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

No. 8:05-CV-530-T-27TBM

THERESA MARIE SCHINDLER SCHIAVO, Incapacitated *ex rel.* ROBERT SCHINDLER and MARY SCHINDLER, her Parents and and Next Friends,	)
Plaintiffs,	)
vs.	)
MICHAEL SCHIAVO, as Guardian of the Person of Theresa Marie Schindler Schiavo, Incapacitated; JUDGE GEORGE W. GREER and THE HOSPICE OF THE FLORIDA SUNCOAST, INC.,	)
Defendant.	)

MEMORANDUM IN SUPPORT OFMOTION FOR TEMPORARY RESTRAINING ORDER

Comes now Plaintiff, Theresa Marie Schindler Schiavo, Incapacitated, *ex rel.* Robert Schindler and Mary Schindler, her parents and next friends and hereby submits her Memorandum of Law in Support of Motion for Temporary Restraining Order filed herewith. As grounds for the Temporary Restraining Order, Plaintiff shows the following.

Plaintiff filed a First Amendment Complaint.

I. The newly enacted Public Law 109-3 compels this Court to grant injunctive relief to sustain the life of Theresa Marie Schindler Schiavo until it can reach a determination on the merits of her claims.

Counts Six through Nine of the First Amended Complaint are brought to this Court pursuant to Public Law 109-3, which became law on March 21, 2005, and which expressly authorizes the Middle District Court of Florida to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any of her rights under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life. (P.L. 109-3, Section 1). The Act further provides that:

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

(P.L. 190-3, Section 3).

This Act was passed in the early morning hours of March 21, 2005. Legislative history demonstrates that at the time the Act was being debated, voted upon, and signed by the President, Terri had already been without food and water for almost three days. Congress and the President were well aware and highly motivated by the knowledge that if they did not move with

unprecedented speed, Terri would be dead before her rights could be finally determined under Public Law 109-3.

Section 3 of the Act would be unnecessary unless Congress intended that the merits of the case be reached, and for the merits of the case to be reached, Terri Schiavo must remain alive long enough for her case to be heard on the merits. Terri will not be alive unless a restraining order or stay of the state court proceedings ordering the withholding of Terri's nutrition and hydration is granted. To assume otherwise would be to assume that Congress intended to do a vain and useless act. "We cannot believe that Congress intended a vain and useless act. Any doubt about the matter, however, is fully resolved by the legislative history which shows without question that Congress drew the bill with the evident purpose"[1] of protecting "status and legal rights of incapacitated individuals who are incapable of making decisions concerning the provision, withholding, or withdrawal of foods, fluid, or medical care." (Public Law 109-3, Section 9). Terri is one of those individuals whose "status and legal rights" will be destroyed absent expedited injunctive relief to order immediately establishment of her nutrition and hydration.

[1] *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 496 F.2d 1017, 1022 (5th Cir. 1974).

If this Court denies Theresa's requested injunctive relief, it will have judicially amended Public Law 109-3 by reading Section 3 out of the newly enacted federal law. The Court is without such authority.

> [T]he role of the judicial branch is to apply statutory language, not to rewrite it. *See Badaracco v. Commissioner*, 464 U.S. 386, 398, 104 S.Ct. 756, 764, 78 L.Ed.2d 549 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."); *Blount v. Rizzi*, 400 U.S. 410, 419, 91 S.Ct. 423, 429, 27 L.Ed.2d 498 (1971) ("it is for Congress, not this Court, to rewrite the statute"); *Korman v. HBC Florida, Inc*., 182 F.3d 1291, 1296 (11th Cir.1999) ("It is not the business of courts to rewrite statutes.").

Harris v. Garner, 216 F.3d 970, 976 (11th Cir. 2000). Clearly the Act assumes the this Court will grant restraining or injunctive relief ordering that Terri's hydration and nutrition be restored to sustain her life until the merits can be heard.

II. This case meets the temporary restraining order standards.

A party seeking a temporary restraining order must establish that: (1) there is a substantial likelihood that the moving party will prevail on the merits; (2) the moving party will suffer irreparable injury if the temporary restraining order is not granted; (3) the threatened injury to the moving party outweighs the threatened harm the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest. *Johnson v. U.S. Dept. of Agriculture*, 734 F.2d 774, 781

(11th Cir. 1984). A temporary restraining order "is to preserve, for a very brief time, the status quo, so as to avoid irreparable injury pending a hearing on the issuance of a preliminary injunction.")

In its consideration of Theresa's previous motion for a temporary restraining order, this Court acknowledged that she had demonstrated three of the four elements she needed to obtain the restraining order.

> It is apparent that Theresa Schiavo will die unless temporary injunctive relief is granted. This circumstance satisfies the requirement of irreparable injury. Moreover, that threatened injury outweighs any harm the proposed injunction would cause. To the extent Defendants urge that Theresa Schiavo would be harmed by the invasive procedure reinserting the feeding tube, this court finds that death outweighs any such harm. Finally, the court is satisfied than an injunction would not be adverse to the public interest.

(Order, 3-4). Plaintiff will not again argue what the Court has already decided.

III. Because the irreparable harm present in this case is so great, Plaintiff need only show a substantial case, not a substantial likelihood of success on the merits.

The "substantial likelihood of success on the merits" element is not reviewed in a vacuum without consideration of the other elements, namely the irreparable harm sought to be prevented. Determining the substantial likelihood of success on the merits "require[s] a delicate balancing of the probabilities of ultimate success at final hearing with the consequence of

immediate irreparable injury which could possibly flow from the denial of preliminary relief." *Siegel v. Lepore*, 234 F.3d 1163, 1178 (11th Cir. 2000) (en banc).

The greater the irreparable harm sought to be prevented, the lesser the showing of likelihood of success on the merits is needed. The Eleventh Circuit has held that "where the balance of the equities weighs heavily in favor of granting the [injunction], the movant need only show a *substantial case* on the merits." *Gonzalez v. Reno*, No. 00-11424-D, 2000 WL 381901 at *1 (11th Cir. Apr. 9, 2000) (emphasis added). Both the Ninth and Tenth Circuits have also reduced the "likelihood of success on the merits" element in light of a strong showing on the other elements. *Walmer v. U.S. Dept. of Defense*, 52 F.3d 851, 854 (10th Cir. 1995) ("We have adopted a modified likelihood of success requirement in the Tenth Circuit."); *Abbassi v. Immigration and Naturalization Service*, 143 F.3d 513, 514 (9 Cir. 1998). In addition, the United States Supreme Court has recognized in stay proceedings that when the likelihood of success on the merits is even (neither strongly for nor against either party), "a strong showing on the equities can still carry the day for the [movant]." *McNary v. Haitian Centers Council, Inc.*, 505 U.S. 1234, 1234 (1992).

"A showing of irreparable harm is the *sine qua non* of injunctive relief." *Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). As Judge Wilson stated in his dissenting opinion, "[T]he immediate irreparable injury [in Terri's case] is not only possible. It is imminent. I am aware of no injury more irreparable than death." *Schiavo*, Docket No. CV-05-00530-T at 19. Here, because the magnitude of the imminent irreparable injury (death) is so great, Plaintiff is merely required to prove a substantial case, not a substantial likelihood of success on the merits.

If this Court declines to apply the reduced standard mandated by the Eleventh Circuit, Plaintiff's counts Six through Nine are sufficient to show likelihood of success on the merits.

IV. Theresa Schiavo is likely to succeed on the merits of her claim that her rights under the federal Rehabilitation Act have been and are being violated by Defendants.

The Rehabilitation Act prohibits any organization that receives federal funding from discriminating against an "otherwise qualified" handicapped individual. Specifically, "[n]o qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance." 45 C.F.R. §

84.4(a). Subsection (b) lists the types of discrimination that are prohibited; they are, in part, as follows:

> (b) Discriminatory actions prohibited. (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
>
> (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
>
> (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
>
> (iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;
>
> (iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;
>
> . . .
>
> (vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

"Qualified individuals with disabilities" are those who (1) have a physical or mental impairment which substantially limits one or more major life activities and (2) meet normal and essential eligibility requirements for whatever service or benefit is being provided by the federally funded organization. 29 U.S.C. § 794.

In this case, Terri Schiavo satisfies both prongs of the "qualified individual with disabilities" test. It is undisputed that Terri suffers from

mental impairment that substantially limits her major life activities. She suffered a loss of oxygen to her brain in 1990, which resulted in severe brain damage. Second, she meets the normal criteria for those receiving food, water, medical care, and therapy at Woodside Hospice, a federally funded organization. Woodside Hospice routinely provides food, water, medical care, and therapy for its patients. Simply by virtue of being a patient at the Hospice, one is entitled to food and water. Yet Woodside Hospice is denying Terri food and water because of her disability in an effort to kill her. This is the ultimate discrimination imaginable.

In addition, Woodside Hospice has for more than eleven years denied Terri medical, rehabilitative, and therapeutic care that it would provide to other patients. Numerous doctors who have only seen Terri on television news articles and on-line videos of Terri have volunteered their declarations under the pain of perjury either that Terri is not in PVS, or that she should be reevaluated to determine her current status, or that recent diagnostic and rehabilitative advances could better determine her cognitive ability. (Declarations filed as Exhibits 1-42, to First Amended Complaint). Nearly all of the declarations agree that if she received therapy, her mental and physical status could improve, including improvement in her condition if give proper therapy.

On March 23, 2005, William Polk Cheshire, Jr., M.D., was actually able to examine Terri in person. Dr. Cheshire is a neurologist certified by the Board of Psychiatry and Neurology. He has been given unprecedented access to Terri's records in the past few weeks and now to her person because of his position as a doctor for the Department of Children and Families. Dr. Cheshire is the first neurologist to examine Terri in approximately three years. Dr. Cheshire concluded the following:

> Based on my review of extensive medical records documenting Terri's care over the years, on my personal observations of Terri, and on my observations of Terri's responses in the many hours of videotapes taken in 2002, she demonstrates a number of behaviors that I believe cast a reasonable doubt on the prior diagnosis of PVS.

Declaration filed as App. 40, attached hereto. Dr. Cheshire when on to list several facts that lead him to his conclusion, including that Terri's "behavior is frequently context-specific," such as her facial expression when interacting with her parents; that she looks at colorful objects and looks at people's faces when the walk into the room; that "she demonstrates emotional expressivity by her use of single syllable vocalizations"; that there are some instances where Terri follows commands; that she appears in a 2002 video to comprehend Dr. Hammesfahr's comments regarding a painful procedure and "signals her *anticipation* of pain."

This final fact is significant here because Terri is presently being starved and dehydrated to death – a very pain intensive process.

Yet Hospice has ignored these doctors and instead cooperated with Michael Schiavo, Terri's guardian, to have her nutrition and hydration removed from her to ultimately cause her death. Therefore, Defendant Hospice is in violation of the Rehabilitation Act, and Plaintiff is likely to succeed on the merits of her RA claim.

V. Theresa Schiavo is likely to succeed in demonstrating that her Fourteenth Amendment rights when he exercised his "substitute judgment" authority without clear and convincing evidence.

Defendant Judge Greer made a clear mistake in his February 11, 2000, Order authorizing termination of Terri's assisted feeding when he discounted the testimony of the Schindler's witness, Diane Christine Meyer, about her 1982 end-of-life conversation with Mrs. Schiavo in connection with the 1976 Karen Ann Quinlan case and Ms. Quinlan's death a decade later in 1985. (App. 1, February 11, 2000, Order).

In the summer of 1982, Terri Schindler would have been 19 years old, not the 11 or 12 Judge Greer assumed her to be when her family "spent portions of summer vacation together which would have included the mid-1970's." In its Order, Judge Greer recounted at great length Ms. Meyer's testimony, finding her to be "believable at the [outset]," but then questioning

Ms. Meyer's credibility when recounting her conversation with Mrs. Schiavo, which she recalled as being during the summer of 1982, after watching a television movie about the Quinlan case and its ongoing aftermath.

> [T]he court noted two quotes from the discussion between she and Terri Schiavo which raise serious questions about the time frame. Both quotes are in the present tense and upon cross-examination, the witness did not alter them. The first quote involved a bad joke and used the verb "is". The second quote involved the response from Terri Schiavo which used the word "are". The court is mystified as to how these present tense verbs would have been used some six years after the death of Karen Ann Quinlin [*sic.*]. . . . While the court certainly does not conclude the bad joke and comment did not occur, the court is drawn to the conclusion that this discussion most likely occurred in the same time frame as the similar comments of Mrs. Schindler. This could well have occurred during this time frame since this witness and Terri Schiavo, together with their families, spent portions of summer vacation together which would have included the mid-1970's.

The "bad joke" to which the Court referred arose in the following testimony during Ms. Meyers' direct testimony when she testified that she and Mrs. Schiavo discussed Karen Ann Quinlan, who was then still alive in a New Jersey nursing home.

> Q Did you and Terri ever discuss any end of life issues?
>
> A There was an incident when I told a poor joke about Karen Ann Quinlan. I remember distinctly because Terri never lost her temper with me. This time she did. She told me that she did not approve of what was going on or what happened in the Karen Ann Quinlan case.

* * *

Q Do you remember what the joke was?

A Yes. Do you want me to say it?

Q Yes.

A I apologize for the joke. It was, "What is the state vegetable of New Jersey?" And the punch line was Karen Ann Quinlan.

Q Do you recall when that was?

A . . . . It was the summer of 1982.

(App. 2, 2000 Trial Transcript, Vol. V, p. 766-767, 768).

Contrary to Judge Greer's assumption, Karen Ann Quinlan did not die in the mid 1970s when her court case ended. Instead, after she was taken off her respirator in 1976, Ms. Quinlan continued to live another 9 years in a New Jersey nursing home, dying on June 11, 1985, at the age of 31. Hannah C. Kinney, Julius Korein, Ashok Panigrahy, Pieter Dikkes, and Robert Goode, "Neuropathological Findings in the Brain of Karen Ann Quinlan: Abtract" NEW ENGLAND JOURNAL OF MEDICINE, 1994, 330:1469-1475. (App. 3).

In 1982, since Karen Ann Quinlan had not died, the bad joke's use of the verb "is" was appropriate and Ms. Meyer's testimony should not have been discredited for the use of that verb.

The second quote that "mystified" the state trial court was Ms. Meyers' use of the verb "are" when she testified that Terri "did not approve of what happened. What the parents are doing." (Exhibit 2, Vol. V, p. 777). The mystery disappears when one fact is noticed. Ms. Quinlan did not actually die until 1985. In 1982, Karen Ann Quinlan was still alive and being cared for in a New Jersey nursing home. The 1977 television movie, "*In the Matter of Karen Ann Quinlan*," was still being rerun on television in 1982, keeping that tragic case in the public eye. Therefore, use of the present tense verb "are" in reference to Ms. Quinlan's situation was appropriate and Ms. Meyer's testimony regarding her conversation with Mrs. Schiavo should not have been discredited for the use of that tense.

It was not Ms. Meyer who was mistaken, but Judge Greer, who discredited Ms. Meyer's testimony because of his own mistaken conclusion that Karen Ann Quinlan was already dead in 1982. In reality, Ms. Quinlan was very much alive in 1982.

In 1982, as an adult of 19 years old, Terri Schindler told Ms. Meyers that she did not approve of the actions of Karen Ann Quinlan's parents in removing their daughter's life support. Ms. Meyer testified that Mrs. Schindler said, "How did they know she wouldn't want to go on. She was so strong about it. Terri, to take that strong of a stand and say something so

strongly and come back at me the way she did, it really embedded in my mind." (App. 2. Vol. V, p., 767).

Ms. Meyer's testimony should had been given credibility by Judge Greer since Ms. Meyer's use of the present tense verbs "is" and "are" was proper in light of the fact that when she discussed Ms. Quinlan's case with Terri, Ms. Quinlan was still alive, contrary to the Court's six-year mistake as to the year of her death. The evidence Ms. Meyer provided about Mrs. Schiavo, as an *adult*, speaking protectively about Quinlan in 1982 seriously impacts the trial court's finding that Mrs. Schiavo's only relevant *adult* statements were favorable to the termination of life-sustaining treatment in cases of comas or a persistent vegetative state.

Taking into consideration the credibility of Ms. Meyer, the evidence before Judge Greer did not rise to the level of "clear and convincing" demanded by *In re the Guardianship of Browning*, 568 So.2d 4 (Fla. 1990). The "facts" upon which the state trial court made its decision changed; Ms. Meyer's evidence was wholly credible inasmuch as Ms. Quinlan was still alive in 1982.

Judge Greer's authorization to end Mrs. Schiavo's life is not a criminal death sentence. If it were, Mrs. Schiavo would be entitled to the post-conviction relief available in death-penalty cases that would entitle her

to her own defense counsel her to raise this new exculpatory evidence. (Fla. R. Crim. P. 3.851). Since this is a case of first impression, in that a judge has ordered that an innocent incapacitated person be put to death with a standard of proof lower than required to put a criminal to death, the analogy to criminal law is appropriate. Judge Greer did not have clear and convincing evidence that Mrs. Schiavo wanted to die, thus violating her due process right to have her assisted feeding terminated only upon clear and convincing evident that was her wish. A trial *de novo* will demonstrate that the clear and convincing evidence standard cannot be met in this case. The facts alleged above clearly show that Plaintiff has a substantial likelihood of success on the merits since the *credible* testimony that she would not want to die was entirely discounted by Judge Greer because of *his own mistake* of the facts before him.

In addition, Dr. Cheshire's evaluation discussed above calls into question the validity of Judge Greer using his "substituted judgment" regarding Terri's end-of-life wishes at all. Dr. Cheshire states that there is "reasonable doubt on the prior diagnosis of PVS," that Terri can respond to certain stimuli, and that she can express her emotions. Based on Dr. Cheshire's affidavit, it is entirely possible that Terri could be rehabilitated to the extent that she could communicate her own wishes rather than resorting

to substituted judgment. In light of Dr. Cheshire's and the other forty or so doctor's statements, Plaintiff has shown an additional grounds under the Fourteenth Amendment upon which she has a substantial case or in the alternative has a substantial likelihood of success on the merits.

VI. Theresa Schiavo is likely to succeed in demonstrating that she has been subjected to cruel and unusual punishment in violation of the Eighth Amendment prohibition against cruel and unusual punishment.

The Eighth Amendment to the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eithth Amendment, like the rest of the U.S. Constitution, is a limitation on the powers of state actors. Judge Greer is a state actor by virtue of his position as a state court judge. Michael Schiavo is also a state actor in his role as guardian of Terri Schiavo. Defendants Judge Greer and Michael Schiavo, in their official capacities as state actors, gave and executed the order to confine Terri to Woodside Hospice, to remove Terri's nutrition and hydration, and not permit her to attempt to ingest anything by natural means.

The protections of the Eighth Amendment extend to Terri Schiavo because she is being held against her will by state actors. The protections of the Eighth Amendment are well-established:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., *food*, clothing, shelter, *medical care*, and *reasonable safety* – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

DeShaney v. Winnebago County Dept. of Social Service, 489 U.S. 189, 199-200 (1989) (internal citations omitted) (emphasis added).

The Eighth Amendment not only protects prisoners opposing their sentence, "[t]he Eighth Amendment also applies to conditions of confinement that are not formally imposed as part of a sentence." *Randles v. Hester*, 2001 WL 1667821 (M.D. Fla. June 27, 2001); *see also Wilson v. Seiter*, 501 U.S. 294 (1991). In addition, the United States Supreme Court has expressly stated, "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982). As in *Youngberg*, Terri has committed no crime, yet she is being confined against her will and is slowly being starved to death by order of Judge Greer, a state actor. The Eighth Amendment is fully applicable to her.

A plaintiff establishes a violation of the Eighth Amendment based on a two-pronged showing. "First, the [petitioner] must demonstrate that the conditions of confinement were objectively so serious as to amount to the denial of a basic human need. . . . Next, it must be demonstrated that the official acted with deliberate indifference." *Randles*, 2001 WL 1667821 (internal citations omitted). Terri Schiavo satisfies both prongs of this test.

First, Terri Schiavo's conditions of confinement are so severe as to deny her basic human needs. The Supreme Court has recognized food, medical care, and reasonable safety to be basic human needs. *DeShaney*, 489 U.S. at 200. As conditions of Terri's confinement, she is being denied nutrition and hydration as well as other necessary medical procedures and evaluation for the expressed purpose of not interfering with Judge Greer's decision to starve her to death. Just as person satisfies the objective prong of this test by showing he was required to clean up blood without protective gear, *Randles*, 2001 WL 1667821, a petitioner satisfies the objective prong of this test by showing that she is intentionally being refused food, water, and medical care for the expressed purpose of killing her. In *Youngberg*, "the state concede[d] that [the confined individual] has a right to adequate food, shelter, clothing, and medical care." *Youngberg*, 457 U.S. at 315. Thus, Terri Schiavo's confinement meets the objective prong.

Second, the state actors named above have acted with deliberate indifference to the danger to Terri Schiavo. "[D]eliberate indifference is demonstrated when [a petitioner] shows the official 'acted or failed to act despite his knowledge of a substantial risk of serious harm.'" *Randles*, 2001 WL 1667821 (*quoting Farmer v. Brennan*, 511 U.S. 825 (1994)).

> This subjective component requires a showing that the official knew of and disregarded an excessive risk to [petitioner's] health or safety . . . . The official need only have been aware of the *risk* of harm, as opposed to being aware of actual harm. Furthermore, a factfinder may conclude that [an official] knew of a substantial risk from the very fact that the risk was obvious."

Randles, 2001 WL 1667821 (internal citations and punctuation omitted).

Here, the state actors not only "knew of and disregarded an excessive risk" to Terri, they intentionally created and perpetuated the risk which could only have the intended result of killing Terri. Therefore, Terri Shiavo's showing satisfies both the objective and subjective prongs of the Eighth Amendment test. The conditions of her confinement are cruel and unusual punishment and are expressly forbidden by the United States Constitution. Because no court in America would allow a prison official to starve to death an inmate, the Plaintiff has shown a substantial likelihood of success on the merits.

IV. Theresa Schiavo is likely to succeed on the merits of her claim that her rights under the federal ADA have been and are being violated by Defendants.

Over the past century, America has developed a history of lethal and medical discrimination against disabled persons, both young and old.[2] The United States Supreme Court has recognized this troubling history by noting that the practice of medical professionals to withhold lifesaving medical assistance from children with lifelong severe disabilities has a "history of unfair and often grotesque mistreatment" arising from a legacy of "prejudice and ignorance" and continuing well into the 20th century. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 453 (1985) (Stevens, J., joined by Burger, C.J., concurring), 455 (Marshall, joined by Brennan & Blackmun, JJ., concurring).

---

[2] F. Kennedy, "The Problem of Social Control of the Congenital Defective," 99 Am. J. Psych. 13-16 (1942); see also "The Right to Kill," Time, Nov. 18, 1935, at 53-54 (where a Nobel Prize winner at the Rockefeller Institute urged that "sentimental prejudice... not obstruct the quiet and painless disposition of incurable... and hopeless lunatics"); D. McKim, Heredity and Human Progress 189,193 (1900)(where a respected New York physician advocated the elimination of all children with severe disabilities, including "idiots," most "imbeciles, and the greater number of epileptics," for society's protection, via a "gentle, painless death" by the inhalation of carbonic gas). D.B. Shurtlett, "Myelodysplasia: Management and Treatment," 10 Current Problems in Pediatrics 1, 8 (1980); see Nat Hentoff, "Are Handicapped Infants Worth Saving?" Village Voice (Jan 8, 1991) at 18; Richard J. Neuhaus, "The Return of Eugenics," Commentary 15-26 (Apr. 1988).

Studies reveal that many physicians, a majority in some specialties, oppose lifesaving surgery for babies with lifelong disabilities. A. Shaw et al., "Ethical Issues in Pediatric Surgery," 60 Pediatrics 588, 590 (1977); R.H. Gross et al., "Early Management and Decision-Making for the Treatment of Myelomeningocele," 72 Pediatrics 450, 456 (1983) (reporting on the results of selection of disabled newborns for treatment between 1977 and 1982 at Oklahoma University Health Sciences Center that babies were provided – or denied – treatment based on such factors as their ambulatory potential, according to a "formula that also factored in the "contribution anticipated from his home and family and society"); D. Crane, The Sanctity of Social Life 96-98 (1975) (documenting that surgeons at a teaching hospital were less likely to perform surgery on Down Syndrome children with heart defects than survey studies would predict).

No doubt Congress understood this history, when, in 1990, it enacted the Americans with Disabilities Act (ADA), clearly providing persons with disabilities basic civil rights. Title II of the ADA subjects all "public entities" to the antidiscrimination requirements of the ADA. Specifically, a "public entity" includes "any State or local government" and "any department, agency, [or] special purpose district." In addition, the receipt of federal funding would qualify a hospice or other entity as a "public entity." 42 U.S.C. §§ 12131(1)(A) and (B). In addition, Title III of the ADA subjects all "public accommodations" to the antidiscrimination requirements of the ADA, including healthcare providers, even if they do not receive federal funding. Woodside Hospice, where Terri Schiavo is currently being starved and dehydrated to death, receives federal funding and qualifies both as "public entity" and a "public accommodation" under the ADA.

The antidiscrimination provision reads as follows:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

§ 12132. Finally, the ADA defines a "qualified individual with a disability" as follows:

> [A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practice, the removal of architectural, communication, or transportation

> barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

§ 12131(2). Thus, for a hospice to deny a disabled person the same therapy and medical treatment, including food and water, that it provides to others violates the ADA. Woodside Hospice provides food, water, and medical treatment to its patients, yet it denies these same benefits and services to Terri Schiavo, a severely disabled individual, thereby violating the antidiscrimination provisions of the ADA.

In addition, one regulation implementing these provisions states that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (1998). "The most integrated setting appropriate" means "a setting that enables individuals with disabilities to interact with non-disabled person to the fullest extent possible." 28 C.F.R. pt. 35, App. A, p. 450 (1998). "Unjustified isolation, we hold, is properly regarded as discrimination based on disability." *Olmstead v. L.C.*, 527 U.S. 581 (1999) (internal citations omitted).

In *Olmstead*, the Supreme Court found the Georgia Department of Human Resources, among others, in violation of the ADA for failing to provide community therapy to the petitioner, a mentally impaired individual,

when the petitioner was ready for such therapy. The Department provided similar therapy of other individuals and would not have to modify its rules, policies or building structure to offer the same therapy to the petitioner. But it refused to provide the therapy for the mentally disabled petitioner, and the Supreme Court found it in violation of ADA. *Id*.

In this case, Terri Schiavo has been residing at Woodside Hospice for several years. During this time, she has been kept secluded in her room and has been deprived basic rehabilitation therapy both individually and in a group setting. The Hospice provides other of its patients with these basic services. Now, in addition to denying both group and individual therapy, the hospice is also depriving Terri of food, water, and reasonable medical care. As in *Olmstead*, Hospice cannot justify its refusal to nourish, hydrate, and rehabilitate Terri, because the Hospice provides this type of benefit or service of its other patients. Thus, Woodside Hospice is violating the ADA.

In addition, the federal regulations implementing the ADA specifically provide, "Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual." 28 C.F.R. Ch. 1, pt. B, § 35.130. Here, Michael Schiavo, Terri's guardian, petitioned the court in 1998 and has fought for seven years to have Terri's food and

water removed from her because of her disability, i.e., because of her brain damage.

Therefore, both Woodside Hospice and Michael Schiavo are discriminating against Terri Schiavo in violation of the ADA. Based on the foregoing, Plaintiff is likely to succeed on the merits of her ADA claim.

VIII. All Writs Act.

The All Writs Act provides, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. Federal courts have "both the inherent power and the *constitutional obligation* to protect their jurisdiction ... to carry out Article III functions." *Procup v. Strickland,* 792 F.3d 1069, 1074 (11th Cir.1986) (en banc) (emphasis added).

Toward that end, the All Writs Act permits federal courts to protect their jurisdiction with regards to "not only ongoing proceedings, but potential future proceedings." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099 (11th Cir.2004) (internal citations omitted); *ITT Comm. Devel. Corp. v. Barton*, 569 F.2d 1351, 1359 n. 19 (5th Cir.1978) ("When potential jurisdiction exists, a federal court may issue status quo orders to ensure that once its jurisdiction is shown to exist, the court will be in a position to

exercise it."). Although the Act does not create any substantive federal jurisdiction, it empowers federal courts "to issue writs in aid of jurisdiction previously acquired on some other independent ground," *see Brittingham v. Comm'r,* 451 F.2d 315, 317 (5th Cir.1971), and codifies the "federal courts' traditional, inherent power to protect the jurisdiction they already have." *Klay,* 376 F.3d at 1099.

The All Writs Act injunction is distinguished from a traditional injunction not by its effect, but by its purpose. To obtain relief under the All Writs Act, Petitioners need not satisfy the traditional four-part test associated with traditional injunctions "because a court's traditional power to protect its jurisdiction, codified by the act, is grounded in entirely separate concerns." *Id.* at 1100.

An appellate court may grant All Writs Act relief to preserve "potential jurisdiction ... where an appeal is not then pending but may be later perfected." *F.T.C. v. Dean Foods Co.,* 384 U.S. 597, 603, 86 S.Ct. 1738, 1742, 16 L.Ed.2d 802 (1966). In *Dean Foods,* the Supreme Court sustained the entry of a preliminary injunction that prevented the consummation of a merger of two corporations. The Court held that the use of an All Writs Act injunction was particularly appropriate in a situation

where “an effective remedial order ... would otherwise be virtually impossible.” *Id.* at 605. That is precisely the case here.

The purpose underlying Congress’ passage of P.L. 109-3 was to preserve the life of Terri Schiavo pending the District Court’s *de novo* review of her federal rights. Upon issuance of the writ, Petitioners will be enabled to the relief clearly contemplated under the new Act—a *de novo* review of their Terri’s federal rights, complete with the time and resources necessary for that process to have any meaning.

Under the Act, "[a] court may enjoin almost any conduct 'which, left unchecked, would have ... the practical effect of diminishing the court's power to bring the litigation to a natural conclusion." *Klay*, 376 F.3d at 1102 (citing *Barton*, 569 F.2d at 1359). Plaintiffs maintain that the issuance of an injunction is essential to preserve the federal courts’ ability to “bring the litigation to a natural conclusion.” *Klay*, 376 F.3d at 1102. By failing to issue an injunction requiring the reinsertion of Theresa Schiavo's feeding tube, this Court virtually guarantees that the merits of Plaintiffs’ claims will never be litigated in federal court. That outcome would not only result in manifest injustice, but it would thwart Congress's clearly expressed command that Plaintiffs' claims be given *de novo* review by a federal court.

IX. Conclusion.

The public interest will be served by the issuance of a TRO to protect Terri while her federal rights are being litigated in this Court. If an injunction does not issue, Public Law 109-3 will have been pointless even if Terri ultimately prevails.

WHEREFORE, Plaintiffs respectfully plead this Court to issue a TRO instructing that Terri's nutrition and hydration be reestablished and that she be transported to the hospital for the medical treatment necessary to sustain her life, and that a hearing date be set on which the merits of Terri's claims may be heard.

Dated: March 24, 2005

Respectfully submitted,

GIBBS LAW FIRM, P.A.,

/S/

David Gibbs III
Florida Bar # 0992062
Gibbs Law Firm, P.A.
5666 Seminole Blvd, Suite 2
Seminole, FL. 33772
(727) 399-8300

George E. Tragos
600 Cleveland St.
Bank of America Building, Ste. 700
Clearwater, FL 33755

(727) 441-9030

Robert A. Destro
Columbus School of Law
The Catholic University of America
3600 John McCormack Road, N.E.
Washington, D.C. 20064
(202) 319-5202

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2005, I electronically filed PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/ David C. Gibbs III