No.

IN THE
SUPREME COURT FOR 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,
THE HOSPICE OF THE FLORIDA SUNCOAST, INC.,

Respondents.

MOTION FOR LEAVE TO FILE AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* AND MOTION TO PROCEED AS *AMICI CURIAE* ON 8 ½ BY 11 INCH PAPER OF FOUR MEMBERS OF THE U.S. SENATE IN SUPPORT OF PETITION FOR EMERGENCY INJUNCTIVE RELIEF ON BEHALF OF UNITED STATES SENATORS WILLIAM H. FRIST, RICK SANTORUM, MEL MARTINEZ, AND SAM BROWNBACK

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ON BEHALF OF UNITED STATES SENATORS
WILLIAM H. FRIST, RICK SANTORUM, MEL MARTINEZ,
AND SAM BROWNBACK

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the Honorable William H. First, Majority Leader of the United States Senate, the Honorable Rick Santorum, the Honorable Mel Martinez, and the Honorable Sam Brownback, United States Senators, respectfully move for leave to file the attached brief as *amicus curiae* in support of the petition for *certiorari* and emergency injunctive relief pursuant to Rule 23 of this Court's Rules, filed by petitioners Theresa Marie Schiavo, Incapacitated, ex rel. Robert and Mary Schindler, Her Parents and Next Friends.

BRIEF OF*AMICI CURIAE*
UNITED STATES SENATORS WILLIAM H. FRIST,
RICK SANTORUM, MEL MARTINEZ, AND SAM BROWNBACK
IN SUPPORT OF PETITION FOR AN EMERGENCY WRIT

INTEREST OF *AMICI*

The Senators signing this brief were instrumental in the passage in of Pub. L. 109-003, which passed the Senate on Sunday, March 20, 2005 and the House of Representatives on Monday, March 21, 2005, and was signed into law by President George W. Bush on March 21, 2005. This law vests the United States District Court for the Middle District of Florida with the jurisdiction to hear, determine, and render judgment on claims brought by petitioners Robert and Mary Schindler on behalf of their daughter Theresa Marie Schiavo for alleged violations of any right of Mrs. Schiavo under the Constitution or laws of the United States, and *amici* have an interest in ensuring that the law they were instrumental in passing is properly construed. Moreover, this case turns on questions of Congressional intent, for which the Senators signing this brief have unique knowledge and insight.

QUESTION PRESENTED

I. Whether the courts below have so far departed from the usual and accepted course of judicial proceedings in construing the Private Relief Act for Theresa Schiavo that an exercise of this Court's certiorari jurisdiction and supervisory power is warranted.

SUMMARY OF ARGUMENT

In an extraordinary weekend legislative session in which Congress was reconvened under its emergency authority, the Senate passed, by unanimous consent, and the House of Representative overwhelmingly approved by a vote of 203 to 58, a private relief bill on behalf of Theresa Marie Schiavo, which President Bush signed into law within a half-hour of its approval in Congress. This legislation was designed to grant federal courts jurisdiction to ensure that Mrs. Shiavo's federal constitutional and statutory rights were not violated. The courts below erred in 1) failing to conduct a *de novo* determination of Mrs. Schiavo's claims to guarantee that her federal constitutional and statutory rights were not abrogated and 2) declining to provide temporary injunctive relief to ensure that Mrs. Schiavo would remain alive pursuant to a determination of her fundamental rights.

ARGUMENT

The Courts Below Have Departed From The Usual And Accepted Course Of Judicial Proceedings In Construing Pub. L. 109-003.

I. In Contravention Of The Federal Statute, The District Court Failed To Consider Schiavo's Claim *De Novo.*

In enacting a Private Relief Bill on her behalf, Congress expressed its intent to grant Mrs. Schiavo a full and fair hearing on the merits of her claim by requiring that "the District Court shall determine *de novo*" any claims brought under Pub. L. 109-003. Although we recognize that this is an unusual case, it is inappropriate for a federal court to disregard an act of Congress.

In this case, the district court declined to re-examine the factual record as Congress required, and instead decided Mrs. Schiavo's fate without conducting a *de novo*

review. Congress clearly intended the district court to evaluate all factual disputes, thoroughly re-examine the factual record, and take new testimony if need be. In refusing to do so, the courts below abrogated the clear intent, as well as the plain language, of Pub. L. 109-003.

Congress' intention for the district court to consider the case *de novo* is illustrated in the record by a statement of Senator William H. Frist that:

> If a new suit goes forward, the Federal judge must conduct what is called de novo review of the case. De novo review means the judge must look at the case anew. The judge need not rely on or defer to that decision of previous judges. The judge also may make new findings of fact, and from a practical standpoint this means that in a new case the judge can reevaluate and reassess Terri's medical condition. 151 Cong. Rec. S3103 (March 20, 2005).

The very intent of the bill was to ensure that the district court conducted a thorough examination of Mrs. Schiavo's claims. If Congress had merely sought a cursory review of the state court's factual determinations, it would not have gone to such extraordinary lengths to enact this emergency private relief.

Similarly, Members of the House of Representatives expressed their understanding that the federal court would conduct a full *de novo* review of the facts in the case. As Speaker Dennis Hastert speaking in support of the bill noted: "It takes her case out of the Florida court system and puts it in the hands of the Federal court. There, her case *will be tried anew* where the judge can reevaluate and reassess Terri's medical condition." *Id*. at 1731 (emphasis added).

Opponents of the bill shared this same understanding. Congressman Barney Frank characterized it as legislation that would "vacate a judgment" and "cancel" the decisions of Florida courts, sending the case to federal court. *Id.* at 1708. According to Congressman Jim Davis, also speaking against S. 686, "[t]he bill under consideration . . .

essentially does one thing: it starts the process all over again with a different judge, an attempt to achieve a different result, a different finding as to Terri's wishes or simply to delay the enforcement of her wishes." *Id*. The legislative history surrounding the bill's enactment plainly demonstrates that Congress expected a brand new examination of Mrs. Schiavo's claims.

At the time Congress acted, the Eleventh Circuit already had examined nearly identical statutory language requiring a district court to conduct a hearing "*de novo*" as demanding a thorough review of the factual record. *See Stephenson v. IRS*, 629 F.2d 1140, 1142 n.4, 1144 (11th Cir. 1980). In *Stephenson*, the Eleventh Circuit interpreted the Freedom of Information Act's requirement that "'the [district] court shall determine the matter *de novo*'" as mandating a searching review of the matter at hand. *Id*. at 1142 n.4 (quoting 5 U.S.C. § 552(a)(4)(B) (1978)) (italics in original). The Eleventh Circuit ruled that because the district court had failed to undertake a thorough review of all factual issues and to re-examine the underlying record, the court's "factual conclusions and subsequent determinations were clearly erroneous." *Id*. at 1144. The Eleventh Circuit reversed the district court, remanded for a new, fact-intensive hearing, and suggested that that the district court review the evidence in the record and possibly take "oral testimony." *Id*.

Congress is presumed to "know the law" when it legislates. *Albernaz v. United States*, 450 U.S. 333, 341 (1981). Congress was thus entitled to assume that the courts below would give identical effect to identical language. By failing to honor Congress's intent to grant Theresa Schiavo a full and fair hearing, the courts below abrogated the clear intent of Pub. L. 109-003.

II. The Courts Below Erred in Refusing To Grant Petitioners' Request To Re-Insert The Feeding Tube.

In providing a private right of action to Mrs. Schiavo and her parents to ensure a full and fair airing of her constitutional and statutory claims, the courts below erred in failing to re-insert the feeding tubes necessary to keep Mrs. Schiavo alive. Specifically, Public L. 109-003 plainly requires that "[a]fter a determination of the merits of a suit brought under this Act, the District Court shall issue such declaratory and injunctive relief as may be necessary to protect the rights of Theresa Marie Schiavo under the Constitution and laws of the United States relating to the withholding or withdrawal of foods, fluids, or medical treatment necessary to sustain her life." *Id.*

The All Writs Act permits federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651. Federal courts have "both the inherent power and the constitutional obligation to protect their jurisdiction . . . to carry out Article III functions." *Procup v. Strickland*, 792 F.3d 1069, 1074 (11th Cir. 1986) (en banc). Chief Justice Rehnquist, writing in *Wisconsin Right to Life v. Federal Election Comm'n*, 125 S.Ct. 2 (2004), explained that where it is "necessary or appropriate in aid of [our] jurisdiction" and where "the legal rights at issue are indisputably clear," it is appropriate for the Court to exercise its equitable powers to maintain its jurisdiction.

An injunction under the All Writs Act is necessarily an extraordinary remedy, designed to "invest[] a court with a power that is essentially equitable, and as such, not generally available." *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999). Although a federal court's power under the Act may be limited, and reserved for extraordinary circumstances, it is sufficiently broad to enable a court "to achieve the ends of justice

entrusted to it." *Adams v. United States*, 317 U.S. 269, 273 (1942). The lower courts' failure to use their authority under the Act to grant Mrs. Schiavo temporary relief by ordering the reinsertion of the feeding tube is just the sort of circumstance that cries out for equitable relief.

In light of the fact that, to date, no *de novo* determination of Mrs. Schiavo's constitutional and statutory rights has occurred, and that she is presently being denied food or water, it is imperative that this Court act to ensure that the feeding tube is reinserted so that such a determination may take place. It is beyond peradventure that Congress understood that it would be necessary to stay the Florida Probate Court's order permitting removal of Mrs. Schiavo's feeding tube. If Congress had intended for a 24-hour hearing process with no temporary order to reinsert Mrs. Schiavo's tube, it certainly would not have provided Mrs. Schiavo's parents thirty days to file all of their claims. It is undisputed that without food and water, Mrs. Schiavo will die well before 30 days have passed. The district court's interpretation thus renders the statute's thirty-day time allotment "superfluous," and thus should be rejected. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

The Eleventh Circuit's reliance upon a colloquy between Senator Frist and Senator Carl Levin on the Senate floor is inapposite. In that colloquy, the Senators expressed their understanding that current law, which makes the granting of a stay discretionary within the reviewing court's authority, would remain unchanged. 151 Cong. Rec. S3099-100 (daily ed. March 20, 2005) (colloquy between Sens. Levin & Frist). That is doubtless true. The legislation in question was not designed to abrogate a court's discretionary authority to order a stay. However, Senator Frist clarified that while

"nothing in the current bill mandates a stay, I would assume . . . the Federal court would grant a stay based on the facts of this case because Mrs. Schiavo would need to be alive in order for the court to make its determination." *Id*.

Although Senator Levin did not share Senator Frist's assumption that a federal court would *necessarily* grant a stay, it defies logic to believe that a court would permit Mrs. Schiavo to die before a *de novo* hearing could be held to determine whether her federal constitutional or statutory rights had been violated.

In truth, the Senate's intention that Mrs. Schiavo's feeding tube be reinserted is evinced by the legislative history of S. 686, the Senate version of what would become Pub. L. 109-003. First, the unprecedented weekend session of Congress demonstrates that Members understood the urgency of Mrs. Schiavo's situation and the need for immediate congressional action. In Senator Frist's opening remarks regarding S.686, he focused on the importance of preserving Terri Schiavo's life, stating "[i]t has been more than 24 hours since Terri Schiavo's feeding tube was removed. Under the legislation we will soon consider, Terri Schiavo will have another chance." 151 Cong. Rec. S3095 (Mar. 19, 2005). Prior to passage of S. 686, Senator Frist again emphasized that "the Congress is continuing to work to pass legislation to *give Terri Schiavo another chance at life*" and that "[u]nder this bill, Terri Schiavo will have another chance. She will have another opportunity to live. The bill allows Terri's case to be heard in Federal court." 151 Cong. Rec. S3099 (March 20, 2005) (emphasis added).

Similarly, in Senator Frist's remarks after the Senate passed S.686, he further emphasized the intent of the legislation, stating that "[t]he bill centers on the sanctity of human life." He explained that "[w]e in the Senate recognize that it is extraordinary that

we, as a body, act. But these are extraordinary circumstances that center on the most fundamental of human values and virtues . . . ." 151 Cong. Rec. S3103 (March 20, 2005). If the Court permits Mrs. Schiavo to die before her federal claims were properly heard, Congress's extraordinary efforts to ensure relief would be cast aside.

It is true, as the Eleventh Circuit noted, that the original draft of this legislation included a provision requiring the district court to issue a stay in order to prevent Mrs. Schiavo's death before her case could be given full consideration in the federal courts. *Schiavo v. Schiavo*, No. 05-11556, at 5 (11th Cir. March 23, 2005). The rationale behind the deletion of this provision in the enacted version of S.686 is that the bill was not intended to create new law or to change current law as to the discretionary nature of a stay. Senator Frist made this very point in his colloquy with Senator Levin, stating "this bill does not change current law under which a stay is discretionary." 151 Cong. Rec. S3100. If, for example, the district court had determined that Mrs. Schiavo's federal rights had been violated, it could have provided her with permanent relief, and a temporary stay would have been unnecessary. However, it would defy reason to think that the court would refuse to grant Mrs. Schiavo temporary relief until after it had conducted a *de novo* review of her claims.

It is instructive to examine the predecessor bill to Pub. L. No. 109-003, which the Senate passed as S. 653. In that earlier version of the legislation, a separate section provided that "the District Court shall issue a stay of any State court order authorizing or directing the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain the life of [Mrs. Schivao] pending the determination of the suit." Although Senator Levin requested that the "shall" in the stay provision be changed to "may," the

House refused to accept the provision as modified because of a concern that it might be read to provide the district court with discretion to deny a stay pending the suit's resolution. As a consequence, in his speech advocating passage of the bill in which the offending provision had been excised, Chairman Sensenbrenner emphasized that: "[o]f critical importance, S. 686 does not contain a provision that might have authorized the Federal court to deny desperately needed nutritional support to Terri Schiavo during the pendency of her claim." 151 Cong. Rec. H 1701, H1707 (daily ed. March. 20, 2005). The court below, however, misconstrued Congress' decision to strike the language describing the stay as discretionary.

As Judge Wilson points out in his dissent, "[i]n short, the legislation did not need an explicit stay provision because, given the already-existing discretionary power of federal courts in aid of jurisdiction, it would have been redundant and unnecessary." *Schiavo v. Schiavo*, No. 05-11556 (11th Cir. Mar. 23, 2005). Thus, contrary to the Eleventh Circuit's determination, the deletion of this provision should not be interpreted as restricting the court's power to issue a stay in this case.

The legislative intent of the Senate is in perfect concert with that of the House of Representatives. During the debate on S. 686 in the House, numerous Congressmen rose to express their understanding that, pursuant to the statute, a federal court would conduct a full review of the Schiavo case on the merits. The record of the debate reflects a clear understanding that in order for the court to conduct such a meaningful review, a stay would be issued to preserve Mrs. Schiavo's life, and with it, the court's jurisdiction.

F. James Sensenbrenner, Jr., the Chairman of the House Committee on the Judiciary and the floor manager of S. 686, stated that "of critical importance, S. 686 does

not contain a provision that might have authorized the Federal court to deny desperately needed nutritional support to Terri Schiavo during the pendency of her claim." 151 Cong. Rec. H1701 (daily ed. Mar. 20, 2005). He added that "what this bill does is . . . require[] the reinsertion of the feeding tube for so long as it takes for a Federal Court to determine whether or not her Federal constitutional or statutory rights are violated. And that is reasonable, because she should not be allowed to die while the courts are determining what her legal rights are and whether anybody has violated them." *Id.* at 1707.

Opponents of the bill shared this same understanding. Congressman Jim Davis, speaking against S. 686, characterized the chief Senate sponsor of the bill as "say[ing] earlier today that the purpose and the effect of the bill in his judgment was to cause the Federal judge who will hear this case to reinsert the tube." *Id.*

Quite reasonably, the sponsors and the opponents of this legislation each assumed that Pub. L. 109-003 would require that Mrs. Schiavo be kept alive until a *de novo* review of her federal constitutional and statutory claims occurred. The entire purpose of Pub. L. 109-003 was "to give the federal courts an opportunity to consider the merits of Plaintiffs' constitutional claims with a fresh set of eyes." *Schiavo v. Schiavo*, No. 05-11556, at 11 (Wilson, J., dissenting). However, by failing to order the reinsertion of the feeding tube, the district court "virtually guarantee[d] that the merits of Plaintiffs' claims will never be litigated in federal court." *Id.* at 14. This Court cannot permit Mrs. Schiavo to die before a federal court, pursuant to a congressionally authorized statute, conducts a *de novo* review to ensure that neither her constitutional nor statutory rights have been violated. If equitable relief is not granted, Mrs. Schiavo's claim will never be properly reviewed,

because she will die.

CONCLUSION

Congress enacted and the President signed into law a means by which Mrs. Schiavo might obtain a full and fair review of her federal constitutional and statutory claims in a federal court. The courts below erred in refusing to grant Mrs. Schiavo temporary relief from a decision to remove her feeding tubes and to consider her constitutional and statutory claims *de novo*. While we recognize that this presents an unusual case, we would respectfully ask that this Court exercise its discretionary jurisdiction to permit Mrs. Schiavo injunctive relief under Supreme Court Rule 23 and to grant her petition for certiorari review.

MOTION ON BEHALF OF UNITED STATES SENATORS WILLIAM H. FRIST, RICK SANTORUM, MEL MARTINEZ, AND SAM BROWNBACK TO PROCEED AS *AMICI CURIAE* ON 8 ½ BY 11 INCH PAPER

The Honorable William H. First, Majority Leader of the United States Senate, the Honorable Rick Santorum, the Honorable Mel Martinez, and the Honorable Sam Brownback, United States Senators, respectfully move for leave to proceed as *amici curiae* on 8 ½ by 11 inch paper.

Rule 33.1 of the Rules of the Supreme Court of the United States requires that briefs of *amici curiae* be printed on 6 1/8 by 9 ¼ inch paper. Due to the exigent circumstances surrounding this case, *amici* are unable to print their brief on 6 1/8 by 9 ¼ inch paper. Accordingly, *amici* request leave to file on 8 ½ by 11 inch paper pursuant to Rule 33.2.