

No. _____

IN THE
**Supreme Court of the United
States**

THERESA MARIE SCHINDLER SCHIAVO, INCAPACITATED *EX REL.*
ROBERT SCHINDLER AND MARY SCHINDLER, HER PARENTS AND
NEXT FRIENDS,

Petitioners,

v.

MICHAEL SCHIAVO, AS GUARDIAN OF THE PERSON OF THERESA
MARIE SCHINDLER SCHIAVO, INCAPACITATED, JUDGE GEORGE W.
GREER, AND THE HOSPICE OF THE FLORIDA SUNCOAST, INC.,

Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit*

**BRIEF OF THE ASSOCIATION OF AMERICAN
PHYSICIANS & SURGEONS, INC.
IN SUPPORT OF PETITIONERS**

ANDREW L. SCHLAFLY
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Physicians and Surgeons, Inc. (“AAPS”) is a not-for-profit membership organization founded in 1943. AAPS represents approximately 4,000 physicians nationwide in all practices and specialties. AAPS was established to preserve the practice of private medicine and has remained dedicated to the defense of ethical medicine and the patient-physician relationship. AAPS seeks to correct several misconceptions about the medical facts and applicable law in this case.

Amicus curiae has a direct and vital interest in the issues presented to this Court based on AAPS's participation in medical ethics for over six decades.

BACKGROUND

The district court denied the emergency request of Terri Schiavo's parents, Mr. and Mrs. Schindler, to reinsert her feeding tube, and by a 2-1 margin a panel of the 11th Circuit affirmed. *Schiavo ex rel. Schindler v. Schiavo*, 2005 U.S. App. LEXIS 4702 (11th Cir. Mar. 23, 2005). The 11th Circuit then denied review en banc, thereby advancing the "death process," as one of the defense attorneys put it. The forced starvation of Terri Schiavo against the will of her parents and many others who are willing to help continues. In unprecedented fashion, many bystanders have been arrested merely for attempting to give water to a woman dying of thirst.

Mrs. Schiavo's current health is described in the words of her attorney, "Where, as here, death is imminent, it is hard to imagine more critical and exigent circumstances." On March 23rd, Judge Wilson of the Eleventh Circuit put it best: "I am aware of no injury more irreparable than death." *Id.* at *27 (Wilson, J., dissenting).

An Act for the Relief of the Parents of Theresa Marie Schiavo (the "Terri Schiavo Act") mandated that:

the District Court **shall determine de novo** any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act, **notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings.**

The District Court shall entertain and determine the suit without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted.

Pub. L. No. 109-3 (emphasis added).

The court below and the panel, however, implicitly relied on the prior state determinations, which in turn were based on errors of medicine and law. The district court did precisely the opposite of what Congress mandated for de novo review, by merely affirming defective state court findings. The courts below applied an inappropriate legal standard, having the effect of ensuring the mootness of this action. The heightened standard for an injunction is not necessary to stay the orders of the state court blocking the provision of food and water to Terri Schiavo. Rather, a stay to preserve the evidence and issues for the de novo determination is warranted here.

In a legal motion recently filed by Mr. Schiavo's attorney, he stated that it is time for all involved to move on and put behind them the legal actions. AAPS, defending the rights of patients, wonders what is meant by moving on with life in this context. Before the court is the life of Terri Schiavo, not anyone else's, and a stay of the court rulings blocking the provision of food and water to her is necessary to preserve this case for the mandated de novo judicial review.

ARGUMENT

Terri Schiavo is not terminally ill, she is not "end stage," and she is likely not in a persistent vegetative state. It is unlawful to deprive her of nourishment, and arrest a third party for attempting to bring water to a woman dying of thirst.

As discussed below, it violates due process to effectively execute Terri Schiavo based on an outdated and inherently unreliable diagnosis of a persistent vegetative state. It further violates due process and the First Amendment to ignore, in determining her intent, the condemnation of this result by her own religious leader considered to be infallible by her faith.

The district and appellate courts applied the incorrect standard for reviewing what amounts to a request for a stay to preserve the issues for de novo review as mandated by Con-

gress. The district court further erred in finding a lack of state action here, when state orders affirmatively prevent parents and bystanders from providing water to a woman dying of thirst.

I. IT VIOLATES DUE PROCESS TO ASSUME THAT TERRI SCHIAVO IS IN A PERSISTENT VEGETATIVE STATE, AS REQUIRED BY FLORIDA STATUTE, WITHOUT ALLOWING HER PARENTS TO ARRANGE FOR A CURRENT, OBJECTIVE AND THOROUGH MEDICAL EXAMINATION.

Persistent vegetative state (PVS) is misdiagnosed as much as 43% of the time. *See* Andrews K. et al., “Misdiagnosis of the vegetative state: retrospective study in a rehabilitation unit,” 313 *British Med. J.* 13-16 (1996). The state court order denying food and water to Terri Schiavo depends entirely on this highly unreliable diagnosis, and Florida law requires a finding of PVS as a condition in this case to denying nourishment. Fla. Stat. § 765.305(2)(b). Numerous physicians have expressed disagreement or skepticism that this diagnosis is correct for Mrs. Schiavo, including Dr. William Cheshire, a board-certified neurologist at the Mayo Clinic, but the state court has blocked a contemporaneous, independent medical evaluation of her. A *de novo* consideration of this case requires, at a minimum, a careful determination of whether she is even in a PVS. This Court need not make a finding on this essential factual question, but an immediate stay is necessary to preserve her condition for a full evaluation.

One study of PVS in a rehabilitation unit concluded as follows: “The level of cognitive functioning present in this misdiagnosed group at the time of discharge was considerable: 60% were oriented in time, place and person, 75% were able to recall a name after 15 minutes delay, 69% were able to carry out simple mental arithmetic, 75% were able to generate words to communicate their needs and 86% were able to

make choices about their daily social activities.” “Editorial: The vegetative state – clinical diagnosis,” 75 Postgrad Med. J. 321-324 (1999). Does Terri Schiavo fall into one of these or other categories showing capacity for improvement? A neurologist who examined her in 2002 determined that she can swallow, vocalize, feel pain, differentiate non-vocal sounds from voices, and even distinguish one voice from another.¹ It is easy to allow for current, unbiased and thorough medical evaluations, yet that has been repeatedly frustrated by the state court. It violates due process to order one’s death in this manner.

Even if there were objective and thorough medical evaluations of Terri Schiavo years ago – which is highly doubtful – far too much time has passed to commit her to death today based on those determinations. Medical technology improves over time, as do patients. The due process rights of Terri Schiavo and her parents have been thoroughly violated by state court orders frustrating a current, objective and complete medical examination.

II. THE ORDER TO WITHHOLD FOOD AND WATER IMPROPERLY SUBSTITUTE THE VIEWS OF THE COURT FOR THE PRESUMPTIVE RELIGIOUS VIEWS OF THE PATIENT.

Terri Schiavo, a Roman Catholic, almost certainly would have followed the papal pronouncement of her church, which emphatically denounced this specific starvation. Yet the legal proceedings have ignored her church’s clear condemnation of this method of inducing death. The courts have substituted their own views of an appropriate death for that of the patient. Judges and others are free to ignore the statements of a

¹ <http://www.hospicepatients.org/william-hammesfahr-md-09-12-02-report-re-terri-schiavo.html> (viewed Mar. 24, 2005).

religious leader, but the courts should not exclude them when assessing the intent of a member of the religion.

Pope John Paul II declared that the removal of feeding tubes from patients in vegetative states is immoral, calling it “euthanasia by omission.”² He confirmed that no matter how sick someone is, “he is and will always be a man, never becoming a ‘vegetable’ or ‘animal.’”³

Surely this moral position would have influenced or reflected Terri Schiavo’s own views. Yet the state courts have ignored her religion in pretending to ascertain her wishes, and failed to address the strong statements by her religious leaders. Such condemnation of this “death process” is presumptively shared by a member of the same church, in the absence of compelling evidence to the contrary, and it is a violation of her First Amendment rights to compel a violation of these principles. U.S. CONST., AMEND. I.

This trampling on religious principles is among the protections included in the Terri Schiavo Act passed by Congress. Yet the courts below were oblivious to it, essentially denying constitutional rights that Congress ordered it to safeguard. The Terri Schiavo Act ordered the federal court to “protect the rights of Theresa Marie Schiavo under the Constitution,” and that plainly includes her right not to be forced to violate her own religious principles.

² <http://www.cathnews.com/news/403/122.php> (viewed Mar. 22, 2005).

³ *Id.*

III. THE COURT BELOW ERRED IN FINDING A LACK OF “STATE ACTION” IN THE COURT-ORDERED WITHHOLDING OF FOOD AND WATER FROM TERRI SCHIAVO

The district court mistakenly omitted Judge George W. Greer in its finding of no state action by defendants. Plaintiffs named Judge Greer as a defendant and he clearly acted under color of state law. His orders in affirmatively preventing the provision of food and water to the starving Terri Schiavo undeniably constitute “state action” that implicates constitutional rights. Already many bystanders have been arrested for attempting to bring water to alleviate her thirst. Nothing about this case is private, as neither Michael Schiavo nor the Hospice of the Florida Suncoast have acted in a private manner in withholding food and water. To the contrary, Mr. Schiavo requested the state to authorize and mandate such deprivation from Terri Schiavo, even petitioning the court to make the decision rather than approving a private act.

The Supreme Court established that private actions should be treated as state action “if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.” *Brentwood Academy v. Tenn. Secondary Sch. Ath. Ass’n*, 531 U.S. 288, 295 (2001) (internal quotation marks omitted). Michael Schiavo and the Hospice are not merely declining to provide Terri Schiavo with food and water. The full power and force of state actors are preventing anyone from doing likewise. Surely there is state action in obtaining a court order to block everyone from feeding a starving person. *See also Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (“State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms.”); *cf. Dennis v. Sparks*, 449 U.S. 24, 28-29 (1980). Forcing someone into a “death process”

against the wishes of her brother, her parents, her church, and millions of supporters rises to the level of state action.

IV. THE COURT BELOW APPLIED THE INCORRECT STANDARD FOR INJUNCTIVE RELIEF IN THE CONTEXT OF AN ATTEMPT TO STAY THE WITHHOLDING OF FOOD AND WATER

The district court and the appellate panel erred in applying the standard for injunctive relief. The underlying goal of Plaintiffs is to obtain a stay of the order denying Terri Schiavo food and water while the trial court makes a de novo determination. Such stays are commonplace in the context of review of capital punishment and the yet court incorrectly denied plaintiffs the equivalent of a stay here. It takes far more than the March 21st cursory hearing, held without any witnesses, to comply with the trial de novo requirement of the “Terri Schiavo Act.” The heightened standard for a restraining order is not necessary in this case and it was erroneous for the district court, and the panel, to rely on that legal standard for granting one. *See Schiavo ex rel. Schindler v. Schiavo*, 2005 U.S. App. LEXIS 4702, *29 (11th Cir. Mar. 23, 2005) (Wilson, J., dissenting) (“A movant need not establish that he can hit a home run, only that he can get on base, with a possibility of scoring later. In fact, our circuit jurisprudence establishes that the movant need not establish a ‘probability’ of success, taking all things into consideration. The merits of Plaintiffs’ substantial claims warrant a more complete review.”).

It is neither necessary nor precedented for Plaintiffs to be compelled to prove a likelihood of prevailing on the merits in order for them to obtain a stay for their trial. For example, Terri Schiavo herself is the central evidence for the trial. Is there any doubt that the court should issue an order preserving evidence for the benefit of the trial? Plaintiffs need to have medical experts examine Mrs. Schiavo to prove their case, yet the court unjustifiably frustrated their ability to do so. This

directly contravened the letter and spirit of the Terri Schiavo Act.

Congress could not possibly have intended that its emergency preservation of rights for Mrs. Schiavo be mooted, thereby denying the rights established by the statute. “The merits of Plaintiffs’ substantial claims warrant a more complete review.” *Id.* This Court should reverse the decision below, stay the orders by the state court, and order the provision of food and water to Mrs. Schiavo pending further proceedings.

CONCLUSION

This Court should grant the relief sought by Petitioners, and order that the February 2000 state court order (and all such subsequent orders, including those dated 2/25/05 and 3/8/05) be stayed pending the outcome of de novo review. To protect the objectives of this proceeding, this Court should further order that Terri Schiavo be placed on a feeding tube and receive medical treatment and intravenous fluids so that items 1 & 2 listed above can be accomplished.

Respectfully submitted,

ANDREW L. SCHLAFLY
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608

Counsel for Amicus Curiae

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