No. ___

In the Supreme Court of the United States

ROBERT AND MARY SCHINDLER,
Individually and in their capacity as Next Friends of their daughter, THERESA SCHINDLER SCHIAVO, Incapacitated

Applicants,

v.

MICHAEL SCHIAVO,
Guardian: Theresa Schiavo

Respondent.

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 DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT

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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, Petitioners, Robert and Mary Schindler, individually and as next friends of their daughter, Theresa Marie Schiavo, hereby petition for an order staying any and all attempts by Respondent to withhold nutrition and hydration from Theresa Marie Schiavo on Friday, March 18, 2005, at 1:00 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, Petitioners 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 [Petitioners 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. (App. 1, p. 15). (February 11, 2000, Order, App. 1).

2. The Florida Court of Appeal, Second District, entered its order denying a stay on Wednesday, March 16, 2005 at approximately twelve o'clock (12:00) p.m. (EST). Under Florida appellate procedure, this order operates as the final judgment of the Florida courts. No direct or discretionary appeal to the Florida Supreme Court is available. As a result, there is insufficient time to file a printed petition for Writ of *Certiorari* in the above-captioned cause before the order to withhold Ms. Schiavo's nutrition and hydration takes effect.

3 On February 28, 2005, Petitioners filed a Motion to Stay Proceedings with the Florida Court of Appeal, Second District (App. 3, pp. 30-52), in which they requested that court to stay further proceedings in the case pending the filing of their Petition for Writ of *Certiorari* in the United States Supreme Court. The Court of Appeal denied the stay on March 16, 2005. (App. 2, p. 18-29.)

4. If execution of the Probate Division's order is not stayed, Theresa Schiavo's feeding tube will be removed at 1:00 p.m. on Friday, March 18, 2005, and she will slowly begin to die of starvation and dehydration before this Court is able to consider the merits of the Petition for Writ of *Certiorari*.

REASONS FOR GRANTING A STAY

5. 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).

6. 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.

7. 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).

8. 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 Petitioners *and* their daughter, Terri Schiavo *herself*, have been denied federal due process and equal protection rights by the Florida courts in that:

A. The guardianship court acted in the dual capacity of health-care surrogate and trial judge. In *In re Guardianship of Schiavo*, 780 So. 2d 176, 178 (Fla. App. 2d DCA 2001) [*Schiavo* I], the District Court of Appeal held that:

> Because Michael Schiavo and the Schindlers could not agree on the proper decision and the inheritance issue created the appearance of conflict, Michael Schiavo, as the guardian of Theresa, invoked the trial court's jurisdiction to allow the trial court to serve as the surrogate decision-maker.

The Court of Appeal confirmed this procedure in *In re Guardianship of Schiavo*, 792 So. 2d at 557 (Fla. 2d. DCA 2001) [*Schiavo II*], when it noted that "Mr. Schiavo, as guardian, requested the court to function as the proxy in light of the

dissension within the family." (Footnote referencing Florida guardianship priorities omitted).

B. The Florida appellate court then held that it was permissible for the *trial court* to function as guardian, notwithstanding Florida statute and constitutional law to the contrary.

> In this context, the trial court essentially serves as the ward's guardian. Although we do not rule out the occasional need for a guardian in this type of proceeding, a guardian ad litem would tend to duplicate the function of the judge, would add little of value to this process, and might cause the process to be influenced by hearsay or matters outside the record.

Schiavo I, 780 So. 2d at 179.

C. Florida judges are not among the individuals the Florida Legislature has designated as eligible to serve as proxies who can act on behalf of incapacitated patients. See FLA. STAT. § 765.401(1)(a)-(g).

D. Florida constitutional law also forbids the assumption of guardianship responsibilities by judges who are presiding in a disputed case. *In Re TW,* 551 So.2d 1186, 1190 n. 3 (1989).

E. Although Theresa Marie Schiavo's due process constitutional rights are non-delegable under Florida law, her legal interests were purportedly represented by counsel for Respondent, Michael Schiavo, who initiated the instant proceedings to withdraw nutrition and hydration from his incapacitated wife and whose financial and personal conflicts of interest led the trial court judge

to conclude that he himself could serve in the dual capacity of both health-care proxy and judge.

F. A Florida judge may act as a guardian for a member of his or her family, but not for anyone else. FLA. STAT. § 744.309(b)(2).

G. Petitioners assert that the finding of the trial court that their daughter, Petitioner Theresa Marie Schiavo, is in a persistent vegetative state (PVS), if ever true, is no longer accurate and that she currently demonstrates a much higher level of cognition.

H. The guardianship court's order mandates the withdrawal of all nutrition and hydration from Ms. Schiavo and prohibited even trying to feed her by mouth after the tube is removed. (App 2., p. 18)

I. The guardianship court has not permitted Petitioner, Theresa Marie Schiavo, to have a swallowing test since 1992, to have the benefit of *any* rehabilitative or therapeutic services since 1994, and has not permitted examination with state-of-the-art medical diagnostic equipment since 2002.

J. Petitioners Robert and Mary Schindler have observed their daughter nearly every day for over fifteen years and they are convinced that she meets at least the criteria for a minimally conscious state ("MCS"), and that had she been given any rehabilitation over the last twelve years her condition might have been significantly better than it is today. Nonetheless, on March 9,

2005, the trial court rejected their application – supported by the declarations of thirty-three physicians and speech therapists – to conduct further medical testing with state of the art diagnostic procedures of the type described in the article quoted below. (App., p. 78)

K. The following table and bracketed text appears in *See* Erik J. Kobylarz, MD and Nicholas D. Schiff, MD, "Functional Imaging of Severely Brain-Injured Patients: Progress, Challenges, and Limitations," 61 *Archives of Neurology* 1357-1360 (September 2004). (App. 5, pp. 56-60)

Table: Comparison of Global Disorders of Consciousness With the Locked-in State

	Unresponsive Patients		Minimally Responsive Patients	
	Coma	Vegetative State	Minimally Conscious State	Locked-in State
Cyclic arousal	Absent	Present	Present	Present
Command following	Absent	Absent	Inconsistently Present	Present
Purposeful movements	Absent	Absent	Inconsistently Present	Absent*
Functional communication †	Absent	Absent	Absent	Present
Cerebral metabolism % normal	-50	40-50	NA	100

Abbreviation: NA, not available.

*Isolated if present.

†The criteria for functional communication ["requires more than the patient's ability to follow simple commands. A reliable communications system must be established with the patient, such as the use of printed cards with "yes" and "no" and a pointing method. Yet it is not uncommon for a patient to accurately and repeatedly identify the cards presented by an examiner yet fail to reliably answer any questions using such signaling. Patients who cannot cross this threshold set the present upper boundary of the MCS diagnostic category."]

L. Florida guardianship procedures require the court "[p]ersonally [to] meet with the incapacitated person to obtain *its own impression* of the person's capacity" (emphasis added). FLA. STAT.

§ 744.3725(3) (2005). Nevertheless, the trial court judge has never seen Terri Schiavo. Though Petitioner Terri Schiavo's condition does not make it possible for *her* to take advantage of "the full opportunity to express his or her personal views or desires with respect to the judicial proceeding and issue before the court," *id.*, her parents, Petitioners Robert and Mary Schindler, contend that her capacity is obvious to those who have taken sufficient time to observe her interactions with members of her family. *See* Kobylarz and Schiff, "Functional Imaging of Severely Brain-Injured Patients: Progress, Challenges, and Limitations," *supra*, at 1358: "To maintain nosological clarity in such borderline cases, *it would seem essential to diagnose the patient as having MCS* [Minimally Conscious State] *if there is any reproducible evidence of awareness on examination* and to diagnose the patient as having VS if not." (Emphasis added). (App. 5).

M. At no time during the course of the guardianship proceedings (*i.e.*, since 1990) did the judge-surrogate ever visit his ward, Terri Schiavo. He has therefore had no opportunity to determine for himself either her reactions to stimuli or her level of her responsiveness to anyone, including her parents.

N. Death by starvation and dehydration is neither quick nor painless. A person who, like Terri Schiavo, is not terminal but is in good health will suffer and die slowly over an extended period of time.

ARGUMENT AND AUTHORITIES

9. "[W]ith less process than would be necessary to seize a refrigerator,"[1] a Florida court has ordered the death of an innocent, disabled woman through one of the most cruel and unusual means imaginable: starvation and dehydration. *See generally* Geneva Convention of 1949, Article 25, 6 U.S.T. 3316; David Marcus, *Famine Crimes in International Law*, 97 Am. J. Int'l Law 245 (2003). Petitioners submit that the trial court's assumption of inconsistent functions – judge and health-care proxy for Petitioner Theresa Marie Schiavo [hereafter Terri Schiavo] – constitutes a fatal "structural" defect in those proceedings that renders its decree void *ab initio.*

10. When Respondent sought permission of the guardianship court to withdraw nutrition and hydration from Terri Schiavo, he did so under a "substituted judgment" theory that presumes that the right of an incapacitated person "to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right … must be exercised for her, if at all, by some sort of surrogate." *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 280 (1990); *In Re Guardianship of Browning*, 568 So.2d 4, 12 (Fla. 1990) *quoting John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So.2d 921, 924-925 (Fla.1984) ("The question [in substituted judgment proceedings] is who will exercise this right and what parameters will limit them in the exercise of this right.")

11. In *theory*, the "decision" to forego necessary medical treatment – in this case defined as artificial nutrition and hydration – is the decision of the incapacitated

[1] *Dahl v. Akin*, 630 F.2d 277, 279 (5th Cir. 1980) *citing, North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

person. In *law and in practice*, however, the decision is the *proxy's*. FLA. STAT. § 765.401(2) provides that:

> a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient's best interest.

12. Because a judicial decree authorizing denial of life-sustaining treatment will inevitably result in death, it can be justified only on the premise that the purpose of the order is not to cause death, but rather to effectuate the ward's substituted judgment concerning the continuation of life-sustaining medical care. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 280 (1990). *Any* defect in the judicial process that would taint, or otherwise call into question the integrity of the fact-finding process, would – and should – place the entire proceeding in constitutional jeopardy.

13. Florida law is clear that proxies, surrogates, and the courts that supervise them must be untainted by any possible conflict of interest. FLA. STAT. § 744.309(1)(b) provides in relevant part:

> (1)(b) No judge shall act as guardian after this law becomes effective, except when he or she is related to the ward by blood, marriage, or adoption, or has maintained a close relationship with the ward or the ward's family, and serves without compensation.

See also FLA. STAT. § 744.309(3) ("The court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.")

14. Had the Florida courts followed the law *as written*, the trial judge would not have been permitted to act as Terri Schiavo's surrogate. Nevertheless, the record is clear that the state courts applied a different rule in these disputed proceedings to withdraw medical treatment. See (App. 6, pp. 61-70), Order on Voidness motion at 5:

drawing a distinction between incompetency and guardianship proceedings "and this type of proceeding where an incompetent person's guardian or surrogate decision-maker is authorized to exercise her constitutional right of privacy for her.")

15. The judicial "modification" of Florida law that occurred below began in *Schiavo I.*[2] Respondent, Michael Schiavo, had petitioned for an order authorizing withdrawal of nutrition and hydration, but Petitioners, Robert and Mary Schindler, objected. They alleged that Respondent should be disqualified from serving as Terri's guardian and surrogate because Mr. Schiavo stood to inherit the balance of a more than one million dollar malpractice award against the doctor who treated Terri before her brain injury and Mr. Schiavo had already started a new family with another woman who had born him two children.

16. Recognizing that "there may be occasions when an inheritance could be a reason to question a surrogate's ability to make an objective decision," *id.*, the Court of Appeal held that *the guardianship court itself* had jurisdiction to serve as surrogate decision-maker for Terri Schiavo.

> Because Michael Schiavo and the Schindlers could not agree on the proper decision and the inheritance issue created the appearance of conflict, Michael Schiavo, as the guardian of Theresa, invoked *the trial court's jurisdiction to allow the trial court to serve as the surrogate decision-maker*.

Schiavo I, 780 So.2d at 178 (emphasis added).

17. Petitioners submit that the Fourteenth Amendment's Due Process Clause does not permit judges to serve in the dual capacity of health-care surrogate and judge. Florida's guardianship statutes, Florida Laws, Chapter 744, expressly prohibit such

[2] *In Re Guardianship of Theresa Marie Schiavo*: Schindler v. Schiavo , 780 So.2d 176, 177 (Fla. Dist. Ct. App. 2001), aff'd without opinion *In re Guardianship of Schiavo*, 789 So.2d 348 (Fla. 2001) (Table)

conflicts of interest. So too does Florida constitutional law. In *In re TW*, 551 So.2d 1186, 1190 n. 3 (1989), the Florida Supreme Court held:

> Under no circumstances is a trial judge permitted to argue one side of a case as though he were a litigant in the proceedings. The survival of our system of justice depends on the maintenance of the judge as an independent and impartial decisionmaker. A judge who becomes an advocate cannot claim even the pretense of impartiality.

Accord, *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); and *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.")

18. Petitioners have consistently – and persistently – argued that Florida has failed to follow its own law in this case, but the courts involved in this case have, just as consistently, refused to hold that these statutes even *apply* to this action. (App. 6)

19. The case at bar offers this Court an opportunity to clarify the ways in which the Due Process and Equal Protection Clauses of the Fourteenth Amendment *affirm* the powers of the state legislatures to preserve individual rights in a setting in which the person whose rights are to be adjudicated cannot speak for herself. The Florida Supreme Court refused even to consider the possibility that permitting a trial court to serve simultaneously as surrogate and judge might have tainted the fact-finding process. It is therefore now impossible for Florida's political branches to adopt post-judgment (but pre-death) remedies that will resolve these important federal due process and equal protection issues. Federal relief is Petitioners' only alternative. *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004).

20. In *Cruzan*, this Court recognized that "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality," and that "a State has more particular interests at stake" when it elaborates and refines a process by which it will resolve conflicts between family members over the person's wishes or the fairness of the proceeding in which those wishes were determined. Writing for the majority, the Chief Justice held:

> Whether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest.

Cruzan, 497 U.S. at 280.

21. When Respondent applied to the court for state authority to terminate Mrs. Schiavo's artificially supplied food and water, he raised a "serious due process issue affecting life." *Schiavo II*, 792 So.2d at 557. Because an order such as the one entered below will deprive Terri Schiavo, of her life, liberty, *and* property (which Respondent will inherit), the due process clauses of both the Florida and United States Constitutions require that she be give a fair hearing before an impartial tribunal in which she is represented by a guardian *ad litem* assisted by counsel, to conduct discovery, to appear in court and present evidence in her own behalf, and to cross-examine adverse witnesses. FLA. CONST. art. 1 § 9, and U.S. CONST. amend. XIV.

22. In the case at bar, Terri Schiavo did not have *any* representation. She was not noticed to appear for the proceedings, she was not provided with a guardian *ad litem* assisted by counsel, and she was not permitted discovery or the right to call or cross-examine witnesses. Respondent, on the other hand, and even though his interests and hers are clearly adverse, was represented by counsel who was paid by Mrs. Schiavo's estate. Mrs. Schiavo's parents were represented by counsel, and were treated by the trial court as her adversaries. The trial court never even *saw* Mrs. Schiavo in person so that he could make an independent assessment of her demeanor, capabilities, credibility, and other factors before authorizing and subsequently *ordering*, her death by starvation and dehydration in its orders entered with increasing severity in 2000, 2003, and 2005. (App. 1, pp. 1-17.)

23. Like involuntary commitment, discontinuance of assisted feeding constitutes a deprivation of life, liberty, and property interests and requires scrupulous attention to the preservation of procedural due process rights. *Chalk v. State*, 443 So.2d 421, 422 (Fla. 2d DCA 1984). The incapacitated person whose life and liberty interests are being curtailed by the state has "a right to the effective assistance of counsel at all judicial proceedings which could result in a limitation on the subject's liberty." *Id.*

24. While Florida statute and case law do not expressly provide that a contested proceeding for court authority to terminate assisted provision of food and water entitles the ward to her due process right to the assistance of an independent guardian *ad litem* who has the benefit of counsel whose loyalties are to the ward alone, these rights are among those that Florida recognizes as the minimum. Under both FLA. CONST., art. 1, § 9, and the Fourteenth Amendment, the due process of law

> contemplates reasonable notice, a hearing, and the right to effective assistance of counsel at all significant stages of the proceedings, i.e., all judicial proceedings and any other proceedings at which a decision could be made which might result in a detrimental change to the subject's liberty.

Jones v. State, 611 So.2d 577, 579 (Fla. 1st DCA 1992). *See also, Specht v.* Patterson, 386 U.S. 605, 610 (1967) ("Due process ... requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own") and *Ibur v. State*, 765 So.2d 275, 276 (Fla. 1st DCA 2000) ("Because involuntary commitment is a substantial deprivation of liberty at which fundamental due process protections must attach, the patient cannot be denied the right to be present, to be represented by counsel, and to be heard.")

25. The trial court's reasoning, by contrast, is to the contrary. In his view, the

burden was on *Petitioners* to prove that incompetent persons are entitled to the due process protections that others enjoy. (App. 6). In the trial court's view, there is a meaningful distinction between incompetency and guardianship proceedings "and this type of proceeding where an incompetent person's guardian or surrogate decision-maker is authorized to exercise her constitutional right of privacy for her." (App. 6).

26. Surely it cannot be argued that an incapacitated person deserves *fewer* procedural safeguards than an accused criminal in proceedings seeking to cause her death. Therefore, the only rational explanation for the trial court's ruling is the structural due process problem that lies at the core of this appeal: judicial conflict of interest. Where, as here, *the court itself* is attempting to serve not only as judge, but also as the incapacitated person's surrogate decision-maker, the need for an independent guardian *ad litem* represented by counsel loyal only the ward is absolutely necessary to protect the ward *from the judge. Cf.* U.S. CONST. Amend. VI (right to a jury trial).

27. The decisions below violate Petitioners' equal protection rights because substituted judgment proceedings are permissible *only* in the case of persons with cognitive or other disabilities that make it impossible for them to make, and communicate, independent, fully informed choices regarding the nature and duration of their medical treatment. *Cf.* Americans with Disabilities Act, 42 U.S.C. §§ 12131, 12132 (2005); 28 U.S.C. § 794 (2005). Since persons with severe cognitive disabilities have the same rights to procedural due process and equal protection enjoyed by others, the courts, no less than the other two branches, must ensure that surrogates – whoever they may be – protect the rights of their incapacitated wards. See *Jackson v. Indiana*, 406 U.S. 715 (1972) (unjustified commitment); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (abuse &

neglect in state hospitals); *Cleburne v. Cleburne Living Center, Inc*., 473 U.S. 432 (1985) (irrational discrimination in zoning). *But see* (App. 7, pp. 71-77, Order Denying Florida Department of Children and Families intervention).

28. The absurd result in the proceedings below is that Florida's courts afford less protection to severely handicapped individuals who are in *their* custody than they do for capital defendants who are in the custody of the executive branch. This is not because Florida expressly contemplates that cruel and unusual treatment is *permissible* for anyone, but because the courts appear to believe that profound disabilities render individuals like Terri Schiavo incapable of *feeling* pain, suffering, or anxiety.

29. This, however, is precisely the kind of stereotype that the law forbids. *Cleburne*, *supra*. Because the trial judge had acquired a professional interest in preserving his decision as proxy, he would not even allow the parties to challenge his factual findings on the basis of admissible evidence that can be discovered by using diagnostic tools readily available to others. *Cf*., 42 U.S.C. §§ 3796gg, 3796kk, *et seq*. (authorizing grants for DNA research and training).

30. This is why the rule that "[e]very litigant is entitled to nothing less than the cold neutrality of an impartial judge" is particularly relevant here. *Clark v. Board of Education of Independent School District No. 89 of Oklahoma County*, 32 P.3d 851, 854 (Ok., 2001). The Constitution requires due process before the state may authorize acts that would otherwise constitute homicide without first ensuring due process of law, and Florida itself forbids cruel or unusual methods of execution. FLA. CONST. Art. I § 17 (prohibiting cruel and unusual punishments). *Cruzan*, *supra*.

31. The judge's participation as Mrs. Schiavo's "proxy" denied her her

individual right to privacy under the Due Process Clause of the Fourteenth Amendment because *In re Guardianship of Browning,* 568 So.2d 4 (Fla. 1990), recognizes that if the family members agree concerning an incompetent patient's wishes, and there is no dissent to that agreement, the decision to discontinue artificial life support is a private medical decision that needs no court oversight. If there are questions about the oral instructions of the principle, however, or if an interested party disagrees with the decision, "the surrogate or proxy may choose to present the question to the court for resolution" or "interested parties may challenge the decision of the proxy or surrogate." *Id.* at 16 (Fla. 1990).

32. The participation of the trial court as both judge and as proxy for Terri Schiavo foreclosed both of these *Browning* options to Petitioners in this case. Although the Respondent did present the question to the judge for review pursuant to FLA. STAT. § 765.401, there was no *independent* surrogate or proxy "to present the question to the court for resolution," and there was no unbiased tribunal in which "interested parties may challenge the decision of the proxy or surrogate." The trial judge's Due Process violations thus violated Petitioners rights under both state law and the decisions of this Court. [3]

33. For Terri Schiavo, the trial judge's orders are a death sentence without due process of law. They even forbid any attempt to provide food or water by mouth after the feeding tube is removed. The trial judge explicitly *rejected* conducting a swallowing test on the Ward (App. 4, p. 53), despite the fact that both rehabilitation medicine and medical imaging have progressed enormously in the nearly *thirteen years* that have

[3] Petitioners do not contend that *Browning* authorizes Florida judges to act in a manner inconsistent with Florida statute and constitutional law. To the contrary, they submit that the right to privacy recognized in *Browning* cannot be effectuated without scrupulous compliance with federal due process guarantees.

passed since Terri's last swallowing test in 1992. The trial judge also explicitly rejected testing with the diagnostic tools that experts in the field now believe are essential tools that enable them to make accurate diagnoses that distinguish – as they must – between the "persistent vegetative state" (PVS) and the "minimally conscious state" (MCS). (App. 8, pp. 78-84). *See* Erik J. Kobylarz, MD and Nicholas D. Schiff, MD, "Functional Imaging of Severely Brain-Injured Patients: Progress, Challenges, and Limitations," 61 *Archives of Neurology* 1357-1360 (September 2004) (App. 5) (App. 4, Order Rejecting Testing). The trial court did not, even once, actually observe Terri Schiavo in person, (App. 9, pp. 85-88), even though Florida law requires that the court "[p]ersonally meet with the incapacitated person to obtain its own impression of [her] capacity." FLA. STAT. §744.3725(3).

34. Judge Greer appears to have decided that, as Terri's self-appointed proxy, he *alone* was entitled to decide what course of action would be in her "best interests" – regardless of the facts; and that he alone could decide that his decision as Terri's proxy was a correct decision.

35. In *Cruzan*, this Court held that Missouri's imposition of heightened evidentiary requirements was *one* acceptable means by which the State might "legitimately seek to safeguard the personal element of this choice." *Id*., 497 U.S. at 281. This Court also implied, but did not decide, that the integrity – if not the constitutionality – of a substituted judgment order turns on the nature and quality of the representation provided by those charged with the duty of protecting those whose "'right' [to refuse treatment] must be exercised for her, if at all, by some sort of surrogate." *Id*., 497 U.S. at 280.

36. Effective representation is thus the *sine qua non* of *the incompetent person's* right to procedural due process in the substituted judgment proceeding. It is also the necessary precondition for the full implementation of the substantive rights the state sought in *Cruzan* to protect with its heightened evidentiary requirement. Given the nature of a substituted judgment proceeding, inadequate representation is the one defect that neither the State, *as parens patriae*, the court, nor the parties can waive or otherwise avoid. Without effective representation, neither the parties, nor the State can be sure that the facts found by trial courts are constitutionally sufficient "substitutes" for the decisions incompetent wards would have made for themselves under the circumstances.

37. Even the dissenters in *Cruzan* recognized that *accuracy* is the touchstone of all substituted judgment inquiries.

> As the majority recognizes, (citation omitted) Missouri has a *parens patriae* interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances. Second, if and when it is determined that Nancy Cruzan would want to continue treatment, the State may legitimately assert an interest in providing that treatment. But *until* Nancy's wishes have been determined, the only state interest that may be asserted is an interest in safe-guarding the accuracy of that determination.
>
> Accuracy, therefore, must be our touchstone. Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination.

Cruzan, 497 U.S. at 315-16, 318 (Brennan, Marshall, and Blackmun, JJ., dissenting) (emphasis in the original). Like the Florida Legislature in this case, these justices expressly distinguished cases in which the families agree from cases like this one in which there is a real controversy over the ward's wishes. *Cruzan*, 497 U.S. at 318. As Justice Brennan pointed out in his dissent in *Cruzan*:

> In a hearing to determine the treatment preferences of an incompetent person, a court is not limited to adjusting burdens of proof as its only means of protecting against a possible imbalance. Indeed, any concern that those who come forward will present a one-sided view would be better addressed by appointing a guardian ad litem, who could use the State's powers of discovery to gather and present evidence regarding the patient's wishes. A guardian ad litem's task is to uncover any conflicts of interest and ensure that each party likely to have relevant evidence is consulted and brought forward--for example, other members of the family, friends, clergy, and doctors.

38. Terri Schiavo was denied both an independent guardian *ad litem* and independent counsel to advocate for *her* federal due process rights, one who is willing to argue that her federal due process rights were denied by ineffective representation, *see* (App. 6 (circuit court record); App. 10. pp. 89-137; App. 11, 138-211 (January 28, 2005, Hearing Transcript); App. 12, p. 212-216, March 3, 2000, Order) Therefore Terri Schiavo's "right to privacy" became her death warrant. This cannot be the meaning of *Cruzan*.

39. No irreparable harm will accrue to Respondent, Michael Schiavo, if a stay is issued. Although Mr. Schiavo will claim that any delay inures to the detriment of Terri Schiavo because it will delay the exercise of her alleged decision to end her life by starvation and dehydration, that position begs the questions raised here: *Was the trial court's decision structurally defective*? If it was, and Petitioners respectfully submit that it was, the trial court's factual "findings" are a nullity.

40. The potential for irrevocable harm to Terri Schiavo is, by contrast, both real and imminent. Even an erroneous decision not to withdraw her food and water results merely in maintenance of the status quo. In such a case:

> [T]he possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life sustaining treatment at least create the

> potential that a wrong decision will be mitigated. **An erroneous decision to withdraw life-sustaining treatment, however is not subject to correction.**

Cruzan, 497 U.S. at 283 (1990). (Emphasis added).

41. A decree in a substituted judgment case that authorizes withdrawal of nutrition and hydration is for all practical purposes, the functional equivalent of a judicially imposed death sentence, even one that employs a cruel and unusual death that would not be permitted for a death row inmate. No doubt that is why even the dissenters in *Cruzan* recognized that *accuracy*, not finality, is the touchstone of all substituted judgment inquiries.

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 Petitioners and Mrs. Schiavo effective relief in this case because Mrs. Schiavo will die before the Court has the opportunity to consider the merits of Petitioners' 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 1:00 p.m. on March 18 through a court order to terminate Mrs. Schiavo's assisted feeding. Petitioners and their daughter are threatened with 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. Petitioners submit that Your Honor should grant the stay pending the filing and determination of their Petition for a Writ of *Certiorari* directed to the Florida Court of Appeal, Second District.

Respectfully submitted,

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Submitted: Thursday, March 17, 2005.

No. ___
In the Supreme Court of the United States

ROBERT and MARY SCHINDLER,
Individually and in their capacity as Next Friends of their daughter,
THERESA SCHINDLER SCHIAVO, Incapacitated
Petitioner,
v.
MICHAEL SCHIAVO,
Guardian: Theresa Schiavo
Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the 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 District Court Of Appeal Of the State Of Florida, Second District, has been furnished by electronic mail to **George J. Felos** at proofg@aol.com and by hand delivery to **George J. Felos**, Felos & Felos, P.A., 595 Main Street, Dunedin, Florida 34698, telephone number 727-736-1402, on this 17th day of March 2005.

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