No. 88-1503

In The

# Supreme Court of the United States

October Term, 1988

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 Petition For 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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The Evangelical Lutheran Church in America is not requesting that this Court find a broad right to die. Rather this case involves the narrow right of an individual and her immediate family, free from unwarranted State intrusion, to decide the level of care appropriate for a loved one who can never regain any experience of human consciousness.

## 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, it 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, the American Lutheran Church and The Association of Evangelical Lutheran Churches. These groups trace their history in this country to the Seventeenth Century.

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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., and of Petitioner from her attorney, Mr. William H. Colby, Esq.

This is the first brief the ELCA has filed in this Court. The filing of this brief 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 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 Issue 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 the prior church bodies that comprise the ELCA recognized in their documents 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 decisionmaking 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]

## LAW AND ARGUMENT

This is not a case about a person's right to die. Rather, an individual and her immediate family seek a narrow constitutional protection from unwarranted intrusion by the state in private family decisions made within the sanctuary of a home environment.

The Supreme Court of Missouri appeared to acknowledge such 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 had "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. 25]

The court's reliance on *Bowers* is misplaced. 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. These fundamental rights fall into several categories: those protecting family relationships, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)(Plurality opinion); the privacy of the home, *Poe v. Ullman*, 367 U.S. 497, 542 (1961)(Harlan J. dissenting), *Griswold v. Connecticut*, 381

U.S. 479 (1965), and those providing protection for certain kinds of intimate decisionmaking within these spheres, *Loving v. Virginia*, 388 U.S. 1 (1967)(marriage); *Griswold v. Connecticut*, *supra* (contraception) and *Roe v. Wade*, 410 U.S. 113 (1973)(abortion).

Mr. Justice Brandeis explained the basis for these rights 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 knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. . . . They conferred, as against the government, the right to be let alone . . ."

The right to be let alone is especially important as it protects the privacy of the family and the home. "The home derives its pre-eminence as the seat of family life." *Poe v. Ullman*, *supra* at 551 (J. Harlan, dissenting). It is here that parents are free to teach their children; *Pierce* and *Meyer*, *supra*, to share sexual intimacy; *Griswold v. Connecticut*, *supra*, to "pass down many of our most cherished values, moral and cultural." *Moore*, *supra* at 504. Indeed, in a somewhat different context, both the Third and Fourth amendments recognize this right against arbitrary intrusion by the police and military power of the state.

If this protected "private realm of family life" includes sexual intimacy, procreation, education and family relationships, it "would indeed be straining at a gnat and swallowing a camel", *Poe*, *supra* at 552, to recognize this aspect of family privacy without understanding and

upholding the historical and traditional place of dying in the same context.

It has long been the case that, in death, persons have expressed their most profound beliefs and private intimacies. Not many years ago, most deaths occurred at home. There, "[s]urrounded 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 "new technologies [that] do not always cure but sometimes only prolong the dying process, at times with great suffering." [App. p. B1]

The relationship between the home and family privacy is especially important in Nancy Cruzan's case. Here, as in *Griswold*, "we have not an intrusion into the home so much as in the life which characteristically has its place in the home." *Poe, supra* at 551. "Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." *Moore, supra* at 505. As Mr. Justice Brandeis warned in *Olmstead, supra* at 479, the state's invasion into the privacy of the home should be most suspect in a case like this one, 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."

Nancy Cruzan's loving family, following careful and agonizing deliberation, has decided to discontinue Nancy's artificial hydration and nutrition. Their decision was based on a lifetime of knowing Nancy and what she would want, her prior expressed wishes and careful family deliberation and prayer. This decision was affirmed following an extensive trial proceeding, and concurred in by a Guardian ad litem appointed to protect Nancy's interests.

The Supreme Court of Missouri has wrested this decision from Nancy Cruzan and her family, placing it instead in the hands of the state. Although a state has a legitimate interest in assuring a careful deliberation and fair decision on behalf of an incompetent person, the Missouri court has decided that artificial fluids and nutrition, once undertaken for a restorative purpose, must be continued forever, irrespective of the lack of success or benefit to a patient. Once a patient's body is given to medical science, it remains a prisoner there, presumably until some force beyond the power of medical technology intervenes.

The Missouri Court's decision invades the privacies of family and home as certainly as the decision of Connecticut invaded the privacy of the marital bedroom in *Griswold*. It is as if the agents of the state of Missouri have been quartered in Nancy's home, ostensibly to preserve her life, but in actuality demanding up to thirty years of continued enslavement to the pain of medical intervention that no longer serves a hopeful purpose. Her doctors agree that Nancy will not improve; her parents, the repository of her prior existence, simply ask to let her depart in peace.

Only this Court can recognize the fundamental constitutional value of the Cruzans' request. Without recognition of this family's prerogative to decide, many others like Nancy Cruzan will fall victim to medical technology which has won a battle but lost the war, prolonging misery without hope of improving and restoring life.

In considering whether to grant certiorari, the ELCA respectfully requests that this Court 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 every person including their treatment decisions and hope in the resurrection over death. Our freedom to believe and to act on that belief in the privacy of our families is inextricably bound to the Cruzan family's struggle to do the same.

In dying, as in conceiving and birthing, humans share their greatest intimacies and most profound beliefs. To many if not most, these beliefs include the comfort of a loving God who creates us and our world and entrusts life, nurture and growth to our guardianship. Part of this creation includes the abundant blessings of medicine, which offer 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 in community is no longer possible, we trust in the assurance of a new life when our earthly bodies fail. At that time, we wish to be free to repeat the words of Simeon, upon seeing 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][2]

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[2] First Amendment religion clause claims have not been made in the case. However, for persons of faith, decisions concerning care for a loved one will inescapably involve religious belief. Similarly, *Meyer* and *Pierce supra,* involved claims of Fourteenth Amendment protection against the power of the state where religious belief primarily motivated the private action.

## CONCLUSION

If this Court grants certiorari, it need only decide a narrow question: whether a state may remove from a family and guardian all decisionmaking power concerning a particular medical intervention where the state's own hearing has shown that the family and guardian ad litem are all acting in the best interests of the permanently unconscious person.

For the reasons set forth herein, your amicus curiae requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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