No. 04A-825

IN THE

Supreme Court of the United States

THERESA MARIE SCHIAVO *EX REL.*
ROBERT AND MARY SCHINDLER,
Petitioners,
v.

MICHAEL SCHIAVO,
Guardian of Theresa Schiavo
Respondent.

On Application for Injunction
From the Court of Appeals
for the Eleventh Circuit

RESPONDENT MICHAEL SCHIAVO'S OPPOSITION TO APPLICATION FOR INJUNCTION

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INTRODUCTION

Petitioners offer no valid justification for the extraordinary and invasive relief they seek. Unconstitutional as it is, the statute giving rise to this case, Pub. L. 109-3, does not come close to mandating the intrusive injunction action demanded by Petitioners. As the court of appeals recognized, the statute merely provides a federal forum to review Petitioners' thin federal claims, which have been repeatedly rejected by the courts. The district court carefully reviewed those claims and found them insubstantial, and the Eleventh Circuit properly found no abuse of discretion. Those decisions were undoubtedly correct and certainly do not rise to the level of egregious, clear error necessary for emergency injunctive relief in this Court.

This case comes to the Court with an extensive history. Mrs. Schiavo has been through eight years of painstaking and transparent litigation, including a week-long trial, a seven-day evidentiary hearing on an action to vacate the judgment, fourteen appeals, and innumerable motions, petitions, and hearings in the Florida courts regarding Mrs. Schiavo's wishes as to her own medical treatment, as well as applications of stay virtually identical to this one; five suits in federal district court, including two in the last week in which federal judges have denied the very injunctive relief sought by Petitioners here; the enactment of unconstitutional state legislation to overturn the judgment of the state courts, which was struck down by the Florida Supreme Court; an effort by a congressional committee to overturn the state court judgment though the use of a committee subpoena and an application for an extraordinary writ to this Court; the congressional enactment of the unprecedented and unconstitutional legislation, Pub. L. 109-3; the decision by the court of appeals; and that court's later denial of a petition for rehearing en banc.

The case has also visited this Court four times. The Court has twice before denied applications for stays in this proceeding, *see Schindler v. Schiavo*, No. 04A801, 2005 WL 615863 (Mar. 17, 2005); *Schindler v. Schiavo*, No. 00A926 (2000), has denied a petition for writ of certiorari, *Bush v. Schiavo*, 125 S. Ct. 1086 (2005), and has refused an application for injunctive relief by a congressional committee, *Committee on Government Reform v. Schiavo,* No. 04A811, 2005 WL 636582 (U.S. Mar. 18, 2005) – each time in the face of identical claims of irreparable harm.

This massive and intensive judicial (and now legislative) scrutiny of a patient's medical condition and intent is unprecedented in the annals of American jurisprudence. As the Florida Second District Court of Appeal explained only last week in rejecting claims identical to those here, the determination that Mrs. Schiavo would have wished to be removed from artificial feeding and hydration "has been subject to appeals and postjudgment scrutiny of all varieties, and it remains a valid judgment pursuant to the laws and the constitution of this state. Not only has Mrs. Schiavo's case been given due process, but few, if any, similar cases have ever been afforded this heightened level of process." *In re Guardianship Schiavo*, No. 2005-968, __ So. 2d __, 2005 WL 600377, at *3 (Fla. 2d DCA Mar. 16, 2005) ("*Schiavo V*"), *stay denied*, No. 04A801, 2005 WL 615863 (U.S. Mar. 17, 2005).

There is no dispute that, prior to enactment of Pub. L. 109-3, all of Petitioners' claims had been fully and finally denied by the courts, both state and federal, with no possibility of meeting any threshold of likelihood of success on which to premise an injunction. As the court of appeals recognized, Pub. L. 109-3 did not miraculously transform meritless arguments into good ones.

At bottom, Petitioners argue against a statutory backdrop that simply does not exist. While Petitioners certainly would prefer a federal statute that *mandates* the invasive procedures necessary to re-establish life support for Mrs. Schiavo against her adjudicated will, Congress never passed such a statute. Rather, in enacting Pub. L. 109-3 – which, as discussed below, is itself unconstitutional – Congress sought to aid Mrs. Schiavo's parents with federal court jurisdiction, but did not change the substantive law at all. *See* Pub. L. 109-3, § 5. Nor did the Congress prejudge the arguments the Schindlers might raise or alter any of the traditional rules that apply to motions for preliminary injunction, especially injunctions that invade fundamental constitutional rights and would compel a person to undergo surgery against her will. Rather, Congress left such issues to the sound discretion of the courts, applying the standards that the courts have always applied – indeed, the same standards that have led multiple Florida state courts, several federal district court judges, the Eleventh Circuit, and this Court to deny relief identical to that sought here.

That Mrs. Schiavo will likely die if the court of appeals' decision is allowed to stand is no reason to grant the application. Rather, that is the only result consistent with her wishes, as ascertained after exhaustive legal proceedings, and the only result that vindicates her rights under the Florida and U.S. Constitutions. As this Court explained in *Cruzan by Cruzan v. Director*, 497 U.S. 261, 286 (1990), the Due Process Clause permits placement of the decision to forgo medical treatment – even life-sustaining medical treatment – with "the patient herself," not with Congress or her parents. In following procedures similar to those in *Cruzan*, including application of the heightened clear and convincing evidence standard of proof, and examining Mrs. Schiavo's medical condition and wishes through the crucible of intensive litigation over

more than eight years, the Florida courts have far exceeded the requirements of due process in protecting and promoting Mrs. Schiavo's rights.

Although maintaining the status quo will result in her death, it is the only way to vindicate Mrs. Schiavo's rights. In contrast, compelling Mrs. Schiavo to undergo surgery against her wishes as Petitioners request would cause her rights to be infringed on an ongoing basis. Because Petitioners could not meet the stringent burden of demonstrating an abuse of discretion by the district court, and because they surely cannot satisfy the even stricter standard governing petitions in this Court for extraordinary injunctive relief, the Court should deny the petition.

STATEMENT OF THE CASE AND THE FACTS

Respondent provides this abbreviated summary of the extensive litigation in this case as background for the Court.

The Guardianship Proceedings

Theresa Schiavo suffered a cardiac arrest on February 25, 1990. Since that time, she has been in a persistent vegetative state, "robbed . . . of . . . all but the most instinctive of neurological functions"; most of her cerebrum "is simply gone and has been replaced by cerebral spinal fluid." *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 780 So. 2d 176, 180, 177 (Fla. 2d DCA 2001) ("*Schiavo I*"). Independent medical experts appointed by the Florida circuit court, as well as the independent guardian ad litem appointed pursuant to the Florida statute that was ultimately struck down, found that Mrs. Schiavo has lost all cognitive abilities. *See In re Guardianship Schiavo*, No. 2005-968, __ So. 2d __, No. 2D05-968, 2005 WL 600377, at *1, *4 (Fla. 2d DCA Mar. 16, 2005) ("*Schiavo V*"), *stay denied*, No. 04A801, 2005 WL 615863 (U.S.

Mar. 17, 2005); *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 851 So. 2d 182, 184-85, 187 (Fla. 2d Dist. 2003) ("*Schiavo IV*"). The evidence was, in a word, "overwhelming." *Schiavo I*, 780 So. 2d at 177. As the Florida Supreme Court stressed, this "is not simply a coma. [Mrs. Schiavo] is not asleep. . . . Medicine cannot cure this condition." *Bush v. Schiavo*, 885 So. 2d 321, 325 (Fla. 2004), *stay denied*, 125 S. Ct. 1086 (2005).[1]

Her husband, Respondent in this case, has served and continues to serve as her guardian. In May 1998, believing that his wife would not wish to be artificially kept alive in her current state and recognizing that Mrs. Schiavo's parents (the Schindlers) disagreed as to her wishes, Mr. Schiavo filed a petition in a Florida circuit court (the "guardianship court") to discontinue Mrs. Schiavo's artificial life support. In that court proceeding, all parties, including the Schindlers, presented evidence concerning Mrs. Schiavo's medical condition and what her wishes would have been. *Schiavo I*, 780 So. 2d at 179. During the course of the litigation, the Schindlers, who opposed the cessation of artificial hydration and nutrition, "were afforded the opportunity to present evidence on all issues" and vigorously litigated all questions related to Mrs. Schiavo's medical condition and wishes. *Bush v. Schiavo*, 885 So. 2d at 331.

The Florida court found by clear and convincing evidence that it was Mrs. Schiavo's wish, as expressed to multiple witnesses, that she not be kept alive artificially. *Schiavo I*, 780 So. 2d at 180. The guardianship court concluded that, pursuant to the Florida Constitution's right to

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[1]Petitioners cite to one doctor (Cheshine) who testified yesterday for the first time and claimed to have drawn his conclusions from sitting in a room with Mrs. Schiavo, but never examining her. In contrast, the extensive testimony by doctors who had actually examined Mrs. Schiavo demonstrated conclusively that Mrs. Schiavo is in a persistent vegetative state from which she will not recover. *Schiavo I*, 780 So. 2d at 177. Petitioners have never been able to accept this medical conclusion.

privacy, Mrs. Schiavo had a right to have her wishes vindicated, and the court authorized the removal of her feeding tube to effectuate that right.[2] *See id.* at 177. The Schindlers had numerous opportunities to challenge this decision,[3] and did so, but the Florida courts repeatedly upheld the guardianship court's findings. As the Florida Second District Court of Appeal observed just last week, "[u]ltimately this case . . . is about Theresa Schiavo's right to make her own decision, independent of her parents and independent of her husband. . . . the trial judge [made] a decision that the clear and convincing evidence shows the ward [Mrs. Schiavo] made a decision for herself." *Schiavo V*, 2005 WL 600377, at *4.

Throughout these proceedings, Mrs. Schiavo's parents, Petitioners here, have repeatedly raised federal constitutional arguments to support their claims that the adjudication of Mrs.

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[2]The guardianship court found that Mrs. Schiavo's death upon removal of her feeding tube "would be painless." Studies in the most respected medical journals conclude that, even for gravely ill but conscious patients who voluntarily cease eating and drinking, death is painless and any discomfort is easily relieved by palliative treatment. *See Comfort Care for Terminally Ill Patients*, J. of the Am. Med. Ass'n (1994) (study of conscious patients who had voluntarily undergone terminal dehydration showed that 97 percent said they felt no hunger at all or only initially; 62 percent said they felt no thirst at all or only initially, all who reported discomfort were successfully treated with palliative measures such as mouth care and narcotics); *Nurses' Experiences With Hospice Patients Who Refuse Food and Fluids to Hasten Death*, New Eng. J. of Med. (2003) (nurses observing terminal dehydration of conscious patients reported that "most deaths from voluntary refusal of food and fluids were peaceful, with little suffering"); Dr. Ira Byock, *Patient Refusal of Nutrition and Hydration*, Am. J. of Hospice & Palliative Care (1995) ("Symptoms referable to dehydration are few -- mostly dry oral and pharyngleal mucous membranes -- and are readily relieved by simple measures.").

[3]Given the short time for this response, Respondent cannot address to every baseless accusation made in Petitioners' brief concerning the conduct of Respondent or counsel. The court in *Schiavo I*, however, found Respondent to be a "loving husband" and "[a]s a guardian, [Respondent] has always attempted to provide optimum treatment for his wife. He has been a diligent watch guard of Theresa's care." *Schiavo I*, 780 So. 2d at 177-78. Mr. Schiavo has never been the guardian of Mrs. Schiavo's property and payments for her care and for an attorney have been court-approved.

Schiavo's rights violated the federal Constitution. The Florida courts have repeatedly rejected those claims – the very claims Petitioners now bring to this Court.

The Florida Statute

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

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

guardian and in direct conflict with the guardianship court's final judgment, to force the surgical reinsertion of a feeding tube.

On September 23, 2004, the Florida Supreme Court unanimously invalidated the state version of "Terri's law." Among other things, the Florida Supreme Court found that the Act exceeded the authority of the Florida Legislature by "effectively revers[ing]" a "properly rendered final judgment." *Bush v. Schiavo*, 885 So. 2d at 331. The Governor sought review from this Court, alleging a variety of purported federal constitutional claims on behalf of himself and Mrs. Schiavo. The Court denied certiorari. 125 S. Ct. 1086 (2005).

Thereafter, the Florida courts re-affirmed their prior judgment upholding the exercise of Mrs. Schiavo's right to refuse artificial nutrition and hydration. The Second District Court of Appeal, which has heard this case from its inception, issued a clear decision finally (at that time) bringing litigation involving Mrs. Schiavo's rights to an end. *See Schiavo V*.

The Recently Enacted Congressional Legislation

On March 21, 2005, at a hastily convened midnight session, Congress enacted legislation purporting to authorize Petitioners to file suit in federal district court to raise issues of federal law under the U.S. Constitution or "laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life." P.L. 109-3, § 2. Notably, the federal statute makes clear that it creates no new substantive rights. *Id.* § 5. The statute, moreover, does not authorize or compel the courts to grant any form of preliminary relief, such as the extraordinary injunction sought by Petitioners here. Congress had previously considered and rejected provisions authorizing or requiring such a preliminary "stay" and made

clear that the statute did nothing to affect the ordinary rules that courts apply in considering applications for preliminary injunctions. *See, e.g.,* S. 653 (bill not enacted that would have authorized but not required issuance of a stay before adjudication on the merits). The enacted statute contains no provision altering the ordinary rules, authorizing an injunction only after re-adjudication of Mrs. Schiavo's rights. That the statute does not affect the court's ordinary processes was confirmed on the Senate Floor in a colloquy between Senate Majority Leader Frist and Senator Levin. *See* 151 Cong. Rec. 3099-3100 (March 20, 2005).[4]

Proceedings in the Federal District Court

On March 18, 2005, prior to enactment of the federal law, Petitioners filed a habeas corpus action in federal district court, raising the exact same claims raised here, and seeking the

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[4] Mr. LEVIN. I rise to seek clarification from the Majority Leader about one aspect of this bill, the issue of whether Congress has mandated that a federal court issue a stay pending determination of the case.

Mr. FRIST. I would be pleased to help clarify this issue.

Mr. LEVIN. Section 5 of the original version of the Martinez bill conferred jurisdiction on a federal court to hear a case like this, and then stated that the federal court "shall" issue a stay of state court proceedings pending determination of the federal case…. The version of the bill we are now considering strikes section 5 altogether. Although nothing in the text of the new bill mandates a stay, the omission of this section, which in the earlier Senate-passed bill made a stay permissive, might be read to mean that Congress intends to mandate a stay. I believe that reading is incorrect. The absence of any stay provision in the new bill simply means that Congress relies on current law. Under current law, a judge may decide whether or not a stay is appropriate. Does the Majority Leader share my understanding of the bill?

Mr. FRIST. I share the understanding of the Senator from Michigan, as does the junior Senator from Florida who is the chief sponsor of this bill. Nothing in the current bill or its legislative history mandates a stay.

151 Cong. Rec. 3099-3100 (March 20, 2005).

same injunctive relief. The district court (Judge Moody) dismissed the habeas petition, finding that it was actually a disguised action under 42 U.S.C. § 1983 and thus barred by the *Rooker-Feldman* doctrine. *See Schiavo v. Greer*, Case No. 8:05-cv-522-T-30TGW, at 2 (M.D. Fla. March 18, 2005). Judge Moody also denied injunctive relief and a stay pending appeal, finding that there was no substantial likelihood of success on these claims. *Id.* at 3. On March 20, 2005, the Eleventh Circuit, after requesting briefing on the habeas issues and on the possible impact of the new law, remanded the case back to Judge Moody with instructions to permit Petitioners to amend their complaint to add claims under P.L. 109-3. *See Schiavo v. Greer*, No. 05-11517, at 2 (11th Cir. Mar. 21, 2005). The Eleventh Circuit did not enter any injunctive relief.

Rather than amending their complaint before Judge Moody, Petitioners filed an entirely new action (this action), resulting in assignment of a new judge (Judge Whittemore). On March 21, 2005, Judge Whittemore received briefing from the parties and held an expedited two-hour hearing to consider arguments on Petitioners' application for injunctive relief. On March 22, 2005, Judge Whittemore denied the application for injunctive relief.

After thorough consideration of each of Petitioners' arguments, Judge Whittemore found that they could demonstrate no possibility of success on the merits of their claims – let alone the requisite "substantial likelihood" of success. *See Schiavo ex rel. Schindler v. Schiavo*, __ F. Supp. 2d __, No. 8:05-CV-530-T-27TBM, 2005 WL 641710 (M.D. Fla. Mar. 22, 2005) ("*Schiavo VI*"), *aff'd*, __ F.3d __, No. 05-11556, 2005 WL 648897 (11th Cir. Mar. 23, 2005), reh'g denied, __ F.3d __, 2005 WL 665114 (11th Cir. Mar. 23, 2005), *appl. for injunction filed* (U.S. Mar. 23, 2005) (No. 04A-825). With respect to their various arguments under the Due Process Clause, Judge Whittemore concluded that the Schindlers had offered "no authority for

their contention that Judge Greer compromised the fairness of the proceeding or the impartiality of the court by following Florida law and fulfilling his statutory responsibilities . . . as presiding judge and decision-maker" in the guardianship proceeding. *Id.* at *3. In examining their claims under the *Mathews v. Eldridge* balancing test, Judge Whittemore found that the "exhaustive[] litigat[ion]" of Mrs. Schiavo's case belied any contention that she had been deprived due process of law, *see id.* at *5. Judge Whittemore further found no likelihood of success on the equal protection and religion claims brought by respondents as well. *See id.* at *6-*7. Petitioners immediately noticed an appeal to the Eleventh Circuit.

Proceedings in the Eleventh Circuit

By a vote of 2-1, a panel of the Eleventh Circuit affirmed the district court's denial of an injunction and refused Petitioners' request for an injunction under the All Writs Act. The panel rejected Petitioners' misreading of Pub. L. 109-3, holding that "in enacting Pub. L. 109-3 Congress did not alter for purposes of this case the long-standing general law governing whether temporary restraining orders or preliminary injunctions should be issued by federal courts." *Schiavo ex rel. Schindler v. Schiavo*, __ F.3d __, No. 05-11556, 2005 (WL 648897 (11th Cir. Mar. 23, 2005) ("*Schiavo VII*") , *reh'g denied*, __ F.3d __, 2005 WL 665114 (11th Cir. Mar. 23, 2005), *appl. for injunction filed* (U.S. Mar. 23, 2005) (No. 04A-825); *see also id.* at *2-*4. The court also held that the All Writs Act is unavailable in cases, like this, where "other, adequate remedies at law exist, namely, Fed. R. Civ. P. 65." *Id.* at *4.

Reviewing the district court's denial of the injunction, the court of appeals "agree[d] that the plaintiffs have failed to demonstrate a substantial case on the merits of any of their claims,"

and concluded that the district court's "carefully thought-out decision to deny temporary relief in these circumstances is not an abuse of discretion." *Id.* at *2. Addressing Petitioners' argument that the district court disregarded the federal statute, the court also noted that "[i]n obedience to Pub. L. No. 109-3 the district court considered the federal constitutional claims *de novo* and made its own independent evaluation of them." *Id.* at *4. "In the end," the court concluded, "no matter how much we wish Mrs. Schiavo had never suffered such a horrible accident, we are a nation of laws, and if we are to continue to be so, the pre-existing and well-established federal law governing injunctions as well as Pub. L. No. 109-3 must be applied to her case." *Id.* at *5.

Petitioners then sought rehearing en banc from the Eleventh Circuit, which was denied. They have now sought issuance of an extraordinary writ from this Court.

ARGUMENT

I. Petitioners Cannot Surmount the Exceedingly High Standard for an Injunction that Will Change the Status Quo and Invade Mrs. Schiavo's Rights, Following Denials of Such Relief by the District Court and Court of Appeals.

Although they attempt to characterize the relief sought in their petition as nothing more than a stay to preserve the status quo under 28 U.S.C. § 2101(f), what Petitioners actually seek is a writ granting affirmative injunctive relief which would fundamentally change the status quo, despite the decisions of both the Middle District of Florida and the Eleventh Circuit that no such relief is warranted. *See Schiavo VII*, 2005 WL 648897, at *1 n.1. Section 2101(f) applies where there is a "final judgment or decree . . . subject to review by the Supreme Court on writ of certiorari," 28 U.S.C. § 2101(f), and such a stay "simply suspend[s] judicial alteration of the status quo," *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S.

1312, 1313 (1986) (Scalia, Circuit Justice). Neither of these requirements are met here, where the relief Petitioners sought below was preliminary in nature (a TRO), and the relief sought from this Court would drastically alter, not maintain, the status quo. In any event, whether Petitioner's application is deemed to be one under the All Writs Act, or § 2101(f), they have not met their burden to obtain the extraordinary relief request.

The status quo today is that Mrs. Schiavo is exactly where she would want to be: she has been released from unwanted, intrusive medical procedures according to her wishes. Preservation of the status quo would allow her to die in peace, and to maintain her dignity and autonomy. Petitioners, however, ask this Court to upset the peace that Mrs. Schiavo has attained, to reverse the fulfillment of her own wishes, and to dismantle eight years of painstaking work by courts in both the Florida system and the federal system. Those courts have all independently determined that it is Mrs. Schiavo's choice to be free from artificial means to keep her alive, and that only the removal of the feeding tube could serve to vindicate her constitutional rights. Instead, Petitioners wish to force Mrs. Schiavo to undergo another surgical procedure, which will entail an incision in her abdomen and the use of guidewires to re-insert the feeding tube for the third time. *See* Decl. of Dr. Stanton Tripodis (filed in the district court).

In order to obtain the extraordinary affirmative injunctive relief they seek, Petitioners must demonstrate that this is an "exceptional case where there is *clear abuse of discretion* or usurpation of judicial power" by the court below. *Ohio Citizens*, 479 U.S. at 1313 (emphasis added). This exceedingly stringent standard is required because "[a] Circuit Justice's issuance of such a writ . . . does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Id.; see also Turner Broad. Sys., Inc. v.*

FCC, 507 U.S. 1301, 1302-03 (1993) (Rehnquist, C.J.) (accord, denying writ); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) (denying writ).

This deferential standard of review requires that even if an individual Circuit Justice personally believes there is merit to the applicants' underlying claims, a writ may not be granted absent the extraordinary circumstances outlined above. *See Holtzman v. Schlesinger*, 414 U.S. 1304, 1304 (1973) (Marshall, J.) (denying application to overturn court of appeals grant of stay); *see also Barefoot v. Estelle*, 463 U.S. 880, 896 (1983), (affirming court of appeals' denial of stay of execution pending appeal of habeas denial and noting "considerable weight" the Court "generally places . . . on the decision reached by the courts of appeals in these circumstances"), *superseded on other grounds by statute*, 28 U.S.C. § 2253(c)(2). *See generally* R. Stern, et al., SUPREME COURT PRACTICE § 17.20 at 805 (8th ed. 2002) (noting that the case law has made clear that the Supreme Court owes the same deference irrespective of whether lower court's decision was to grant or, conversely, deny a stay). Indeed, in this case, the standard Petitioners must meet is higher still because they seek a preliminary injunction for a case that remains with a lower court (here not even a court of appeals). In such circumstances, stays are "rarely granted." *Heckler v. Rosebud Hosp. Dist.*, 473 U.S. 1308, 1312 (1985) (quoting *Atiyeh v. Capps*, 449 U.S. 1312, 1313 (1981) (Rehnquist, J., in chambers)). Petitioners are unable to meet this standard. They simply cannot establish that the right to any relief is "indisputably clear."[5]

[5]Even if Petitioners were seeking a true stay, they could not show that four Justices would vote to grant a petition for certiorari, that the Court would rule for them, or that the balance of harms favors them.

Still less can Petitioners overcome the history of this case. The very same contentions Petitioners advance here – paired with the very same equities – have already been rejected by *every* court that has reviewed this case and considered applications for injunctive relief in the past. The Florida courts have several times denied discretionary review and stays; this Court has twice denied stays and once denied certiorari; and the Middle District and Eleventh Circuit have recently rejected Petitioners' application for equitable relief. All of these decisions were thoughtful and well-reasoned; indeed, despite the tight time frame, the Eleventh Circuit received two briefs each from the parties and issued a careful opinion affirming a detailed opinion of the district court. All of the aforementioned courts have found, as did the Eleventh Circuit, that Petitioners are simply unable "to demonstrate a substantial case on the merits of any of their claims." *Schiavo VII*, 2005 WL 648897, at *2. Petitioners' right to relief is thus anything but "indisputably clear." For that reason, the application must be denied.

II. Petitioners Cannot Evade Their Heavy Burden by Reference to P.L. 109-3 or the All Writs Act.

Because Petitioners cannot meet the requirements for the invasive injunctive relief that they seek, they attempt to sidestep their burden, first by arguing that P.L. 109-3 guarantees them preliminary injunctive relief that would force Mrs. Schiavo to undergo invasive surgery, regardless of her wishes, and then by arguing that relief should issue pursuant to the All Writs Act. Both arguments are wrong.

A. P.L. 109-3 is Unconstitutional and, in Any Case, Does Not Compel Entry of the Relief that Appellants' Seek.

P.L. 109-3 is unconstitutional, for reasons set forth in Part IV *infra*. There is thus no subject matter jurisdiction over this action, and no basis for entry of any relief. In any event,

nothing in P.L. 109-3 guarantees the injunction Petitioners seek, without regard to the merits of their arguments. Their interpretation of the statute is foreclosed by the text of the statute and its (brief) legislative history.

Petitioners concede both that P.L. 109-3 says nothing about the entry of preliminary relief, and that the Eleventh Circuit was correct in holding that "Congress meant no change in the rules it did not mention," *i.e.*, the standard to be applied by the district court with respect to an application for preliminary injunctive relief. *Schiavo VII*, 2005 WL 648897, at *7; *see* Pet'rs.' App. at 9. With respect to the claim that the statute mandates a grant of preliminary injunctive relief, the Act's "plain language . . . marks the beginning and the end" of the inquiry, and dooms this argument. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 176 (1980). Petitioners' contention to the contrary that congressional silence may be read as an affirmative mandate in their favor belies reason (particularly in light of their aforementioned concession) and settled principles of statutory construction. This Court has "frequently cautioned that [i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States v. Wells*, 519 U.S. 482, 496 (1997) (internal quotation marks and citation omitted). Furthermore, with respect specifically to statutory language pertaining to injunctive relief, this Court has held that even where a statute expressly provides that an injunction "shall be granted" – which, of course, P.L. 109-3 does not – this does not alter the traditional discretion enjoyed by district courts when considering whether to grant or deny such relief. *See Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944). Thus, the district court and court of appeals were correct in refusing to fabricate a "mandatory" preliminary injunction provision that does not exist.

Even if the Court looked beyond the text of the statute to its legislative history, that history only serves to confirm this point. Congress specifically considered and declined even to expressly authorize – let alone mandate – a preliminary "stay" of outstanding court orders. As Petitioners themselves describe, prior versions of the legislation in which preliminary injunctive relief was either expressly mandated or authorized were considered and *rejected*, making it clear that Congress intended for the courts to apply their ordinary standards for cases in which a party seeks injunctive relief. *See* Pet'rs.' App. at 8-9; *see also* S. 653 (unenacted bill that specifically authorized but did not require issuance of a stay prior to adjudication on the merits). This point is further borne out by the above-cited colloquy between Senate Majority Leader Bill Frist and other members of the Senate. *See* 151 Cong. Rec. 3099-3100 (March 20, 2005); *supra* note 4. Where Congress includes certain "language in an earlier version of a bill but deletes it prior to enactment, it may be presumed the [deleted language] was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (citations omitted).[6]

Petitioners' contention that the statute must be read as requiring injunctive relief from the inception of and throughout the duration of their suit is ultimately a contention that they have *no* burden to prove their claims under the statute – in other words, they urge that Congress intended through P.L. 109-3 to supersede the existing Rules of Federal Civil Procedure. In their view,

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[6]Petitioners' contention that the statute entitles them automatically to "at least thirty days" after the filing of the complaint (during which time and continuing thereafter, of course, they claim to be entitled as of right to injunctive relief) in order to develop their claims is similarly at odds with the statute's plain language. Pet'rs.' App. at 9. P.L. 109-3 provides merely that Petitioners had thirty days from the passage of the Act to file a claim. P.L. 109-3 § 4 ("Time for Filing"). In no respect can this provision be read as requiring the district court to order preliminary injunctive relief without regard to the traditional standards for granting such relief (whose applicability Petitioners concede in their brief to this Court) for the first 30 days of the case, and beyond.

bare allegations of due process violations or other claims suffice to guarantee them not only preliminary relief but, indeed, a full trial; indeed, under this reading, their claims could never be subject to dismissal for failure to state a claim.[7]

Congress, however, did not prejudge the issues in this case, nor did it direct any conclusions about whether entry of an invasive injunction is consistent with federal law.[8] Rather, Congress merely provided Petitioners with the right to assert certain types of claims in the Middle District of Florida, while leaving intact the court's traditional discretion whether to grant preliminary relief as well as the Federal Rules of Civil Procedure. P.L. 109-3 – though unconstitutional, to be sure – was not a "collossal waste of . . . Congress'[s] . . . time." Pet'rs.' App. at 9. The statute gave Petitioners one last chance to make their arguments to a federal court. But the statute takes no position on whether their arguments have merit, and thus it did not turn meritless arguments for injunctive relief that have been rejected by numerous state and federal courts into persuasive arguments.

B. The All Writs Act Provides No Basis For Injunctive Relief Here.

Petitioners also sought emergency injunctive relief in the Court of Appeals under 28

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[7] The standard which the lower courts were required to apply here, of course, was not the generous Rule 12(b)(6) standard. Rather, the standard was whether among other things Petitioners had met their burden to show a substantial likelihood of prevailing on at least one claim. The point here is simply that Petitioners' extraordinary position is that they are entitled by right under P.L. 109-3 to injunctive relief from the inception of the case as well as to litigate their claims all the way through trial, regardless of whether they have made *any* showing as the merits of those claims.

[8] Had Congress wanted to compel reinsertion of the feeding tube by statute even in the face of meritless claims, it would have said so. Such a statute, of course, would be even more unconstitutional than P.L. 109-3 already is. Such a statute would undoubtedly invade Mrs. Schiavo's fundamental rights to no end whatsoever – something that cannot be squared with her rights under the Due Process Clause and the Equal Protection Clause.

U.S.C. § 1651 (the "All Writs Act") and 28 U.S.C. § 2283.[9] Petitioners simply rely on the dissenting opinion from the Eleventh Circuit's denial of rehearing en banc and fail to address in any substance that court's correct determination that relief under the All Writs Act was not available because adequate remedies at law – including preliminary injunctive relief – were available. *Schiavo VII*, 2005 WL 648897, at *4. Assuming the lower federal courts have any jurisdiction in this case, such extraordinary relief must be denied for several reasons, each of which the Court of Appeals correctly specified. Id. at *4-*5.

"The All Writs Act is a residual source of authority to issue writs that are *not otherwise covered by statute*. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985) (emphasis added); *see also Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004). Where, as here, Petitioners have access to the ordinary statutes and rules governing injunctive relief, such as Fed. R. Civ. P. 65, the All Writs Act cannot be used, and the other statutes – with their traditional test for relief including the requirement of a substantial likelihood of success on the merits or certainty of success in this Court – are "the appropriate avenue upon which to proceed." *Fla. Med. Ass'n, Inc., v. U.S. Dep't of Health, Educ. & Welfare*, 601 F.2d 199, 202 (5th Cir. 1979); *see also Klay*, 376 F.3d at 1101 n.13 (noting that applications for All Writs Act relief "are invariably denied in such circumstances because they are typically not 'necessary or appropriate in aid of [a court's] jurisdiction'").

The federal courts thus regularly rebuff efforts by litigants, such as Petitioners here, to use

[9] Petitioners' reference to 28 U.S.C. § 2283 adds nothing to the merits of their application. Section 2283 simply effectuates that part of the All Writs Act that authorizes relief in highly unusual and limited circumstances "in aid of [a court's] jurisdiction." *See Klay v. United Healthgroup, Inc.*, 376 F.3d 1092 1103 n.16 (11th Cir. 2004).

the All Writs Act to circumvent the requirements of case law – and implicit in P.L. 109-3 – for the granting of a preliminary injunction. "The All Writs Act does not free a district court from the restraints of Rule 65 . . . . [I]t does not authorize a district court to promulgate an *ad hoc* procedural code whenever compliance with the rules proves inconvenient." *Florida Med.*, 601 F.2d at 202. Thus, federal courts "may not evade the traditional requirements of an injunction by purporting to issue what is, in effect, a preliminary injunction under the All Writs Act." *Klay*, 376 F.3d at 1101 n.13.

Here, in seeking relief under the All Writs Act, Petitioners effectively propose to nullify the requirements for issuance of emergency injunctive relief. A preliminary injunction has already been sought – and denied – by the district court in this case. The All Writs Act relief sought here is no different in substance, and should not be permitted. "[A] court may not issue an order under the All Writs Act, circumventing the traditional requirements for an injunction, when a party is in reality seeking a 'traditional' injunction." *Id.* (citing *Florida Medical*, 601 F.2d at 202). As the court of appeals correctly observed, *Schiavo VII*, 2005 WL 648897, at *2, the district court's denial of a preliminary injunction was subject to review for abuse of discretion based on the traditional standards for injunctive relief. *See, e.g.*, *Klay*, 376 F.3d at 1096. The court of appeals applied that standard appropriately here, affirming the district court's denial, as this Court should do, given its even more circumscribed review in these circumstances.

III. Appellants Utterly Fail to Demonstrate that Their Legal Rights Are Indisputably Clear.

Faced with the daunting legal standard, Petitioners' claims – which have repeatedly been rejected – cannot possibly justify an injunction here. Indeed, this Court facing the exact same

equities has denied injunctions identical to this one in this very case. It should do the same here.

A. Petitioners' Due Process Claim is Meritless, Much Less Indisputably Clear.

Petitioners manifestly cannot demonstrate that their due process claims are "indisputably clear," or that the court of appeals abused its discretion in finding an insufficient showing of a violation of that right to grant injunctive relief. *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1313-14.

Petitioners' due process claim turns on their insistence that the guardianship court judge did not act as an impartial decisionmaker. Specifically, Petitioners repeatedly urge that Judge Greer became an advocate by certain judicial acts, to wit: by making factual findings (made under a heightened clear and convincing standard of proof) regarding Mrs. Schiavo's medical condition and wishes, and by issuing an order (pursuant to the settled constitutional law of Florida) effectuating her wish to refuse artificial prolongation of her life. *See* Pet'rs.' App. at 14-16, 30-32. Petitioners further contend, ignoring settled due process doctrine as well as the record in this case, that as a matter of federal constitutional law Mrs. Schiavo's rights were violated because Judge Greer did not appoint an independent guardian ad litem and/or separate legal counsel. *See id.*

In so arguing, Petitioners seek relief unmoored from the Due Process Clause. They neither identify a concrete right for a substantive due process claim, nor focus on the question of minimum adequate procedures that lies at the heart of procedural due process. Ultimately, Petitioners argue for the federal courts to impose a federal common law of guardianship – something wholly foreign to the Due Process Clause, which has never been construed to mandate a fixed, detailed prescription in these areas. *See Mathews v Eldridge*, 424 U.S. 319, 334 (1976)

(noting the "truism" that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances" (internal quotation marks and citation omitted)). Indeed, at times Petitioners suggest that Florida's chosen method for adjudicating issues of guardianship and bodily integrity is *per se* unconstitutional. *See* Pet'rs.' App. at 11 ("The District Court's conclusion, by contrast, simply relies on its conclusion that as long as the Florida courts followed *Florida* law, there is no federal issue. This is not the law . . . .") (emphasis in original).

Petitioners' arguments are particularly incongruous here, in an area where this Court has indicated that States have primary responsibility. *See Cruzan*, 497 U.S. at 277 (noting that state law cases regarding the right to refuse treatment "demonstrate both similarity and diversity in their approaches," and that "[s]tate courts have available to them for decision . . . state constitutions, statutes, and common law . . . which are not available to us"); *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"). Florida constitutional and statutory law is fully consistent with the scheme upheld in *Cruzan*, as it safeguards the wishes of patients – including incompetent patients – regarding medical treatment. *See In re Guardianship Browning*, 568 So. 2d 4, 13 (Fla. 1990) ("Th[e] choice must be the patient's choice whenever possible[.]"); *id.* at 12; Fla. Stat. § 765.401 (creating a hierarchy of persons who may serve as proxy to "exercise the incapacitated patient's rights to select or decline health care" upon "clear and convincing evidence" of what "the patient would have chosen"); *see also Cruzan*, 497 U.S. at 286 ("[W]e do not think the Due Process Clause requires the State to repose judgment on these matters with anyone," including family members, "but the patient herself."). Where there is a dispute as to what the patient

would have wanted – as in this case – Florida law, as enunciated in *Browning*, provides for judicial resolution of that dispute. *Browning*, 568 So. 2d at 16. Under this legal regime, in the proceedings before the guardianship court interested parties are permitted – as Petitioners were – to advocate for their position. *See id.* Finally, in adjudicating as a factual matter the nature of the patient's condition and what her wishes would have been, the guardianship court plays a quintessentially judicial role: it finds facts, identifies the applicable law, applies the law to the facts, and issues a binding resolution (subject to motions to re-open and appeal, all of which procedures Petitioners employed multiple times).[10]

The role played by the Florida guardianship court – determining, upon the presentation of evidence and legal arguments and under a heightened clear and convincing standard of proof, the patient's subjective wishes – not only comports with Florida law and *Cruzan,* but is also the majority approach taken by the States across the country. *See Woods v. Commonwealth*, 142 S.W.3d 24, 44 (Ky. 2004) (noting states applying this standard); A. Meisel & K. Cerminara, THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISIONMAKING § 4.05 at 4-28, § 8.08 (3d ed. 2005) (explaining that nearly all jurisdictions, whether by case law or statute, look first to the incompetent patient's wishes, if determinable, under a clear and convincing evidence standard).[11]

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[10] As just one of the numerous examples of review of Judge Greer's findings regarding Mrs. Schiavo's wishes, the state appellate court in *Schiavo I* evaluated in detail the evidence, as well as evidentiary rulings, and considered various attacks on the judge's findings. *See Schiavo I*, 780 So. 2d 176 (Fla. 2d DCA 2001).

[11] The Schindlers' suggestion that a jury trial is compelled here (or in the state court proceeding) by the Seventh Amendment does not withstand scrunity. There is no such right in cases such as this one, which were unknown at common law. Moreover, if jury trials were required, the schemes employed by States across the nation to determine an incompetent patient's wishes regarding medical treatment would be thrown into disarray.

Petitioners' litany of factual allegations and arguments regarding Judge Greer's purportedly improper role in the guardianship proceedings not only fail to implicate any legitimate constitutional concerns, they also are internally inconsistent. Even under Petitioners' preferred guardianship process, which presumably would have involved an appointed guardian more to Petitioners' liking, a presiding state court judge still would ultimately issue a controlling determination of Mrs. Schiavo's medical condition and wishes. Petitioners' characterization of Judge Greer as a "proxy," *see*, *e.g.*, Pet'rs.' App. at 31, 32, does not change the identical role he played here: the neutral arbiter of factual and legal disputes, who properly applied the heightened evidentiary standard required by Florida law and approved in *Cruzan*.[12]

Isolated factual allegations notwithstanding, Petitioners nowhere identify a constitutional right at issue or demonstrate how it was violated. As this Court's decision in *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and its progeny make clear, for example, there is no free-floating and general affirmative duty on States to prevent an individual from making medical choices that ultimately may harm that individual. *See*, *e.g.*, *Johnson by Johnson v. Thompson*, 971 F.2d 1487, 1495-96 (10th Cir. 1992) (rejecting appellants' claim that the Due Process Clause guaranteed "a right to treatment" for their children, who were born with spina bifida and who died after the State provided them with only "supportive care" as

[12] Thus, the claim that Judge Greer violated Chapters 744 and 765 of the Florida Statutes by allegedly acting as Mrs. Schiavo's "guardian" and/or "proxy" cannot, as the district court concluded, withstand scrutiny. Chapter 744 merely precludes a judge from acting as a guardian except under certain familial circumstances, and has no application here: Mr. Schiavo, not Judge Greer, is Mrs. Schiavo's guardian. Fla. Stat. § 744.309(1)(b). Chapter 765, enacted in its current form subsequent to *Browning*, specifically does "not impair any existing rights . . . which . . . a patient . . . may have under the . . . State Constitution," and provides no ground for challenging the court's role under *Browning* as the adjudicator of the patient's wishes where there is a dispute. Fla. Stat. § 765.106 (amended 1992).

opposed to the "vigorous treatment" which in other cases saved the lives of all but one child treated); *White v. Lemacks*, 183 F.3d 1253, 1257 (11th Cir. 1999) (rejecting claim that Due Process Clause imposes such an affirmative duty on the government). That is because the Due Process Clause is only "a *limitation* on the State's power to act" that "forbids the State *itself* to deprive individuals of life, liberty, or property without 'due process of law.'" *DeShaney*, 489 U.S. at 195 (emphasis added). Here, the state court merely validated Mrs. Schiavo's wishes. There is no state custody (nor, indeed, state action of any kind), and no basis for a constitutional claim based on the state's failure to preserve her life at all costs. *See Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 510-11 (1982).

But even assuming Petitioners had uncovered a constitutional right at stake, they cannot, on this record, show that it is "indisputably clear" that Mrs. Schiavo has been deprived of due process in the exercise of that right. As this Court has made clear, review of questions of procedural due process is exceedingly narrow: "Restraint is appropriate on the part of courts called upon to adjudicate whether a particular procedural scheme is adequate under the Constitution." *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 855-56 (1977). Due process is, moreover, "a flexible concept that varies with the particular situation." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990); *see also Mathews*, 424 U.S. at 334-35. With these basic precepts as a backdrop, Petitioners' claims cannot meet the high threshold required for granting the sort of extraordinary intrusion sought here.

In addition to the general complaints about the role of the guardianship court judge (discussed above), Petitioners make a series of arguments that the Due Process Clause commands certain specific procedures. Thus, Petitioners' argument that federal and state standards on

judicial qualification and professional ethics and "best practice" rules required Judge Greer to disqualify himself are simply inapposite, as well as meritless. Petitioners claim that Judge Greer was not impartial, but they offered no evidence below and suggest only that Judge Greer was biased because he ruled contrary to their beliefs.[13] Petitioners' complaints about the purported lack of a guardian ad litem are both demonstrably untrue[14] and never connected to an asserted denial of due process. Petitioners' claim about lack of legal representation for Mrs. Schiavo is, once again, untrue and unconnected to a claimed lack of due process. Mrs. Schiavo had a guardian (Mr. Schiavo) who was legally obligated to represent her interests, and who was represented by counsel, who in turn represented her interests. And Petitioners cannot credibly claim that their point of view, which is opposed to Mrs. Schiavo's, was not fully aired in the Florida courts. Petitioners were permitted to litigate challenges to Mr. Schiavo's status as guardian numerous times. *See Schiavo VI*, 2005 WL 641710, at *3. And at every stage of the process, Petitioners and their squadron of lawyers argued the position contrary to Mrs. Schiavo and her guardian, claiming that Mrs. Schiavo must be forcibly maintained in a persistent

[13]Notably, Petitioners' cited authorities for a lack of "judicial independence" bear absolutely no relationship to Petitioners' allegations here. *See* Pet'rs.' App. at 10-11 (citing cases involving, *inter alia*, a judge's financial interest in the outcome of a case, a litigant's prior suit against a presiding judge, a judge bribed by defendants).

[14] With respect to a guardian ad litem, not one, but three such guardians participated at various points in the litigation over Mrs. Schiavo, with each one confirming aspects of the Florida court's final judgment and exonerating Mr. Schiavo from baseless accusations. *See Schiavo VI*, 2005 WL 641710, at *4-*6 (discussing participation of the various guardians ad litem including, in the case of the first guardian, by participating as a witness in the trial regarding Mrs. Schiavo's wishes). It is particularly ironic that Petitioners have attacked the findings of the third guardian ad litem appointed – Dr. Jay Wolfson, Ph.D., J.D. – and struggle to claim that his appointment somehow furthered the alleged due process violation, as his appointment was made pursuant to the Florida law which was ultimately struck down, and at the request of Governor Jeb Bush. Dr. Wolfson was appointed by the Chief Judge of the Sixth Judicial Circuit Court of Florida (not, as Petitioners stated in their brief in the Eleventh Circuit, by Judge Greer.) *See Schiavo V*, 2005 WL 600377, at *1 n.2.

vegetative state. *See id.* at *5-*6. There can be no legitimate claim on this record that there was a lack of due process, a lack of representation on the side of "life," or a lack of full and transparent litigation of all of the relevant issues.

Petitioners' real complaint is not that there was insufficient process. Rather, it is that they do not like the end result. Thus, because Petitioners did not obtain the outcome they desired, they argue that the federal courts must interpret the Constitution as requiring the specific procedures they favor. But the Due Process Clause deals only with process, not results. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985) ("[T]the very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, 'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.'" (quoting *Mathews*, 424 U.S. at 344)). "[D]ue process is satisfied when the challenger has an opportunity to present his allegations and to demonstrate the alleged bias." *McKinney v. Pate*, 20 F.3d 1550, 1562 (11th Cir. 1994) (*en banc*); *see also id.* at 1563 (holding that even if there were a "procedural deprivation" as an initial matter, as a matter of law there is no "violation of . . . procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation.").

And whatever the policy merits of Petitioners' arguments about jury trials, guardians, conflicts of interest, and other subjects, they cannot find support for those arguments in the Due Process Clause. That constitutional provision is not a detailed prescription of procedures but, rather, a basic guarantee of process. That guarantee was amply satisfied in this case. The guardianship court's final judgment regarding Mrs. Schiavo's condition and wishes, and the

rejection of challenges thereto in the state's higher courts, was tested and re-tested, and repeatedly withstood all challenges, as to bias and otherwise.[15] This is precisely – and only – what procedural due process requires: A due process violation "is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided[.]" *Zinermon*, 494 U.S. at 126; *see also McKinney*, 20 F.3d at 1562 (en banc), (holding that due process may be satisfied where the state "make[s] . . . available a means to remedy the deprivation" such that "the challenger has an opportunity to present his allegations and to demonstrate the alleged bias").

As the Second District Court of Appeal recently explained in rejecting these identical claims:

> [T]his is not a case where the trial court validated the guardian's decision for the ward without a full and independent inquiry. Instead, both Mr. Schiavo and the Schindlers were allowed to present evidence to the trial court as if each were her guardian . . . . The trial court then made its decision pursuant to law and based upon a heightened standard of proof. That decision has been subject to appeals and postjudgment scrutiny of all varieties, and it remains a valid judgment pursuant to the laws and the constitution of this state. Not only has Mrs. Schiavo's case been given due

[15]As the Eleventh Circuit explained, it was not improper for the district court, in evaluating the strength of Petitioner's due process claim, to "consider[] the procedural history of extensive court litigation." *Schiavo VII*, 2005 WL 648897, at *4. Petitioners assert a lack of procedural due process by the state courts, and "[t]heir pleadings and brief in the district court and th[e] Court [of Appeals] are replete with citations to and discussion about the state court proceedings and decisions." *Id.* It should go without saying that the lower courts could not "consider a claim that the state court proceedings violated the Due Process Clause without examining what those proceedings were." *Id.* Just so, it would be impossible for this Court to ignore the fact that those proceedings occurred. The burden is on Petitioners to *demonstrate* based on the record and the law that it has an "indisputably clear" legal right entitling it to this relief. The court of appeals cannot be said to have abused its discretion in denying Petitioners request for injunctive relief where, as here, there is not even a semblance of a due process claim, let alone a substantial showing, as was required for that court to grant such relief.

> process, but few, if any, similar cases have ever been afforded this heightened level of process.

Schiavo V, 2005 WL 600377, at *3. Given this history, Petitioners cannot meet their heavy burden of showing an indisputably clear violation of the Due Process Clause.

B. Petitioners' Equal Protection Claims Are Meritless.

Petitioners' Equal Protection claim fares no better than their Due Process claim. Indeed, as the district court concluded, and as the Court of Appeals confirmed, the former is entirely duplicative of the latter, and must fail for the same reasons. *See Schiavo VI,* 2005 WL 641710, at *6. Petitioners claim that "persons with severe cognitive disabilities are denied equal protection by the procedures authorized by the Florida courts in Terri Schiavo's case." Pet'rs.' App. at 6. But this argument reflects nothing so much as Petitioners' disagreement with the conclusions reached by the guardianship court: that Mrs. Schiavo is in a persistent vegetative state; that she would not want artificial life-prolonging measures continued; and that she has a fundamental right under the Florida Constitution to have those wishes respected. An unsuccessful litigant's disagreement with a court's decision – especially one reached after exhaustive litigation and confirmed repeatedly under intense scrutiny on review – does not give rise to an Equal Protection claim any more than it gives rise to a Due Process claim. *See id.* at *4 ("[N]o federal constitutional right is implicated when a judge merely grants relief to a litigant in accordance with the law he is sworn to uphold and follow."). And it most certainly falls far short of justifying the extraordinary relief Petitioners have requested here.

C. Petitioners' Free Exercise Claims Are Meritless.

In the court of appeals, Petitioners abandoned claims under the Free Exercise Clause of the First Amendment, U.S. Const. amend. I, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (RLUIPA). They are therefore waived. Because, however, Petitioners make mention of the free exercise of religion in their application, Respondent will briefly address the issues. As the district court found, Petitioners' claims are insubstantial.

Every court to have considered this case has concluded, based on clear and convincing evidence, that Mrs. Schiavo "would elect to cease life-prolonging procedures if she were competent to make her own decision." *Bush v. Schiavo*, 885 So. 2d at 325; *see also id.* at 325-28 (summarizing history of litigation). The courts in Florida applied the same standard that applies to all Floridians, which is not only neutral and generally applicable, *see Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), but specifically designed to determine and honor the patient's wishes. Following the conclusion of the guardianship court, which has been repeatedly affirmed, Petitioners' arguments regarding, among other things, recent professions of the Pope, *see* Pet'rs.' App. at 17-18, cannot suffice to establish that state court proceedings to ascertain Mrs. Schiavo's wishes constituted a burden on her "freedom to believe, to worship, and to express [herself] in accordance with the dictates of [her] *own* conscience." *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985).[16] Indeed, Mrs. Schiavo had expressed herself in

[16]Petitioners' application betrays a hostility towards patient freedom of choice – the fundamental right to refuse or end unwanted medical treatment. Indeed, Petitioners testified in the state court proceedings that they would force artificial life-support on their daughter – even if they *knew* it was contrary to her wishes. Throughout this litigation, they have attacked as biased or ignorant all those who disagree with them – a group which now includes the entire judiciary of the state of Florida, several federal district court judges, and all but two members of the Eleventh Circuit.

accordance with her conscience, and she made clear that she did not want to be artificially sustained by a feeding tube.

Petitioners' claims fail for additional reasons. Both courts below found that there had been no state action behind the alleged infringement of Mrs. Schiavo's religious exercise. *See Harvey v. Harvey*, 949 F.2d 1127 (11th Cir. 1992). Moreover, RLUIPA does not apply on its own terms — Mrs. Schiavo is not a resident of an "institution" as that term is defined in the Act. *See* 42 U.S.C. § 1997(1)-(2). Petitioners thus failed to establish any actionable claim at all, much less one with sufficient merit to support the extraordinary relief sought. There is simply no merit to the claims that the Florida courts abridged Mrs. Schiavo's right to free exercise by honoring her constitutionally protected right to refuse medical treatment.

D. Irreparable Harm Will Occur if the Court Grants the Relief Requested.

Both the Middle District of Florida and the Eleventh Circuit denied Petitioners' request for an injunction because of the complete and utter lack of merit in their claims; indeed, both courts deemed the claims so weak as to be dispositive of the preliminary injunction analysis without regard to the question of the balance of harms. *See Schiavo VII*, 2005 WL 648897 at *2; *Schiavo VI*, 2005 WL 641710, at *1-*2. The balance of harms, however, also tips against Petitioners.

Death is indeed an imposing presence in this case. If the Court upholds the decision of the Eleventh Circuit, 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 not to be forced to receive nutrition and hydration in her vegetative state.

However, as Mrs. Schiavo herself recognized when she was in a position to communicate to her husband her wish not to be forced to undergo unwanted medical treatment, there are other important values and issues at stake in this case.

First and foremost among these values is Mrs. Schiavo's "constitutionally protected liberty interest in refusing unwanted medical treatment." *Cruzan*, 497 U.S. at 278; *see also id.* at 287 (O'Connor, J., concurring). This Court has examined the matter of voluntary refusals of nutrition, hydration and medication on a number of occasions. When faced with the question whether the state of Missouri could "require clear and convincing evidence of Nancy Cruzan's desire to have artificial hydration and nutrition withdrawn," 497 U.S. at 292 (O'Connor, J., concurring), the Court recognized that such a desire is encompassed by the liberty interests undergirding the Court's own precedents. *See id.* at 278; *id.* at 287 (O'Connor, J., concurring). Seven years later, in assessing the constitutionality of Washington State's ban on assisted suicide, the Court reaffirmed that "[t]he right assumed in *Cruzan* ... was entirely consistent with this Nation's history and constitutional traditions." *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997). Although the Court found no constitutional infirmity in the state law, it also recognized that "[t]he decision to commit suicide with the assistance of another ... [and] the decision to refuse unwanted medical treatment ... are widely and reasonably regarded as quite distinct." *Id.*; *see also Vacco v. Quill*, 521 U.S. 793, 800-01 (1997). "[W]e think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational."). Thus, the Court has recognized that to the extent permitted by the states,

individuals have a liberty interest that entitles them to refuse unwanted medical care, nutrition and hydration.

Petitioners have sought to divert attention from the severity of the harm they are visiting on Mrs. Schiavo's right to bodily integrity by conjuring visions of the pain that might attend the removal of artificial support. As discussed, note 1, supra, nothing could be further from the truth. Far from hurting Mrs. Schiavo, she will not suffer pain from the lack of forcible nutrition and hydration is painless.

Conversely, the relief sought by Petitioners – the surgical reinsertion of tubes and devices into Mrs. Schiavo's body – is no panacea for her. "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 fifteen years, 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 Cruzan*, 497 U.S. at 288-99 (O'Connor, J., concurring) (describing the various invasive medical procedures that may be used to accomplish artificial nutrition and hydration). This Court should not be fooled into thinking that the relief sought by Petitioners is anything but harmful to Mrs. Schiavo.

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.

IV. The Statute Under Which the District Court Assumed Jurisdiction is Unconstitutional.

P.L. 109-3 creates one set of procedures for Mrs. Schiavo and a different set for every other American, effectively suspending a state court adjudication of her federal and state constitutional rights. This is unprecedented in American history. The statute runs afoul of constitutional norms because it (1) intrudes on one of the most personal and fundamental rights – the right to refuse medical treatment forced by the government and cannot survive strict scrutiny; (2) singles out one person for burdens imposed on no one else without a rational basis; (3) nullifies a court judgment fully and finally adjudicating Mrs. Schiavo's rights under the state and federal constitutions; and (4) operates retroactively to strip Mrs. Schiavo of her rights, including her right of repose in an adjudication of her constitutional rights.

Each of these aspects of the statute, individually, render it constitutionally suspect. Together, they make it blatantly unconstitutional and one of the most egregious invasions into the rights of any person in American history. A contrary conclusion would mean that *no* rights of any American are inviolable and that Congress may nullify any state court judgment for any reason by compelling further review in federal court.

Congress cannot suspend the operation of the federal and state constitutions with respect to a single citizen. This statute would force Mrs. Schiavo – after eight years of state court

litigation fully and finally adjudicating her rights – to be subjected to another level of review, forced by the government to be subjected to extraordinary measures to keep her alive against her will as adjudicated by the courts. Nothing could be more repugnant to the Constitution of the United States.

Although the Court need not, at this juncture, invalidate this statute, P.L. 109-3 cannot provide the basis for any injunctive relief sought by Petitioners.

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

Mrs. Schiavo has a fundamental right to refuse medical treatment under the federal as well as her own state's constitution.[17] *See Cruzan*, 497 U.S. at 278 ("[A] constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."). This federal constitutional right is grounded in "well-established, traditional rights to bodily integrity and freedom from unwanted touching." *Vacco*, 521 U.S. at 807; *see also Glucksberg*, 521 U.S. at 720 (noting Court's own assumption that "the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment"). This liberty interest goes to the core of every citizen's personhood: "The liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water." *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring).

[17] While the phrase "medical treatment" is employed here for purposes of shorthand, there is no effective "treatment" for Mrs. Schiavo's underlying condition. Her condition, as found conclusively by the Florida courts after exhaustive and painstaking medical and legal scrutiny, and as reflected in the leading independent medical authorities on persistent vegetative states, is untreatable. Artificial nutrition and hydration serve only to prolong her physical existence – against her will – not to cure or improve in any way her irreversible brain damage and deterioration. By contrast, artificial nutrition and hydration is considered to be treatment for purposes of effectuating her right to refuse *unwanted* medical care.

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

The statute, if enforced as Petitioners desire, would compel Mrs. Schiavo to live or die based on other people's values, not hers. Mrs. Schiavo's wishes – to be permitted to go in peace, to not have unwanted medical treatment – were exhaustively and conclusively resolved through eight years of litigation. The Florida courts found by clear and convincing evidence that she is in an incurable persistent vegetative state, and that she would not want artificial nutrition and hydration continued. Having so found, the Florida guardianship court ordered the only course of action consistent with Mrs. Schiavo's fundamental right: that the feeding tube artificially keeping her alive be removed.

Now, Congress purports to give Petitioners the right to compel another review of Mrs. Schiavo's case, and if Petitioners prevail on their application for an injunction, a federal court the power to order the forced surgical re-insertion of a feeding tube. But *any* prolongation of Mrs.

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

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

B. The Statute Violates the Equal Protection Clause.

By singling Mrs. Schiavo out of all people in the United States, including all those in a persistent vegetative state and all those in the process of end-of-life decisionmaking, P.L. 109-3 violates the Equal Protection Clause. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The Clause's protection is at its zenith when fundamental rights, such as the right to refuse unwanted medical treatment, are at stake. To withstand equal protection review, governmental classifications that interfere with an individual's choice to refuse medical treatment must be narrowly tailored to support a compelling state interest. *See Tennessee v. Lane*, 541 U.S. 509 (2004) (heightened judicial scrutiny is required when the government burdens the fundamental right of access to the courts for disabled persons). The statute cannot possibly pass this test, and indeed cannot even survive rational basis review.[18]

A statute that imposes burdens on one person that do not apply to anyone else is suspect because such enactments demonstrate that Congress was not seeking to advance any compelling interest, but was instead seeking merely to interfere with the rights of that person because Congress did not agree with her exercise of her rights. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (discussing how underinclusiveness can demonstrate the lack of a compelling interest). Whereas the privacy rights of all other Floridians (and all other Americans) are governed by one set of rules and procedures, only Mrs. Schiavo is treated differently. She alone of 260 million

[18] Because the statute implicates a fundamental right requiring application of strict scrutiny, the burden is on the government (or Petitioners) to justify its intrusion on Mrs. Schiavo's previously adjudicated rights.

Americans is subjected to litigation in both state and federal courts to effectuate her choice – despite the fact that her case has almost certainly been the most litigated and most scrutinized case of end-of-life decisionmaking in the history of this country. The narrow focus of the proposed statute demonstrates only one thing – that Congress would prefer that Mrs. Schiavo be kept alive, regardless of her wishes. That desire, without more, cannot possibly be a compelling interest sufficient to nullify Mrs. Schiavo's rights. That is the teaching of this Court's decision in *Cruzan.*

Petitioners cannot defend the statute by claiming that it merely requires review of Mrs. Schiavo's case. Forcing a person to relitigate rights over and over is itself a burden that must be subjected to close scrutiny. As this Court said in *Romer v. Evans,* 517 U.S. 620, 633 (1996), "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection in its most literal sense. The guaranty of equal protection of the laws is a pledge of the protection of equal laws." *Id.* at 633-34 (internal quotation marks omitted). This promise is even more forcefully broken when *one person* is chosen for such differential treatment.

By singling out Mrs. Schiavo for the extraordinary burden of ending the hard-won repose granted by the Florida courts to enforce her right to refuse medical treatment, while doing no such thing to other similarly situated persons, Congress has denied her equal protection in a blatant and direct way. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from other similarly situated and that there is no rational basis for the difference in treatment."); *Bolling v. Sharpe*, 347 U.S.

497, 499-500 (1954) ("Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."). This Court has invalidated far less egregious impositions preventing individuals from exercising their constitutional rights. *See Zablocki v. Redhail*, 434 U.S. 374, 389-91 (1978) (invalidating statute prohibiting marriage for a certain class without court approval); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (invalidating law requiring a special permit for a group home premised on concerns that neighbors might object).

C. The Statute Exceeds Congress's Authority Under Article I and the Fourteenth Amendment.

The statute exceeds the limited power granted to Congress in Article I of the Constitution and Section 5 of the Fourteenth Amendment, and thus should be struck down for this reason as well.

This Court has held that Congress may not enact legislation that nullifies, suspends, or "reverses a determination, once made, in a particular case." *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 219, 225 (1995) (quotations omitted); *see United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) (where a law purports to forbid a court from "giv[ing] the effect to evidence which, in its own judgment, such evidence should have," the legislature "has inadvertently passed the limit which separates the legislative from the judicial power"). This restriction on Congress's authority, like other constitutional provisions, such as the Ex Post Facto Clause and the prohibition against Bills of Attainder, is not merely part of the separation of powers in the U.S.

Constitution, but also represents a fundamental protection of individual liberty. *See Plaut*, 514 U.S. at 240-41 (Breyer, J., concurring).[19]

The limit on congressional power re-affirmed in *Plaut* reflects the Framers' fundamental concern that "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 303 (Karmnick ed. 1987). This was particularly a concern with Congress. Madison famously posited that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist No. 48, at 309 (Karmnick ed. 1987).

This singular focus on legislative abuse was hardly unfounded. "One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures." *INS v. Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring); *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395 (1798) (Patterson, J.) (observing that the Connecticut Legislature had, "from the beginning, exercised the power of granting new trials"); The Federalist No. 48, at. 310-11 (discussing experiences in Virginia and Pennsylvania). By colonial legislatures routinely suspending or re-opening final court judgments, "the people had 'been taught to consider an application to the legislature, as a shorter and more certain mode of obtaining relief from hardships and losses, than the usual process of law.'" *Id.* at 221 (quoting the Report of the Pennsylvania Committee of the Council of the Censors 6 (Bailey ed. 1784)).

The remedy adopted in the Constitution was the separation of legislative from judicial power. "The legislature," argued Hamilton in The Federalist No. 78, would "prescribe[] the rules

[19] The law in *Plaut*, like the statute here, also violated the Due Process Clause. The Court had no need to rule on that ground because it invalidated the statute. 514 U.S. at 217.

by which the duties and rights of every citizen are to be regulated," *id*. at 437, while "[t]he interpretation of the laws [would be] the proper and peculiar province of the courts. *Id.* at 439. The usurpation of judicial power would be impossible, for under the new Constitution, "[a] legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases." The Federalist, No. 81, at 452.

Although *Plaut* concerned intrusions by Congress on the power of the federal courts, its fundamental holding was that attempts to interfere with final judicial judgments on a retrospective basis exceed the legislative power given to Congress in Article I.[20] The limitation on congressional authority recognized in *Plaut* rests on two distinct aspects of the separation of powers. First, the challenged statute infringed upon the judicial power by "nullifying prior, authoritative judicial action." *Plaut*, 514 U.S. at 239. The negative impact on the federal judiciary alone would be unconstitutional, for "even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757 (1996). But there was a second dimension to the constitutional violation identified: "Congress ha[d] exceeded its authority" under Article I by exercising the judicial power to reopen final judgments. *Plaut*, 514 U.S. at 220; *id.* at 240-41 (explaining that "Congress lacks the power under Article I" to reopen the judgments at issue). Regardless of its effect on the federal

[20] Nor can Congress look to Section 5 of the Fourteenth Amendment for additional authority. As an initial matter, no court has ever held that Section 5 authorizes Congress to exercise anything other than legislative power. Nothing in the history of the Fourteenth Amendment or its interpretation by the courts has ever suggested that its passage expanded the power of Congress to engage in trial by legislature.

judiciary, such an arrogation of power by Congress is unconstitutional. A judicial determination that "'conclusively resolves the case,'" is "subject to review only by superior courts." *Plaut*, 514 U.S. at 219 (quoting F. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990)). It is simply not within the power of Congress to set aside judgments or grant new trials in cases finally adjudicated. *Id.* at 223-25

Nothing in this Court's decisions indicates that final judgments from state courts should be treated with any less respect, for Congress exceeds its legislative authority no less by directing the nullification of state court judgments. If anything, federalism concerns make the exercise of power over state courts even more problematic. As the Court explained in *Alden v. Maine*, 527 U.S. 706 (1999), "[i]t would be an unprecedented step, however, to infer from the fact that Congress may declare federal law binding and enforceable in state courts the further principle that Congress' authority to pursue federal objectives through the state judiciaries exceeds not only its power to press other branches of the State into its service but even its control over the federal courts themselves." *Id.* at 752-53; *see also id.* at 752 (rejecting argument that would mean "the National Government would wield greater power in the state courts than in its own judicial instrumentalities"). *Alden* affirms that Congress's Article I power is limited to requiring "state courts to hear only 'matters appropriate for the judicial power.'" *Id.* at 754 (quoting *Printz v. United States* , 521 U.S. 898, 907 (1997)). If Congress cannot retroactively suspend final federal court judgments, it cannot do so to state court judgments either.

The threat of tyranny from suspension of state court judgments is no less than where federal judgments are at issue. As this Court has repeatedly held, federalism and separation of powers are intertwined, each reinforcing the other as "double security" to protect individual

liberty. *See Printz v. United States*, 521 U.S. 898, 922 (1997) (quoting Federalist No. 51). That "double security" can be "shattered," however, when Congress exceeds its permissible bounds, whether by commandeering the state judiciary to do what the federal judiciary cannot, *Alden*, 527 U.S. 706, or directing state executive officials to take action unsupervised by the President. *Printz*, 521 U.S. 898. If Congress were authorized to re-open every state court decision involving a potential procedural due process claim – which is the necessary implication of the purported exercise of authority by Congress here – then there would be absolutely no finality to state court judgments in this country, even those adjudicating and vindicating rights under state and federal constitutions. For example, Congress could, at any time, upend child custody proceedings that are long since final, simply because someone with political clout managed to get a bill passed.[21]

To be sure, Congress can legislate *prospectively* to limit the preclusive effects of future state court judgments in a class of cases.[22] In such situations, the legislation enacted by Congress would, on a prospective basis, make covered state court judgments not final, for federal purposes, because Congress, through the Supremacy Clause, would have effectively limited the ability of

[21]If there were any doubt that a ruling validating the statute in this case would embolden Congress to new and even more egregious excesses of power, the Court need only look to its own docket in a related proceeding. In Docket No. 04-A811, the House Committee on Government Reform sought an extraordinary writ from the Court seeking the same relief sought in this application. The House Committee argued that a Committee subpoena, issued by one member of Congress, "trump[s]" all "final state court judgment[s]" under the Supremacy Clause. *See* Emergency Application by Committee on Government Reform to Justice Anthony M. Kennedy for Injunctive Relief at 1 (filed March 18, 2005). The Court properly denied that application. *See Comm. on Government Reform v. Schiavo,* 2005 WL 636582 (Mar. 18, 2005)

[22] As the Court recognized in *Plaut*, the availability of habeas corpus does not indicate otherwise. Habeas corpus existed prior to the Constitution and thus applies prospectively to all of Congress' legislation). *See Plaut*, 514 U.S. at 235 ("It is meaningless to speak of [the federal statutes regarding habeas corpus] as applying 'retroactively,' since they simply codified judicial practice then pre-existing.").

the state courts to make final judgments. *Cf. Plaut*, 514 U.S. at 234 ("The finality that a court can pronounce is no more than what the law in existence at the time of judgment will permit tomorrow. If the law then applicable says that the judgment may be reopened for certain reasons, that limitation is built into the judgment itself, and its finality is so conditioned. The present case, however, involved a judgment that Congress subjected to a reopening requirement which did not exist when the judgment was pronounced.").

But that is not what Congress has done here. Instead, Congress has legislated purely *retrospectively* – by suspending the effect of a single state court judgment. That is not an exercise of legislative power, but trial by legislature, something that exceeds Congress's Article I power. As *Plaut* demonstrates, the fact that the statute "merely" requires re-review of a judgment does not save it. Any law that suspends, nullifies, or reverses a final court judgment is an exercise of judicial, not legislative power. *See* 514 U.S. at & 222 n.4. And the fact that the purported justification for the nullification of a prior judgment is a "preference for life" does not alter the unlawful character of the statute. "The prohibition is violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons, such as the legislature's genuine conviction . . . that the judgment was wrong." *Plaut*, 514 U.S. at 228.

In sum, when state courts adjudicate federal rights, Congress cannot, after such judgments become final, suspend or nullify them. This limitation is consistent with basic constitutional design. "When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations." *Alden*, 572 U.S. at 758. As the Court has made clear:

> Most of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among the sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York v. United States, 505 U.S. 144, 187 (1992).

P.L. 109-3 exceeds all known bounds of permissible legislation under Article I or Section 5 of the Fourteenth Amendment. The Court should not issue any injunctive relief premised on that statute and should make clear that there should be no further proceedings in the district court under the statute.

CONCLUSION

For the foregoing reasons, this should deny Petitioners any and all of their requested relief, and the Court should make clear that no further proceedings may occur under P.L. 109-3.

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Respectfully submitted

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