No. 88-1503

In The

Supreme Court of the United States.

October Term, 1989

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN,

Petitioners,

vs.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,

Respondents.

vs.

THAD C. McCANSE, Guardian ad litem,

Respondent.

On Writ Of Certiorari To The Missouri Supreme Court

BRIEF AMICUS CURIAE OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

DOES THE IMMEDIATE FAMILY OF AN IRREVERSIBLY COMATOSE PERSON HAVE THE RIGHT, FREE FROM UNWARRANTED STATE INTRUSION, TO DETERMINE THE LEVEL OF CARE APPROPRIATE FOR THEIR LOVED ONE?

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INTEREST OF AMICUS CURIAE[1]

The Evangelical Lutheran Church in America ("ELCA") has five and one-third million members in over eleven thousand congregations served by about seventeen thousand pastors. As part of its mission, the ELCA supports twenty-nine colleges, eight theological seminaries, 360 missionaries in 63 countries, 820 chaplains in the armed forces and 300 social service institutions, including hospitals, homes for older persons, and facilities for adults, youth and children with special needs.

The ELCA began its official existence January 1, 1988, as a merger of three predecessor church bodies: The Lutheran Church in America (LCA), The American Lutheran Church (ALC) and The Association of Evangelical Lutheran Churches. These groups trace their history in this country to the seventeenth century.

This is the second brief the ELCA has filed in this Court. The first was filed in support of the Petition for Writ of Certiorari in this case. The filing of both briefs is authorized by the Office of the Bishop and the Commission for Church and Society.

The guiding principles for positions of the Evangelical Lutheran Church in America on issues of social ethics are contained in Social Statements and Task Force Reports of its predecessor church bodies. The ELCA takes the

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[1] The Evangelical Lutheran Church in America has received consent of the parties to the filing of this brief amicus curiae. Consent of Respondents was received from the Attorney General of Missouri and counsel for guardian ad litem, Thad C. McCanse, Esq. The consent of Petitioner was obtained from her attorney, William H. Colby, Esq.

position it does in this brief because of two such documents: a 1977 paper issued by the American Lutheran Church's Task Force on Ethical Issues in Human Medicine [reprinted in Appendix A], and The Lutheran Church in America's Social Statement entitled Death and Dying that was adopted by the Eleventh Biennial Convention of that body in 1982 [reprinted in Appendix B].

Both of these documents recognized that new technologies in medicine can "keep people alive biologically until life becomes an intolerable burden." [App. p. A1] Medical interventions "do not always cure, but sometimes only prolong the dying process." [App. p. B1] With respect to chronically ill persons, the LCA statement took a strong position in favor of treatment except "in case of extreme and overwhelming suffering from which death would be a merciful release, or in cases in which the patient has irretrievably lost consciousness." [App. p. B9]

Similarly, the ALC Task Force paper affirms the use of life support systems whenever they serve "to improve the quality of personal and biological life." [App. p. A4] However, "wherever personality and personhood are permanently lost, artificial supportive measures often are seen as unfair to the dignity of the person. . . ." [App. p. A5]

These conclusions were reached because of the ELCA's theological understanding of life and death, all of which is in God.

God's gift of dominion over the earth calls us "in our lifetime . . . to be good stewards of all that we are and have." [App. p. A6] "Both living and dying are part of the dynamic processes of the created order, which Biblical

faith affirms as being good." [App. p. B2] Both should occur within a caring community that mandates respect for each person. [App. p. B4]

Medical decision-making is a personal matter and "we affirm the human right of individuality which allows us to die our own death within the limits of legal, social, and spiritual factors." [App. p. A3] At the same time, "we acknowledge our interrelated and interdependent nature, and seek to provide an individual facing death with the love and care of family and close friends." [App. p. B5]

Above all, "Christian faith teaches us the duty of preserving health, but does not hold life to be an absolute value . . . Our hope is the hope of the resurrection." As "Christ affirmed his death as an event that glorified God so can we affirm our own death." [App. p. A6] "As life draws to an end, with no hope for health restoration, permitting death is often the most heroic, caring and charitable rendering of stewardship." [App. p. A5]

SUMMARY OF ARGUMENT

The Missouri Supreme Court erred in two important respects in this case. First, it misunderstood the nature of the constitutional right at stake. Second, it failed to recognize that the legitimate interest of the state was already satisfied by the procedure required in the trial court.

The Constitutional right in this case is the type of traditional right that historically has been held to be protected as a fundamental part of liberty in the Fourteenth Amendment. A long line of cases has defined a

private realm of family life beyond the power of the state to regulate. This right of family privacy has received substantive protection and has necessitated procedural guarantees. The historical respect and commitment of our civilization to the sanctity of family authority is consistent with and essential to our traditions of individual liberty. The right of parents or nearest relatives to decide, without unwarranted state intrusion, the level of medical care or the termination of it for an irreversibly comatose loved one fits squarely within the history, purpose and tradition of our constitution. (Pages 6-12)

At times, the right of families to be let alone involves a spiritual dimension. This is especially true in times of grave illness or impending death. In this case, Nancy Cruzan's loving family, following a careful and agonizing deliberation, decided to respect her ideals and beliefs by deciding to discontinue artificial hydration and nutrition. Their decision on her behalf deserves constitutional protection. (Pages 12-15)

The state has the power to protect children and other dependent people, but it may do so only when parental control falters. The trial court made no finding of bad faith by Nancy's parents. The state has a legitimate but limited interest in this case; to assure that family decision-making acted on correct information and from proper motives. Once the state hearing has provided testimony clearly establishing a patient's medical conditions and future treatment options, what remains is a moral decision for the unconscious patient, based as closely as possible on her own view of life and death. The real issue in this case, as the Missouri court does recognize, is not whether proxy decisions will be made, but

who should make them. The choice is among medical personnel who diagnose, state officials who regulate health care, and family who, our constitutional tradition recognizes, can grasp and implement the thoughts, emotions, sensations and spiritual belief of the patient. If state officials are allowed to make these decisions, they necessarily will grant primacy not to the person's life values which they do not know, but to other matters such as efficiency, cost, medical data and their own value judgments. (Pages 15-18)

Although the state has a legitimate interest in protecting the public through the criminal law, it is not triggered here. The historical distinction between merciful omission and deliberate acts continues to be used today to distinguish between homicidal intent, which is not present in this case, and permission for the normal process of death. The state's invasion of family privacy is especially suspect in this case, where its decision effectively condemns Nancy's body to total and continued medical intervention that she does not want. (Pages 18-19).

Protecting the family's right to decide encourages family involvement in and supervision over the treatment of dependent loved ones. The Missouri decision severs family ties by substituting the moral and religious judgment of the state for that of the person. The state's right to regulate should be limited to assuring that family decision-making acted on correct information and from proper motives. All that was accomplished in the trial court in this case. Beyond this Nancy's voice must be heard through her family, whose right to decide should be recognized and upheld. (Pages 20-21)

ARGUMENT

I. FAMILY MEMBERS, MAKING MEDICAL DECISIONS ON BEHALF OF AN INCOMPETENT DAUGHTER ACCORDING TO HER WISHES, HAVE A CONSTITUTIONAL RIGHT TO BE FREE FROM UNWARRANTED STATE INTRUSION INTO THEIR DECISION-MAKING.

This case calls on the Court to define the boundary between the power of state government and the family. Consistent with its prior decisions, this Court should recognize that a family has a constitutional right to make medical decisions on behalf of a comatose loved one. This right is subject only to a state's interest in providing a fair hearing, and in the absence of a showing of abuse, cannot be totally usurped by state decision-makers.

A. The Cruzan's Have A Constitutional Right To Make Medical Decisions On Nancy's Behalf.

The Supreme Court of Missouri appeared to acknowledge a constitutional right in this case, but found that the state's expression of a strong policy favoring life "outweighs any rights invoked on Nancy's behalf to terminate treatment." [Petitioner's App. p. 43] Relying on *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Missouri court expressed "grave doubts as to the applicability of privacy rights to decisions to terminate the provision of food and water to an incompetent patient." [Petitioner's App. p. A25]

The Missouri court's reliance on *Bowers* is misplaced and ignores a long-standing group of cases in which this

Court has recognized a constitutional right of privacy in family matters. In *Bowers*, this Court held that the federal right to privacy does not protect homosexual activity, finding "[n]o connection between family, marriage or procreation on the one hand and homosexual activity on the other. . . . " [p. 191]. This Court emphasized in *Bowers*, however, that traditional rights not expressly set out in the text of the constitution are nonetheless protected as fundamental privacy and liberty rights under the liberty provision of the Fourteenth Amendment. Decisions of this Court both before and after *Bowers* firmly establish a range of rights under the rubric of family privacy.

"It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint." *Michael H. v. Gerald D.*, 109 S.Ct. 2333, 2341 (1989) citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923).

A long line of cases has defined a "private realm of family life which the state cannot enter," *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). These decisions have afforded substantive protection to the decision to marry, *Turner v. Safley*, 107 S.Ct. 2254 (1987), *Zablocki v. Redhail*, 434 U.S. 374 (1978), *Loving v. Virginia*, 388 U.S. 1 (1967); the decision to procreate, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J. dissenting), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the education of children, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); and family living

arrangements, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion).

Procedural due process rights have also been deemed essential to protect "[t]he fundamental liberty interest of natural parents in the care, custody and management of their child. . . . " *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). See also *Caban v. Mohammed*, 441 U.S. 380 (1979), *Cleveland Board of Education v. LaFluer*, 414 U.S. 632 (1974), *Stanley v. Illinois*, 405 U.S. 645 (1972), *Armstrong v. Manzo*, 380 U.S. 545 (1965), *May v. Anderson*, 345 U.S. 528 (1953).

These cases reflect the historical respect and commitment of Western Civilization to the "sanctity . . . traditionally accorded to the relationships that develop within the unitary family." *Michael H.*, 109 S.Ct. at 2342. See also *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). The sanctity of the family is protected by the constitution "precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Michael H.*, 109 S.Ct. at 2342, citing *Moore*, 431 U.S. at 503. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, *Commentaries* 447; 2 J. Kent, *Commentaries on American Law* 190." *Parham v. J. R.*, 442 U.S. 584, 602 (1979).

In this case, Missouri's action has totally deprived Nancy's parents of her custody, care and nurture. This result directly contradicts the cases of this court that recognize close family ties and that find a presumption in

favor of family right and duty to be even more important when care and custody of children are concerned, because the parents' claim "is basic in the structure of our society." *H. L. v. Matheson*, 450 U.S. 398, 410 (1981) citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) quoting *Prince v. Massachusetts*, 321 U.S. 158, at 166.[2]

Although Nancy Cruzan is a thirty-two year old adult, the primary right of family to custody, care and nurture of children has been recognized in the situation of others incapable of caring for themselves such as "the insane and those who are irreversibly ill with loss of brain function. . . ." *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2693 n. 23 (1988). This presumptive power of family control "includes counseling children in important decisions," *H.L. v. Matheson*, 450 U.S. 398 (1981) and making medical care decisions, *Parham v. J.R.*, 442 U.S. at 603.

B. The Presumption Of Parental Right Is Essential To Our Tradition Of Individual Liberty.

"Properly understood, . . . the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic

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[2] Protecting children has historically included the power of parents to bring actions on their behalf in courts of law and equity. See *Blackstone, supra*; J. Story, *Equity Jurisprudence*, Sec. 1742-84 (1886).

presuppositions of the latter." *Bellotti v. Baird*, 443 U.S. 622, 638 (Powell, J. concurring). "The child is not the mere creature of the State. . . . " *Pierce*, 268 U.S. at 535.

Affirming the right asserted here by the family of Nancy Cruzan involves no more than a logical extension of prior cases regarding family privacy. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In those decisions, the Court recognized that this right has no explicit basis in the language of the constitution nor in prior decisions of this Court. Nor did either involve an assertion of a failure of procedural due process. But, as Justice Harlan so cogently insisted in his dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), the due process clause of the Fourteenth Amendment must reach beyond procedural regularity or else the State could, "with the fairest possible procedure . . . destroy the enjoyment of [life, liberty and property]" *id.* at 541, with no constitutional redress.

The right asserted here, as well as that in the *Poe* case, are rights " 'which are . . . *fundamental*; which belong . . . to the citizens of all free governments.' " *id.* quoting *Corfield v. Coryell*, 4 Wash. CC 371, 380, 6 F Cas 546 (1823). Although Justice Harlan was concerned in *Poe* about finding and defining what appeared to be a novel claim to constitutional protection, he was certain of the need to do so. In articulating his decision-making process, he found no formula for due process, but recognized the need to consider the balance our nation historically and traditionally has struck between "the liberty of the individual and the demands of an organized society." 367 U.S. at 542. Arguing that judges should guard against "unguided speculation" by careful attention to what history teaches are our living traditions, he recognized that

the concept of liberty is not a series of "isolated points" of rights explicitly enumerated in the Bill of Rights, but rather a "rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Id.* at 543. These fundamental rights must be found in "the purposes of [the enumerated rights] and not [in] their text," *id.* at 544, as well as in the history and tradition which sheds light on that text. "Due process," therefore, and "liberty," which vaguely define the outer limits of state power, reach beyond those rights explicitly spelled out in the constitution.

The history, purpose and tradition of the constitution similarly confirm the existence of a right of parents or nearest relatives to determine, without unwarranted state intrusion, the level of medical care or the termination of it for their irreversibly comatose loved one. The inalienable personal rights, tellingly relied on in the Declaration of Independence, served as the understood background of the Bill of Rights. The whole purpose of the Ninth Amendment was to respond to the well-founded fears of some of the founding fathers that any enumeration of fundamental rights must be incomplete. James Madison, in drafting the Ninth Amendment, clearly sought to avoid the negative implication of the enumerated list of rights, that rights not enumerated did not exist.[3]

It would be ironic if a society which enumerated the limits of the federal government's power to intrude into

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[3] See, Barnett, *Reconceiving the Ninth Amendment*, 74 Cornell L. Rev. 1 (1988); Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 Hastings L. J. 305 (1987); Sherry, *The Founder's Unwritten Constitution*, 54 U. Chi. L. Rev. 1127 (1987).

the home by quartering troops or by using warrantless searches, would not also have limited the power of the government to interfere with decisions affecting one of the most sacred of family events, the death of a loved one, if such an intrusion had then been medically feasible.

Parental and family privacy is essential to our culture, traditions and history because the family cultivates and transmits shared ideals and beliefs, fosters diversity, acts as a critical buffer between the individual and the power of the state and safeguards the emotional attachment of close ties that enable persons to define [their] identity. *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984). All of these purposes are "central to any concept of liberty." *Id.* As Mr. Justice Brandeis explained in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion): "The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men."

C. For Many, Especially When Facing Death, The Roots Of Family Privacy Lie In Spiritual Beliefs.

The right of families to be let alone often involves a spiritual dimension. At times, religious belief motivates private action that directly conflicts with the power of the

state. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Other cases also involve claims of Fourteenth Amendment protection against the power of the state where religious belief primarily motivated the private action. *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Ultimate questions of life and death compel everyone to confront his or her religious beliefs or fundamental value systems.

For many, if not most, the significance of our spiritual nature takes priority in times of grave illness or impending death. For persons of faith, decisions concerning care for a loved one will inescapably involve religious belief. Not many years ago, most deaths occurred at home. There, "surrounded by family and friends, dying people were invited to repent of their sins, bless the children present, ask forgiveness, bid farewell and make recommendations." [App. p. A1] Death occurred as a natural and private experience. Today, "people often experience death in the sterile environment of hospital or nursing home," [App. p. A2] often connected to a "new technologies (that) do not always cure but sometimes only prolong the dying process, at times with great suffering" (App. p. B1)

In considering this case, the ELCA respectfully requests this Court to consider that a person of faith who makes a decision to discontinue artificial hydration or nutrition should not be forbidden from doing so. We believe that for us, such a decision requires prayerful consideration of the gift of life from God, respect for the

unconscious person's preferences and hope in the resurrection over death. Continued life, ordered by state officials over family objection, should not be allowed to frustrate religious belief that accepts death as part of the created order [App. p. B3] and proclaims ultimate victory over death through the promise of the resurrection of the body [App. p. B4]. Our freedom to believe and to act on this belief in the privacy of our families is inextricably bound to the Cruzan family's struggle to do the same.

In contemplating death, humans share their greatest intimacies and most profound beliefs. To many, these beliefs include the comfort of a loving God who creates us and our world and who entrusts life, nurture and growth to our guardianship. Part of this creation includes the abundant blessings of medicine, which offers us freedom to live longer and fuller lives than ever before in human history. Our use of medical intervention, like our use of the earth, must be for the service of humankind. Though we as Christians fight for life and treasure it, when life is severely burdened by continual medical intervention and when life in community is no longer possible, we trust in the assurance of a new life.

In this case, Nancy Cruzan's loving family, following a careful and agonizing deliberation, has respected Nancy's ideals and beliefs by deciding on her behalf to discontinue artificial hydration and nutrition. Their decision was based on a lifetime of knowing Nancy and what she would want, on her prior expressed wishes and on careful family deliberation and prayer. The family's decision was affirmed by an extensive trial proceeding, and concurred in by a guardian ad litem appointed to protect

Nancy's interests. That decision, lovingly made and carefully considered, deserves constitutional protection.

II. THE MISSOURI DECISION, WHICH SUBSTITUTES THE MORAL AND RELIGIOUS JUDGMENT OF THE STATE FOR THAT OF THE CRUZAN FAMILY, FAILS TO LIMIT THE LEGITIMATE STATE INTEREST IN THIS CASE TO ASSURING A CAREFUL DELIBERATION AND FAIR DECISION ON BEHALF OF AN INCOMPETENT PERSON.

Government regulation of the family is appropriate only where forbidden conduct substantially threatens the public safety, peace or order, see e.g. *Reynolds v. United States*, 98 U.S. 145 (1879); *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905); *Prince v. Massachusetts*, 321 U.S. 158; and where the state regulation is "appropriately designed to reach such evils." *Id.* at 169.

The well-being of children and other dependent people "is of course a subject within the State's constitutional power to regulate . . . ." *Ginsberg v. New York*, 390 U.S. at 639. The State of Missouri, however, goes far beyond appropriate regulation in this case because it totally usurps parental control when no showing has been made that Nancy's parents sought to act on incorrect information or improper motivation. If a conflict is asserted by individuals, this fact might "require intervention of the State to determine where the rights of one end and those of another begin." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 630 (1943). But only "if parental control falters" *Schall v. Martin*, 467 U.S. 253, 265 (1984) should the state "play its part as parens patriae." *Id.*

In this case, as in *Parham v. J.R.*, 442 U.S. at 603, there was "no finding by the [trial] court of even a single instance of bad faith" by Nancy's parents. The entire testimony in the Missouri probate court indicated that her parents were promoting Nancy's will and seeking to implement her wishes. Testimony of other family members and friends confirmed this, and a separately appointed guardian ad litem concurred as well.

A. The State's Legitimate Interest Is Limited To Providing A Fair Hearing.

The state, of course, has a legitimate interest here, but a strictly limited one. The state should assure that the family acted on correct information and proper motives. The state's purpose, therefore, was to assure that decisions about Nancy's care were based on accurate medical facts and were consistent with her true beliefs. Once it was clear that these goals were met, however, the state's power to limit parental authority ceased. "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Parham v. J.R.*, 442 U.S. at 603. The state may require a hearing to assure that abuse and neglect do not exist, but may not terminate parental authority over the child absent such a finding. *Santosky*, 455 U.S. 745.

The real question confronting this Court is not whether third party decisions should be made, but who should make them. The Missouri court understood that someone must make medical decisions on an individual basis for dependent and incompetent persons when it

insisted that "[t]he issue . . . is whether feeding and providing liquid to Nancy is a burden *to her*." (Petitioner's App. pp. 36-37) Stated this way, the proper approach should emphasize the expertise of each group in arriving at the best, albeit imperfect, decision, for each individual patient.

In this case, the state's hearing facilitated clear and convincing medical testimony which established " . . . that Nancy will never interact meaningfully with her environment again" and that "[s]he will remain in a persistent vegetative state until her death, . . . totally dependent on others for her care." [Petitioner's App. p. 34] The state's hearing also provided the occasion for those who knew Nancy and her wishes to testify, and for a court appointed guardian ad litem to independently investigate and weigh the medical and personal facts of the case.

Once the medical evidence clearly established her condition and future treatment options, medicine had offered what it could. Once the state hearing produced testimony from friends and relatives and discovered no wrongful motives, the state had facilitated all it could. What remained was a moral decision based on these facts that would most closely uphold Nancy's own view of her life and death. The Missouri court assumes that the state is the moral repository of individual belief concerning life and death. Our constitutional jurisprudence recognizes that this right was never given to the state and, absent abuse by another, is beyond the power of the state to regulate.

If the state is allowed to reverse decisions on behalf of incompetent patients made by families on the basis of their often intimate knowledge and honest endeavor to care for a relative as she would want, then these decisions will be made by unrelated state officials on the basis of their own morality. Lacking the benefit of information concerning a particular person, they will necessarily consider what they do know: cost, efficiency, medical data, and their own view of certain classes of cases or disorders.

The state's parens patriae power is especially offensive when it coerces standardized behavior. Thus in *Meyer v. Nebraska*, 262 U.S. 390, *Pierce v. Society of Sisters*, 268 U.S. 510, and *Wisconsin v. Yoder*, 406 U.S. 205, the state's power to require education was unquestioned, but the "means adopted . . . exceed[ed] the limitations upon the power of the state" *Meyer* at 402. Though the state can mandate instruction, its police power "excludes any general power . . . to standardize its children by forcing them to accept instruction from public teachers only." *Pierce* at 535. Families and individuals such as the Cruzans similarly have a fundamental right to be free from forced existence where disease or injury has so compromised biological function that all hope of recovery is gone and human interaction is totally impossible.

B. Homicide And Suicide Are Not At Issue In This Case.

Another legitimate state interest lies in protecting the public order through the criminal law. Families and individuals have no fundamental right to die at whim. That

certainly is not the case here. The Cruzans' decision cannot be viewed as homicide or aiding a suicide. Historically, suicide occurred only if a direct and deliberate act ended life. Blackstone, *Commentaries Book IV:189* (9th ed 1783). Homicide or aiding a suicide was also limited to a deliberate affirmative act. See e.g. *Regina v. Wagstaffe*, 10 Cox Crim. L. Cases 530, 533 (1868). This distinction between deliberate acts and merciful omissions continues today and has been applied to situations where life supports originally undertaken for a restorative purpose no longer provide hope. See e.g. *Barber v. Superior Court*, 147 Cal. App. 3d 1006 (1983). The ELCA similarly believes that a "deliberate act is far removed from decisions which allow people to die. . . . Permission for the normal process of death is an act of omission in the spirit of kindness and love . . . . [App. p. A6]

Under the guise of the state's power to protect life, the Supreme Court of Missouri has in fact condemned Nancy's body to continued physical invasion necessitated by medical intervention that renders her totally dependent on impersonal machinery for even the vegetative acts of existence. The state's invasion of family privacy is especially suspect in a case such as this, where "the Government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding," *Olmstead v. U.S.*, 277 at 479. Undertaken originally for a restorative purpose, medical intervention must, in Missouri's view, be continued forever, irrespective of the lack of success or benefit, physical or moral, to the patient or the family. The state of Missouri now controls and mandates the continuation of Nancy Cruzan's every function.

C. Encouraging Rather Than Preventing Family Involvement In Decision-Making Will Best Guard Against Abuse Of Dependent People.

Perhaps the Missouri Supreme Court's chief concern in this case was preventing abuse of dependent people. If so, it should care about encouraging the involvement of as many individuals in the care of each other as it can. Instead, its decision requiring state power to supersede family choice acts to sever family ties at the time dependence on institutional care begins. At the point of institutional involvement, the family loses control to the institution's policies, regulated or determined by the state. Out of sight and out of control, the care of dependent people becomes monitored by no one but the bureaucratic regulators themselves.

Loss of control to impersonal institutions has another less obvious but equally troublesome result. Family members who seek to maintain control may initially refuse to consent to treatment, fearing the consequences of their later inability to withdraw consent should treatment become hopeless and burdensome. Those who hope that such a situation will not occur, such as the Cruzans, are left to face the agonizing prolongation of a loved one's suffering. In addition to this, they must fight guilt heaped on them by a powerful state that tells them their compassionate decision is morally wrong.

The Missouri court in this case, therefore, should be free to fashion a rule that establishes a commitment to life as long as hope for recovery remains. It should also be free to impose procedural due process requirements that assure that medical diagnosis and prognosis are carefully

evaluated.[4] It may even require an unrelated guardian ad litem who will independently investigate the situation. All of this was accomplished in the trial court in this case. What the Missouri Court should not be free to do is to order continued intrusion into Nancy's body to maintain biological existence for a person who insists in the only way she is able, through her closest family, that she has had enough. Nancy's doctors agree that she will not improve; her parents, the repository of her prior existence, simply ask to let her depart in peace.

When we as Christians have lived our life and our earthly bodies fail, we wish our families to be free on our behalf to repeat the words of Simeon, upon seeking the infant Jesus: "Lord, now lettest thou thy servant depart in peace according to thy word; for mine eyes have seen thy salvation which thou hast prepared in the presence of all peoples." *Luke* 2:29-31

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[4] Due Process may include a guardianship procedure or more informal ethics committee consult in a local institution. See e.g. *In re Quinlan*, 70 N.J. 10, 49, (1976) *cert. denied*, 429 U.S. 922 (1976); Institutional Ethics Committees and Health Care Decision Making (R. Cranford & A. Doudera eds. 1984); Whiteneck & Brown, Forum Allows LTC Facilities to Face Ethical Issues Together, 69 Health Progress 82 (1988), Brown, Miles & Aroskar, The Prevalence and Design of Ethics Committees in Nursing Homes, 35 J. Am. Geriatrics Soc'y 1028 (1987).

CONCLUSION

For the reasons set forth herein, your amicus curiae requests that the judgment of the Supreme Court of Missouri be reversed and that of the trial court be reinstated.

Respectfully submitted,

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