No. 05-11556

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

THERESA MARIE SCHIAVO, Incapacitated,
ex rel. ROBERT AND MARY SCHINDLER,

Petitioner-Appellant,

---v.---

MICHAEL SCHIAVO, Guardian of the
Person of Theresa Marie Schiavo, Incapacitated,
THE HONORABLE GEORGE W. GREER,
and THE HOSPICE OF THE FLORIDA SUNCOAST, INC.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR RESPONDENTS-APPELLEES

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Certificate Of Interested Persons & Corporate Disclosure Statement

Pursuant to Rule 28-1 of the Eleventh Circuit Court of Appeals and Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant submits that there are no interested persons other than the parties before the Court, nor is the rule regarding corporate disclosures applicable.

Statement Regarding Oral Argument

Because it is clear that this Court lacks jurisdiction over this case, and because Appellants' claims are in all other respects lacking in merit, Defendant-Appellee believes this Court can resolve the issues herein without oral argument.

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INTRODUCTION

Appellee Michael Schiavo respectfully files this brief in opposition to the latest request of Appellants to reverse a denial by the district court of an invasive injunction seeking to force Theresa Schiavo to undergo surgery to reinsert a feeding tube against her wishes as adjudicated by the Florida courts. At the eleventh hour, Appellants discovered "new" claims (Counts Six through Ten) in their Second Amended Complaint. These second-tier arguments, weakly premised on different statutes and constitutional provisions, are transparently the same as those already presented to the Court. This Court previously refused to reverse the district court's denial of an injunction as to these claims, which decision was upheld by the full court sitting en banc and then by the U.S. Supreme Court.

Appellants now abandon all pretense of resort to law, and make a pure emotional appeal. But their new claims, as well as their latest emotional appeal, fail for the same reasons as their original application for an injunction did. As the district court found (once again), there is no substantial likelihood of success on the merits of their arguments. That decision should be affirmed.

STATEMENT ON JURISDICTION

Neither this Court, nor the district court, had jurisdiction because P.L. 109-3 is unconstitutional.

STATEMENT OF THE CASE

The case is once more in front of the Court following yet another well-reasoned decision by the District Court for the Middle District of Florida denying Appellants' second application for a temporary restraining order. While this Court was considering Appellants' last appeal, Appellants' amended their complaint to add four "new" claims, and filed a second motion for a temporary restraining order. As expedited briefing was proceeding in the district court with a hearing scheduled on that motion, Appellants amended their Complaint yet again (in violation of Fed. R. Civ. P. 15), presumably planning for a third application for a temporary restraining order. The district court consolidated briefing on all claims and held a four-hour hearing yesterday evening.

A detailed statement of the case and of the facts was provided in Appellees' brief to the Court earlier this week. *See* Br. for Respondents-Appellees (March 22, 2005) at 1-7. Appellees will not repeat that history here, but will simply note again that this massive and intensive judicial scrutiny of a patient's medical condition and intent is unprecedented in the annals of American jurisprudence, and that all of the arguments Appellants make here have been repeatedly rejected by state and federal courts throughout the course of this case. Appellants' persistence signals neither new facts nor new standards applicable to this case; in short, nothing has

changed since this Court recognized three days ago that Appellants' arguments are without merit and insufficient to justify the invasive injunction that they seek.

The district court's carefully reasoned decision found there was no substantial likelihood of success as to the merits on any of Appellants' claims. That decision essentially followed the reasoning of the district court's ruling earlier this weak, rejecting Appellants' first set of claims. That decision was upheld by this Court, as well as the Court en banc and the Supreme Court. *See Schiavo ex rel. Schindler v. Schiavo*, --- F.3d ---, 2005 WL 648897 (11th Cir. 2005) ("*Schiavo VII*"), reh'g denied, --- F.3d ---, 2005 WL 665114 (11th Cir. Mar. 23, 2005), *stay denied*, --- U.S. ---2005 WL 672685 (Mar. 24, 2005).

SUMMARY OF ARGUMENT

In the district court, Appellants attempted to recast their allegations as "new" claims, but they are the same claims that Appellants have made to this Court and many others. Because those arguments have been thoroughly rejected, and, in any event, do not demonstrate a substantial likelihood of success on the merits, Appellants switch course and make a plea based on purportedly new evidence. Neither Appellants' claims in the district court, nor their plea in this Court, however, satisfy the traditional test for injunctive relief that this Court has said applies here. The district court was correct in denying the invasive injunction sought by Appellants again, for many of the same reasons underlying the district

court's first denial of an injunction. As the district court made clear, on no set of facts alleged by the Appellants is their a substantial likelihood that they will prevail on their claims. As before, the Court should deny Appellants' application and affirm the district court's well-reasoned decision.

ARGUMENT

I. Appellants' Naked Emotional Appeal Cannot Conceal that They Lack A Substantial Likelihood of Success on the Merits.

As demonstrated by Appellants' brief, they have abandoned all pretense of arguing the law. Rather than making any of the arguments that they made in the district court – all of which were rejected as insubstantial – Appellants now literally throw themselves on the mercy of the Court with "new" "evidence" about Mrs. Schiavo's medical condition, including a doctor who sat in her room but never examined her and two individuals who suddenly have remembered that they saw Mrs. Schiavo respond to them. The former's "testimony" was long ago (and just yesterday) rejected by the Florida courts as insubstantial and insufficient to raise any doubt about the absolute certainty of Mrs. Schiavo's medical condition. *See Schiavo I*, 780 So. 2d at 177 (describing the evidence of her condition as "overwhelming"). The latter "testimony" – though purportedly based on events of a week ago – was never presented to any state or federal court at any point prior to this brief (and thus is not in the record on appeal) – rendering it suspect in the

extreme and appropriate to be stricken[1] – and provides no basis on which to suggest that there is a substantial argument on the merits here.

But no matter the revelations that Appellants attempt to proffer, the one thing that is clear is that they have no likelihood of success, much less a substantial one, because there is no *legal* basis for granting the extraordinary injunction they seek. Appellants do not challenge – because they cannot – that, even based on all the facts alleged in their complaint (all of which have also been repeatedly rejected by the many courts to have considered their case), Appellants have no constitutional or federal law claims of merit.

As the district court found, the adjudication of Mrs. Schiavo's rights and affirmation of her wish to refuse medical treatment – regardless of Appellants' disagreement with the results of those adjudications and their claim to re-litigate it under an unconstitutional federal statute -- cannot form the basis of a claim under any of the statutes or constitutional provisions that they argued in the district court

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[1] *See Drake v. General Finance Corp.,* 119 F.2d 588, 589 (5th 1941). The "evidence" of an event on March 18 was known to Appellants on March 21, when they filed their action in the Middle District but not reduced to writing until after their first motion for a TRO was denied and they had appealed to this Court. Appellants did not present this information in their first appeal to this Court, in their request for reconsideration en banc, or in their emergency motion to the Supreme Court. It was not presented to the district court, nor mentioned at last night's TRO hearing. Indeed, it was notarized after Judge Whittemore denied their second motion for a TRO and submitted for the first time to this Court today. Nor did they present them to the state court in their March 23, 2005 motion to vacate final judgment (said motion and order thereon attached hereto).

(and abandon in this Court). In addition to their individual deficiencies, all of the claims, no matter how denominated, suffer from some common defects, any one of which completely defeats their claims: 1) there is no state action here where a state merely allows a person's wishes to be implemented; 2) even if there was state action, none of the constitutional or statutory provisions cited create an affirmative obligation on the state to prevent the choice Mrs. Schiavo has made; and 3) the extensive proceedings in state and federal court render any argument that there is a substantial likelihood of success on claims that are, in most respects variants of procedural due process claims, untenable and certainly unlikely to succeed.

The only argument even mentioned in their brief here is their Due Process claim, which the district court properly rejected as without merit and essentially duplicative of the same Due Process arguments made in their first motion. As the district court recognized and as is discussed in more detail in Part III.B below, that argument depends completely on finding in the Due Process Clause a free-floating affirmative obligation on the State to prevent people from coming to harm, including refusing medical treatment. That argument turns the *Cruzan* case completely on its head. In *Cruzan*, the Court recognized a right to refuse medical treatment, including life-sustaining measures, but held that the States *may* require clear and convincing evidence to support decisions to remove artificial nutrition

and hydration. *Cruzan*, 497 U.S. at 292. It did not, however, hold that States *must* impose such a standard (or any standard) under the Constitution.

Indeed, the Supreme Court emphasized that issues related to the procedures for implementing end-of-life decisionmaking are generally left to the States and State Constitutions and – contrary to the assertions of Appellants – that the federal Constitution has much less of a role to play. *See Cruzan*, 497 U.S. at 277; *see also id.* at 277, 280 (holding that the Due Process Clause did not "prohibit[] Missouri from choosing the rule of decision which it did"). Moreover, to agree with Appellants' view that Mrs. Schiavo's intent must be determined and re-determined de novo over and over again (until they obtain the result they want) runs directly counter to her fundamental right under both the state and federal constitutions to have her right effectuated.

As the district court, this Court, and the U.S. Supreme Court all recognized earlier this week, and the district court recognized again in rejecting this latest request for an injunction, Appellants do not have substantial claims on any version of their evidence. Given that, as well as the long history of this case rejecting every one of these same claims repeatedly, there is no basis for an evidentiary hearing[2] and no basis for any relief, much less the injunction that they seek.

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[2]Because the district court ruled as a matter of law that Appellants' arguments were insufficient, there was no reason to take testimony. In any case, the decision whether or not to take evidence on a motion for preliminary injunctive relief rests

Appellants flagrantly propagandize this matter by describing this as a "mercy killing case." This case, however, proceeded under Florida's Constitution, which establishes a right to the removal of "*artificial* life-support" and "medical treatment." *In re Guardianship of Browning*, 568 So.2d 4, 11-12 (Fla. 1990). Appellants blatantly misrepresent that law, which – in both Florida's statutes and Constitution, serve to effectuate that right for all persons, regardless of medical condition (or need not be terminally ill) or capacity. 568 So.2d at 11, 12. This Court has no power under P.L. 109-3 or any other provision of law to question the State's application of its own law to this case, nor does the sufficiency of the evidence in a state proceeding raise any constitutional of federal statutory issues. Thus, Appellants' suggestion that Florida law has been violated – something with which the Florida courts disagree – cannot be part of this proceeding.

This represents the last ditch effort of Appellants and their supporters, who will do anything to prevent Mrs. Schiavo from exercising her right to refuse forced feeding and hydration. The Court answered this naked emotional appeal two days ago, with words that still apply here: "[i]n the end, and no matter how much we

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within the sound discretion of the trial court. *See Cumulus Media, Inc. v. Clear Channel Communications, Inc.*, 304 F.3d 1167, 1178 (11th Cir. 2002). As the Court has previously held, nothing in P.L. 109-3 suspends the ordinary rules of Civil Procedure and cabins the discretion of the district judge to determine whether an evidentiary hearing is required. The statute does not give Appellants a right to any sort of hearing on claims that are legally flawed.

wish Mrs. Schiavo had never suffered such a horrible accident, we are a nation of laws. . . . . While the position of [Appellants] has emotional appeal, we as judges must decide this case on the law." *Schiavo VII*, 2005 WL 648897, at *5.

II. P.L. 109-3 Is Unconstitutional and the Court Cannot Enter Any Relief Based on It.

The sole basis for jurisdiction in this Court is P.L. 109-3. Pursuant to the instructions of the Clerk of Court, Appellee will not re-brief the issues discussed previously in Appellee's Opposition to Appellants' All Writs Petition, denied by this Court just two days ago. As discussed therein, P.L. 109-3 violates the Due Process and Equal Protection Clauses of the U.S. Constitution and exceeds Congress's authority under Article I and Section 5 of the Fourteenth Amendment. Although this Court has presumed the statute constitutional and did not need to reach these issues because it denied Appellants' application, the Court cannot grant any relief under an unconstitutional statute. In any case, in considering whether there is a "substantial likelihood of success," the statute's constitutional flaws further erode Appellants' minuscule prospect of success in this case and thus provide an additional basis on which to deny their extraordinary second motion.

III. The District Court Clearly Acted Within Its Discretion Because Appellants Failed to Show A Substantial Likelihood of Success.

Although Appellants no longer argue the legal claims they advanced below, Appellee nonetheless address them here. Appellants cannot obtain an injunction

absent a showing of substantial likelihood of success on the merits. *See Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1247 (11th Cir. 2002). As the Court has previously held in this case, the district court's denial of the injunction must be reviewed on an abuse of discretion standard. The heavy burden on Appellants should be even heavier here where Appellants "new" arguments are in fact the same arguments repeatedly rejected by state and federal courts as bases for relief, including preliminary injunctive relief. As the district court below held, Appellants can show no likelihood of success on the merits.

A. There Is No Substantial Likelihood of Success on Counts Six and Seven.

The District Court correctly concluded that Appellants have utterly failed to demonstrate a substantial likelihood of success, or even a substantial case on the merits, as to Counts Six and Seven. Apellants claim that Michael Schiavo and Hospice violated Mrs. Schiavo's rights under the Americans with Disability Act, 42 U.S.C. § 12101 et seq. ("ADA"), and the Rehabilitation Act, 29 U.S.C. § 794, by failing to provide certain services and withholding artificial sustenance.[3]

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[3]Consistent with Plaintiffs' approach throughout this litigation, these counts merely rehash claims Plaintiffs have previously and unsuccessfully have made in this and other courts. Plaintiffs raised both claims against Hospice and Michael Schiavo in a 2003 federal suit. *See* Civil Docket, Civ. Act. No. 8:03–CV-01860-RAL (M.D. Fla. 2003), Doc. 3. Even in its unconstitutional overreaching, P.L. 109-3 in no way purports to undo the preclusive effect of prior *federal* court determinations and judgments, *see* P.L. 109-3, § 2. These claims are thus barred.

Both claims are meritless. To begin, the district court correctly concluded that Michael Schiavo is not subject to either Act, and Hospice is subject only to the Rehabilitation Act. *See* Opn. at 4, 6. But even if both Appellants were subject to both Acts, these claims would still fail. In order to establish a prima facie discrimination under the ADA, Appellants must demonstrate that Mrs. Schiavo is "(1) is disabled, (2) is a qualified individual, and (3) was subjected to unlawful discrimination because of her disability." *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000). The identical standard governs under the Rehabilitation Act. *Id.*

Appellants' claims fail for two reasons. First, Mrs. Schiavo is not a "qualified individual," and second, Plaintiffs have failed to make any showing of discrimination against Mrs. Schiavo based on her disability status. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of [her] handicap." *Southeastern Comm. College*, 442 U.S. at 406. The district court recognized that this criteria "'cannot be meaningfully applied to a medical treatment decision.'" Opn. at 6 (quoting *Grzan v. Charter Hosp. of Northwest Indiana*, 104 F.3d 116, 121 (7th Cir. 1997); *see also Johnson*, 971 F.2d at 1494.

Nor is there a cognizable claim for discrimination. Appellants have nowhere alleged in their multiple complaints that Mrs. Schiavo was treated differently from someone who is not in a persistent vegetative state, or that she was mistreated because she suffered from that condition. Indeed, as the district court noted,

Hospice cooperated not only with the removal of the feeding tube, but also with its reinsertion. Its conduct, "therefore, must necessarily have been motivated by the Court's order, not any discriminatory animus toward Theresa Schiavo." Opn. at 6.

Moreover, as the district court correctly recognized, the ADA and the Rehabilitation Act prohibit discrimination against persons with disabilities; they do not mandate the provision of services. *See* Opn. at 5 (quoting *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 n.14 (1999)); *see also Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979); *Cercpac v. Health and Hospitals Corp.*, 147 F.3d 165, 168 (2d Cir. 1998); *Johnson by Johnson v. Thompson*, 971 F.2d 1487, 1494 (10th Cir. 1992). Nor can they be used to challenge the quality or level of medical services provided in the treatment of a disability. *See Grzan*, 104 F.3d at 121; *Johnson*, 971 F.2d at 1493; *United States v. Univ. Hosp.*, 729 F.2d 144, 156-56 (2d Cir. 1984). In the end, the ADA and Rehabilitation statutes simply do not do what the Appellants wish they did. Because Appellants fundamentally misunderstand the purpose and operation of these statutes, they fail to establish a substantial likelihood of success on Counts Six and Seven.

B. There Is No Substantial Likelihood of Success on Count Eight.

In Count Eight, Appellants simply re-package the same arguments rejected by the district court and this Court two days ago as part of their procedural due process claim. By this reiteration, Appellants purport to have a "sufficiency of the

evidence" claim based on the Due Process Clause of the Fourteenth Amendment to the United States Constitution, in which they dispute Judge Greer's factual findings that Mrs. Schiavo is in a persistent vegetative state and would not want her life prolonged by intrusive and artificial means.[4]

Appellants' argument depends entirely on a misinterpretation of the Supreme Court's decision in *Cruzan*. Appellants assert that under *Cruzan*, the Due Process Clause "requires that decisions to remove hydration and nutrition from an incapacitated person must be supported by clear and convincing evidence that the incapacitated person would have made the same decision." Second Am. Compl. ¶ 89. This statement turns the Court's decision in that case on its head. In fact, in *Cruzan*, the Court emphasized that issues related to the procedures for implementing end-of-life decisionmaking are generally left to the states. *See Cruzan*, 497 U.S. at 277, 280. Indeed, Justice Scalia went so far as to say that "that the federal courts have no business in this field" and "the Constitution has nothing to say about the subject." *Id.* at 293 (Scalia, J., concurring). The properly-rendered determinations as to Mrs. Schiavo's physical condition and her intent were

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[4] Because the Due Process Clause does not impose on the states any affirmative obligation, as Appellants have insisted, their real complaint amounts to nothing more than disagreement with the outcome of the proceedings in the Florida courts. That disagreement is not a federal constitutional or statutory question, and thus is well beyond the scope of the federal jurisdiction created by P.L. 109-3 (even to the dubious extent that P.L. 109-3 is constitutional).

governed by Florida's clear and convincing evidence standard; in accordance with *Cruzan*, the Due Process Clause has absolutely no bearing on that standard or on Judge Greer's determinations thereunder.

The Court's most important observation in *Cruzan* was this: "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Id.* at 278; *see also id.* at 287 (O'Connor, J., concurring); *Glucksberg*, 521 U.S. at 725 ("The right assumed in *Cruzan* ... was entirely consistent with this Nation's history and constitutional traditions."). The *Cruzan* Court held that the States *may* require clear and convincing evidence to support decisions to remove artificial nutrition and hydration. *Cruzan*, 497 U.S. at 292. It did not, however, hold that States *must* impose such a standard – or, indeed, any standard at all. Still less did the Court hold, as Appellants urge, that a state law permitting a guardian to do so would violate the Constitution. In fact, Justice O'Connor made precisely this point:

> Today's decision, holding only that the Constitution *permits* a State to require clear and convincing evidence of Nancy Cruzan's desire to have artificial hydration and nutrition withdrawn, does not ... *prevent* States from developing other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment....

Cruzan, 497 U.S. at 292 (O'Connor, J., concurring) (emphasis added).

Appellants' argument – just like their procedural due process argument advanced earlier this week – attempts to create a free-floating obligation on the

part of the states under the Due Process Clause. But as the Supreme Court stressed in *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, the Due Process Clause is rather "a *limitation* on the State's power to act." 489 U.S. 189, 195 (1989) (emphasis added). Nowhere has the Court interpreted the Due Process Clause as obliging the states *affirmatively* to prevent harm that may come to an individual by the individual's own medical choices. *See id.; see also White v. Lemacks*, 183 F.3d 1253, 1257 (11th Cir. 1999); *Johnson by Johnson v. Thompson*, 971 F.2d 1487, 1495-96 (10th Cir. 1992).

In this case, Judge Greer did nothing that can by any stretch of the imagination be characterized as a violation of Mrs. Schiavo's rights under the Due Process Clause; nor is the Florida law that formed the basis of his actions remotely violative of the federal Constitution. On the contrary, by effectuating Mrs. Schiavo's desire to be free from intrusive surgical procedures and unwanted life-sustaining measures, Judge Greer and the entire Florida state court system have vindicated Mrs. Schiavo's "constitutionally protected liberty interest in refusing unwanted medical treatment." *Cruzan*, 497 U.S. at 278. In the decisions and actions of Judge Greer, and in the substance of Florida law, there is simply no deficiency under the federal Due Process Clause. *See Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 510-11 (1982).

C. There Is No Substantial Likelihood of Success on Count Nine.

The District Court correctly concluded that there is no substantial likelihood of success on Count Nine – the Eighth Amendment claim – because the requisite state action is lacking and because Mrs. Schiavo has been subjected to neither a criminal sanction nor confinement. *See* Dist. Ct. Slip Op. at 8-9.

The Eighth Amendment generally, "and perhaps exclusively," applies to the criminal law context. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal*, 492 U.S. 257, 260-62 (1989). Indeed, this Court has made clear the amendment applies only "to confinement that occurs subsequent to and as a consequence of a person's lawful conviction of a crime" and requires a "formal adjudication of guilt." *Hamm v. Dekalb Cty.*, 774 F.2d 1567, 1571 (11th Cir. 1985). Established law rejects attempts to apply the Eighth Amendment to inapposite contexts. *See Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977); *see also, e.g., Massey v. Helman,* 196 F.3d 727, 736 n.6 (7th Cir. 1999) (rejecting Eighth Amendment claim for physician's termination from prison employment after disagreement about proper medical care for prisoners); *Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 647 (E.D. Pa.1999) (collecting cases).

There has been no adjudication of guilt here, Mrs. Schiavo is not being detained either at – or by – Hospice, and Mr. Schiavo and Judge Greer are not state actors. *See Harvey v. Harvey*, 949 F.2d 1127, 1132-33 (11th Cir. 1992) (use of the courts by private parties is not state action; *see also DeShaney*, 489 U.S. at 201

(plaintiff's natural father, who had "custody" over plaintiff," "was in no sense a state actor"); *White*, 183 F.3d at 1257 (sentencing judge not a state actor for purposes of the Eighth Amendment). Finally, if the Eighth Amendment compelled a State to force medical care on those who refuse it, there would be no liberty right to refuse treatment at all.

D. There Is No Substantial Likelihood of Success on Count Ten.

The District Court correctly found that there is no substantial likelihood of success as to Count Ten – which at oral argument Appellants suggested alleges a violation of Mrs. Schiavo's substantive due process "right-to-life." Dist. Ct. Slip Op. at 9. There is neither the requisite state action nor a basis on the record to conclude that Mrs. Schiavo was subjected to conduct which is "conscience shocking, in a constitutional sense." *White*, 183 F.3d at 1258 (internal quotation marks and citation omitted).

As explained above, a substantive due process violation requires state action. *Deshaney*, 489 U.S. at 195; *White*, 183 F.3d at 1257-58; *see also* Dist. Ct. Slip Op. at 10. Judicial resolution of a dispute as to Mrs. Schiavo's wishes does not constitute state action. *See Lehman*, 458 U.S. at 510-11. Moreover, absent a custodial relationship between the State and the individual, the Due Process Clause imposes no general affirmative obligation on the State to protect against deprivations by other actors or to prevent individuals from making their own

choices. *See, e.g., White*, 183 F.3d at 1257; *Johnson*, 971 F.2d at 1495. Indeed, when an individual makes a decision to refuse medical treatment – even where that will lead to her death – the Fourteenth Amendment protects that decision against state interference. *See Cruzan*, 497 U.S. at 261. Count Ten thus necessarily fails. *See* Dist. Ct. Slip Op. at 10.

Nor is it tenable to contend that the Florida courts' adjudicatory process – a trial, week-long evidentiary hearing, litigation and resolution of multiple appeals, motions to re-open, and numerous other proceedings – constitutes "egregious" conduct which "shock[s] the conscience." *Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (internal quotation marks and citations omitted). Appellants allege procedural due process violations, but the district court's prior conclusion that they failed to show a substantial likelihood of success in that regard was upheld by this Court sitting en banc and the U.S. Supreme Court. These arguments (which at bottom attack the result, not the process) still lack merit.

Indeed, Mrs. Schiavo's right – to refuse medical treatment – was in fact vindicated by the Florida courts. But in any event, the district court, noting Justice Scalia's opinion in *Cruzan*, correctly concluded that Mrs. Schiavo's "right to life" has been protected by Fourteenth Amendment procedural due process. *Id.* (citing *Cruzan*, 497 U.S. at 293 (Scalia, J., concurring) ("The text of the Due Process Clause does not protect individuals against deprivations of liberty *simplicter*. It

protects them against deprivations of liberty 'without due process of law.'").

III. The Balance of the Harms Supports Denial of the Motion.

Although this Court has already reviewed the issue of harm in its consideration of Appellants' earlier identical first motion for injunctive relief, Defendant respectfully urges that the balance of harms tips against Appellants.

Death is indeed an imposing presence in this case. If the courts continue to reject the onslaught of litigation from Appellants, Mrs. Schiavo will eventually die. The world will lose a unique and cherished human being. Nowhere in his approach to this case, or in his relationship with his wife and ward, has Michael Schiavo ever underestimated the gravity of the inevitable consequence of his wife's choice. However, as Mrs. Schiavo herself recognized when she was in a position to communicate to her husband her wish not to undergo unwanted medical treatment, there are other important values at stake – liberty and autonomy. *See Cruzan*, 497 U.S. at 278.

Appellants seek to divert attention from the severity of the harm of invading Mrs. Schiavo's right to bodily integrity by conjuring visions of the pain that might attend the removal of artificial support. Nothing could be further from the truth. Far from hurting Mrs. Schiavo, her current freedom from forcible nutrition and hydration is painless, as the guardianship court has previously found. Moreover, it is what she wanted – to be permitted to go in peace. Conversely, the relief sought

by Plaintiffs - the surgical reinsertion of tubes and devices into Mrs. Schiavo's body and prolongation of her life against her wishes - is no panacea:

> The State's imposition of medical treatment on an unwilling competent adult necessarily involves some form of restraint and intrusion. . . . Such forced treatment may burden that individual's liberty interests as much as any state coercion. . . . The State's artificial provision of nutrition and hydration implicates identical concerns.

Cruzan, 497 U.S. at 288 (O'Connor, J., concurring) (citations omitted).

For years as these litigations have proceeded, Mrs. Schiavo has been subjected to unwanted medical treatment and forced to undergo such "restraint and intrusion." Indeed, the last time Mrs. Schiavo's wishes were disregarded, she was removed by armed men from her residence at a local hospice, brought to a hospital, and subjected to the surgical reinsertion of a feeding tube. Such an invasion of Mrs. Schiavo's rights must not be permitted again. *See id.*, 497 U.S. at 288-99 (O'Connor, J., concurring).

The great tragedy of Mrs. Schiavo's life is not what lies ahead; it is in what she is trying to leave behind. Her tragedy was the cessation of her heartbeat fifteen years ago, and the persistent vegetative state that has trapped her since. Ours is that we allow a fear of death to rob the dignity of her life.

CONCLUSION

The Court should deny all relief requested by the Appellants.

DATE: March 25, 2005

Respectfully submitted

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of March, 2005, a true and correct copy of the foregoing has been furnished by facsimile transmission to the following parties:

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