court from "giv[ing] the effect to evidence which, in its own judgment, such evidence should have," the legislature "has

inadvertently passed the limit which separates the legislative from the judicial power"). This restriction on Congress' authority, like other constitutional provisions, such as the Ex Post Facto Clause and the prohibition against Bills of Attainder (which would also invalidate the proposed statute), is not merely part of the separation of powers in the U.S. Constitution, but also represents a fundamental protection of individual liberty. *See Plaut*, 514 U.S. at 240-41 (Breyer, J., concurring).

Although *Plaut* concerned intrusions by Congress on the power of the federal courts, its fundamental holding was that attempts to interfere with final judicial judgments on a retrospective basis exceed the legislative power given to Congress in Article I. That limitation applies regardless of whether state or federal court judgments are at issue, and indeed may be even more important given the important federalism concerns at issue here. *Cf. Alden v. Maine*, 527 U.S. 706 (1999) (discussing limits on Congress power to interfere with state courts). As the Justice Scalia explained in *Plaut*, the Framers of the Constitution were cognizant of the tyranny that could be imposed by a legislative power that could suspend, nullify or itself re-adjudicate individual court judgments retroactively. Quoting from the Federalist Papers, the Court explained that "[a] legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule of future cases." *Plaut*, 514 U.S. at 222 (quoting The Federalist No. 81). It is simply not within the legislative power of the Congress to set aside judgments or grant new trials in cases finally adjudicated. *Id.* at 225.[6]

[6]There has never been any suggestion that *Plaut* would have been differently decided if the federal securities laws, at issue there, had given state courts concurrent jurisdiction over litigation under federal securities laws. The rationale of *Plaut* is that the Framers prohibited trial by legislature, including suspensions of final judgments, by placing those limits in Article I. Such limitations, complemented by the Tenth Amendment's reservation of rights to the state, render the exercise of authority by Congress in this case beyond the bounds of the U.S. Constitution.

State courts across the country routinely render decisions on issues of federal law. If Congress were authorized to re-open every one of those decisions – which is the necessary implication of the purported exercise of authority by Congress here – then there is absolutely no finality to state court judgments in this country, even those adjudicating and vindicating rights under state and federal constitutions. Under that theory, Congress could, at any time, upend child custody proceedings that are long since final, simply because some one with political clout manages to get a bill passed. Such legislation cannot stand and provides no basis for the intrusive relief sought in this case.

## CONCLUSION

For all of these reasons, the Court should deny the injunctive relief sought by the Schindlers and refuse to compel Mrs. Schiavo to undergo surgery for reinsertion of the feeding tube

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Respectfully submitted

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I HEREBY CERTIFY that a copy of the foregoing was furnished this 21st day of March, 2005 by hand delivery to David C. Gibbs III, 5666 Seminole Blvd., Ste. 2, Seminole, FL 33772.

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