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March 20, 2005

## **VIA EMAIL & FACSIMILE TRANSMISSION**

Honorable Judges of the  
United States Court of Appeals  
for the Eleventh Circuit  
Tuttle Court of Appeals Bldg.  
56 Forsyth St. N.W.  
Atlanta, GA 30303-3147

**RE: SCHIAVO V. GREER, et. al.**  
**Appeal No. 05-11517-A**

## **SUPPLEMENTAL LETTER BRIEF**

Dear Honorable Judges:

Pursuant to this Court's request communicated to us by phone and email through the Court's Clerk, Honorable Thomas Kahn, at 11:00 p.m. on March 19, 2005, Robert and Mary Schindler, as Petitioners/Appellants on behalf of and as next friends for their daughter, Theresa Marie Schiavo, an incapacitated adult, file this Supplemental Letter Brief.

The Court's request has asked the parties to file a supplemental letter brief "stating their position as to the effect, if any, of the impending legislation if enacted into law, on the matters now before this Court, and what action this Court should take in the present matter if the legislation becomes law."

### **Summary of Congressional Action**

In the finest traditions of American democracy in defense of life and justice, the United States Congress had taken extraordinary steps expressly purposed to save the life of Terri Schiavo, from whom food and water are now actively being withheld under order of the courts of the State of Florida. (See Exhibit 1). For Terri, every minute without food and water is crucial as her fate now rests in the hands of this Court.

According to statements made on the floor of the Senate by the Majority Leader, Senator Bill Frist, "Congress has been working nonstop for the last three days to do its part to uphold human dignity and affirm a culture of life." (See Exhibit 2). On Thursday, the United States Senate passed a bill narrowly tailored to give the Federal District Court jurisdiction in the Schiavo case. The House of Representatives passed broader legislation that would have applied to other similar cases where the legality of withholding food or medical treatment from incapacitated persons was challenged. The Compromise Bill introduced yesterday is similar to the Senate bill and specifically applies to Terri's case. (See Exhibit 1). The bill is calendared for a vote in the House at 1:00 p.m. today and in the Senate at 2:00 p.m. If unanimous consent cannot be obtained, the measure may be considered for a vote as early as one minute past midnight tonight. According to President Bush's spokesman, he has re-arranged his weekend schedule to be present in Washington to sign the bill the moment it is passed.

In addition to the compromise bill more fully analyzed below, Congress has taken other action that is yet pending relative to this case and that merits consideration in this Court's review of Petitioner's request for an emergency injunction requiring the resumption of the provision of food and water to Terri. On Friday, March 18, 2005, the House Committee on Government Reform issued five subpoenas requiring the testimony of the recipients before Congress and to maintain "all medical and other equipment that provides nutrition and hydration to Theresa Schiavo – in its current and continuing state of operations – and all data, information, and records relating to the functioning of such equipment, subject only to such routine

and necessary maintenance as is necessary to ensure its continued proper functioning to provide such nutrition and hydration to Theresa Schiavo.”<sup>1</sup> (See Exhibit 3). In an attempt to enforce compliance with the House Subpoenas, the U.S. House of Representatives Office of the General Counsel filed a Motion to Modify the February 25, 2005 Order with Judge Greer in the Circuit Court for Pinellas County, Florida. The motion was argued by phone at 1:15 on Friday and Judge Greer refused to modify his Order and issued an unequivocal proclamation requiring that nutrition and hydration be removed “forthwith.”

In addition to the House subpoenas, Senator Michael Enzi, as Chairman of the Senate Health, Education, Labor and Pensions Committee, issued a letter to Michael and Theresa Schiavo requesting them to appear before his Committee on March 28, 2005, to testify regarding “Health Care Provided to Non-ambulatory Persons.” (See Exhibit 4).

Finally, as referenced in Section 9 of the compromise bill, Congress has initiated a federal inquiry into the nation’s policies regarding the status of legal rights of incapacitated individuals who are incapable of making decisions concerning the provision, withholding, or withdrawal of foods, fluids, or medical care. On March 18, 2005, Congress issued a Joint Statement of Speaker of the House J. Dennis Hastert, House Majority Leader Tom DeLay and Government Reform Committee Chairman Tom Davis (See Exhibit 5):

The Committee on Government Reform has initiated an inquiry into the long term care of incapacitated adults, an issue of growing importance to the federal government and federal healthcare policy. The committee’s inquiry arises out of the

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<sup>1</sup> Subpoenas were issued to Michael Schiavo, Victor Gambone, Stanton Tripodis, Annie Santamaria, and Theresa Schiavo. Victor Gambone and Stanton Tripodis are doctors charged with the care of Theresa Schiavo. Annie Santamaria is a hospice administrator also charged with her care. The Committee believed all three would be involved in the planned removal of nutrition and hydration from Theresa Schiavo.

case of Terri Schiavo, who is currently being kept alive in a hospice in Florida.

### **Analysis of Proposed Legislation's Impact on This Case**

Our understanding of the impending legislation is that it will give **jurisdiction** to the Middle District to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any of her rights under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

The proposed law would give Mr. and Mrs. Schindler **procedural** standing to bring a suit against any person who was a party to State court proceedings relating to the withholding or withdrawal of food, fluid, or medical treatment necessary to sustain Terri's life. The law gives the District Court authority to determine *de novo* any claim of a violation of any right of Terri within the scope of the 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 will be able to proceed to a final determination of the suit without delay or abstention in favor of even on-going State court proceedings.

The proposed law authorizes the Middle District Court to issue such declaratory and injunctive **relief** necessary to protect the rights of Theresa under federal law relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

Any such suit on Theresa's behalf must be **filed** within 30 days after the enactment of the Act.

Of course, the enactment, once signed by the President, must be presumed constitutional. *I.N.S. v. Chadha*, 462, 919, 944 (1983); *Fairbanks*

*v. U.S.*, 181 U.S. 283, 285 (1901); *Benning v. Georgia*, 391 F.3d 1299, 1303 (11th Cir. 2004).

**Immediate Injunction From Further  
Withholding of Terri's Assisted Feeding**

If and when the bill passes both Congressional houses and President Bush signs it, and if Terri is still alive, Petitioner-Appellant's most urgent and critical concern will be to seek an immediate injunction to require Mrs. Schiavo's guardian to reinsert her feeding tube and to obtain all medical treatment necessary to assist her in recovering from her days of being without food and water. By the time the Court receives this letter, Terri will have been without any food or liquids whatsoever for almost forty-eight hours. By the time Respondent must file his response, she will have been without food or liquid for almost three days. The human body was not intended to go without food and water for that long. The deprivation of water from Terri has already begun to damage her organs and cause her physical, mental, and emotional stress. It will be of utmost urgency that the deprivation be reversed at the earliest possible moment to avoid her irreparable injury, if not her death.

**Ms. Schiavo's Case Will Survive  
Summary Denial by the District Court**

The District Court will have jurisdiction.

After that most pressing concern of reestablishing Mrs. Schiavo's assisted feeding is taken care of, Mr. and Mrs. Schindler will require an opportunity to assess their remedies. The petition for writ of *habeas corpus* is, of course, limited in scope to testing the lawfulness of Mrs. Schiavo's detention. Its limits have already been revealed by the District Court's Order denying the writ based upon the Court's perception that Ms. Schiavo is not in confinement.

Section 2254 provides, in pertinent part, that “[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Petitioners have provided no basis for the Court to conclude that Ms Schiavo meets this criteria. (March 18, 2005, Order denying COA, p. 2).

Appellant argues that the state-controlled medical treatment and state-ordered death of Mrs. Schiavo, complete with security guards and arrests to prevent its interruption, does place her in state-custody so as to entitle her to the relief of a writ of habeas corpus. The new Act will make it clear that, in state custody or not, Mrs. Schiavo does have a federal remedy to test the lawfulness of the order to discontinue her assisted feeding.

The Schindlers will have standing.

The District Court also questioned Mr. and Mrs. Schindler’s standing to bring the *habeas corpus* action on behalf of their daughter.

As Petitioner’s point out, Michael Schiavo is their daughter’s legal guardian. Thus, even if the Court were to find that it had jurisdiction to entertain the Petition, it is not satisfied that Petitioners have standing to bring this matter on their daughter’s behalf. *Id.* at n. 3.

Again, Appellant argues that as Terri’s parents, they do have standing to bring a *habeas* action on her behalf. The new Act, on the other hand, will expressly confer standing upon the parents of Theresa Marie Schiavo to bring a suit on her behalf relating to the violation of any of her federal rights by the withdrawal of her food, fluids, or medical treatment to sustain her life.

A suit under the new Act will not be barred by the *Rooker-Feldman* doctrine.

The District Court denied Appellant's Petition for A Writ of *Habeas Corpus* as being barred by the *Rooker-Feldman* doctrine that prohibits the relitigation of state court judgments. "The *Rooker-Feldman* doctrine not only bars review of issues that were adjudicated by the state court, but it also prohibits federal courts from reviewing issues that are 'inextricably intertwined' with the state court's judgment." (March 18, 2005, Order denying writ). Appellant's suit under the new Act will be excepted from the bar raised by *Rooker-Feldman* because the Act provides 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.

Appellant has argued that her *habeas corpus* petition is an exception to the *Rooker-Feldman* doctrine. The new Act will make it clear that prior state litigation may not bar their action to determine whether their daughter's federal rights have been violated by the withdrawal of her assisted feeding.

Mrs. Schiavo will be even more likely to succeed on the merits of her federal constitutional claims, thus entitling her to a temporary injunction.

The District Court denied Appellants' request for a temporary injunction because, the Court found, "there is not a substantial likelihood that Petitioners will prevail on their federal constitutional claims." (Order denying temporary injunction, p. 4). The new Act that gives Appellants a *de novo* determination of the violation of Terri's federal constitutional claims

amounts to a substantial likelihood that she will prevail in her attempts to obtain the protection of her rights.

**The New Act Gives Mrs. Schiavo  
Broader Rights Than a *Habeas* Action**

The matters now before this Court are the appeal of the denial of Appellants' Petition for Temporary Injunction and the denial of their Petition for a Writ of *Habeas Corpus*. Appellants' current understanding of the proposed legislation is that it confers on Mr. and Mrs. Schindler much broader remedies than does a *habeas* action. Under the new Act, the Schindlers will not be limited to raising violations of Terri's federal constitutional rights as they relate to the lawfulness of her confinement. The new Act will afford them broader remedies on Terri's behalf of raising the violation of any right under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

For instance, they will explore bringing counts regarding violation of Terri's rights under the Americans With Disabilities Act, the Rehabilitation Act, the Civil Rights Acts, the First Amendment religion clauses, and the Equal Protection Clause. It has not yet been determined what specific claims will be raised on Terri's behalf, but the Schindlers are dedicated to obtaining all the relief to which she is entitled. Mrs. Schiavo's years of having her assisted feeding threatened with removal and the now three times it has actually been removed, not to mention the years of medical and therapeutic neglect she has suffered at the hands of the State of Florida and her guardian demand that she obtain the relief offered by the new Act. If the federal courts determine that she would not wish to have food and water withheld from her, she will need assistance in paying for her treatment, rehabilitation, and therapy because all of her assets have been wasted by her guardian trying to obtain and enforce state authority to cause her to starve and dehydrate to death.

**Relief Requested**

The new Act would have a dramatic effect on the matters now before this Court, the greatest of which would be the ability of the Court to order that Terri's assisted feeding be immediately reestablished to save her life. After that is accomplished, Appellants would ask the Court to grant them the 30 days provided in the Act in which to amend their pleading to seek redress on behalf of Mrs. Schiavo for the violation of the additional federal and constitutional rights permitted under the Act.

WHEREFORE, Petitioner-Appellant respectfully prays that this Court:

1. Immediately temporarily enjoin Respondent from further withholding of Mrs. Schiavo's food, fluids, and medical treatment necessary to sustain her life pending completion of this action;
2. Reverse the judgment below;
3. Remand with instructions to the District Court to give Petitioner-Appellant 30 days to amend their Petition;
4. Such other relief as this Court deems just.

Mrs. Schiavo's life literally hangs in the balance. Mr. and Mrs. Schindler therefore pray that this Court expedite its consideration of the matters raised herein and make its Order effective immediately after the law takes effect with the signature of the President.

A woman is dying from dehydration and starvation. President Bush recognized this emergency situation where every minute counts by re-arranging his schedule to be in Washington D.C. immediately upon passage of this bill. We would respectfully request that this Court honor the good and noble intentions of the U.S. Congress and the personal sacrifice of the

President with the same commitment to save life. I implore this Court to move immediately to save the life of Terri Schiavo upon the passage of this law, even if that occurs later today or at 12:01 a.m. Monday morning. A tragedy of unbelievable proportions would occur if the Act is passed into law and this Court does not respond in time to save Terri Schiavo's life.

I plead with you to move immediately on this matter. It is expected that Terri Schiavo's innocent life will be placed in the hands of this most honorable Court. On behalf of her parents, we respectfully plea for the life of their daughter whom they love more than life itself.

Sincerely,

*Gibbs Law Firm, P.A.*



David C. Gibbs III

*Admitted in Florida, North Dakota, Minnesota, Colorado, Texas, and the District of Columbia.*

Exhibits Enclosed as Stated

CC: Attorney George E. Tragos  
Attorney Robert Destro  
Attorney George Felos, by facsimile  
Honorable George Greer, by facsimile