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 WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

BRIEF FOR PETITIONERS

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September 1, 1989

QUESTION PRESENTED

As the result of a car accident more than six years ago, Nancy Cruzan is an incompetent person in a persistent vegetative state without hope of ever recovering cognitive interaction with the world around her. She can live indefinitely in this state. She is kept alive by means of a surgically implanted gastrostomy tube which artificially provides her fluid and nutrition. The question presented is:

Whether a state's general interest in life can override all constitutional privacy, liberty and equal protection rights of an incompetent person to reject medical treatment.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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The opinion of the Missouri Supreme Court is reported at 760 S.W.2d 408. It is reprinted in the petitioners' appendix to the petition for certiorari ("Pet. App.") at A1-A88. The opinion of the Missouri Circuit Court for Jasper County, Probate Division, is not reported. It is reprinted at Pet. App. A89-A100.

JURISDICTION

The Circuit Court for Jasper County, Probate Division, entered its judgment on July 27, 1988, upholding petitioners' constitutional right to withdraw artificial life support that had been instituted at an earlier time, when hope of recovery remained. On November 16, 1988, the Missouri Supreme Court reversed the trial court. Thereafter, on December 13, 1988, the Missouri Supreme Court denied a timely petition for rehearing. The petition for certiorari was filed on March 13, 1989, and granted on July 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are set out in the Appendix. They include the First, Fourth, Fifth and Ninth Amendments, and Section 1 of the Fourteenth Amendment to the Constitution of the United States, as well as pertinent provisions of Missouri's living will act, abortion act and guardianship act.

STATEMENT

A. Nancy Cruzan

Early in the morning of January 11, 1983, Nancy Cruzan had a car accident on a deserted country road. Pet. App. A89-A90. The state trooper who first arrived at the scene found Nancy face down on the frozen ground and believed her dead; he started no emergency procedures. Pet. App. A90. When additional emergency personnel arrived, they started cardiopulmonary resuscitation and other advanced life support procedures. Pet. App. A91. Although they were able to restore breathing and heartbeat, Nancy's brain had gone too long without oxygen, and she never regained consciousness after the accident. Pet. App. A91-A92. She will never again interact with the world around her in any way. Pet. App. A95.

Nancy Cruzan lies today in the respondent Missouri Rehabilitation Center, a state hospital, in a persistent vegetative state ("PVS"). Pet. App. A34. PVS is a type of permanent unconsciousness or coma in which all cognitive functioning is gone but in which the brainstem, the part of the brain which controls unconscious activity, continues to function to some degree. The cerebral cortex or "thinking" portion of Nancy's brain has been replaced by fluid. Pet. App. A95. Nancy retains primitive vegetative functions, but she is "oblivious to her environment except for reflexive responses to sound and painful stimuli." Pet. App. A95. The functioning brainstem allows Nancy to breathe on her own and causes periods during which her eyes are open, but she is unaware of herself or her environment. Pet. App. A95. Her eyes when open move randomly in all directions, but they do not track objects or persons or respond to the environ-

ment around her. TR. 126, 318-19, 373, 431-32.[1] She has lost the "ability to swallow food or water" even by a primitive gag reflex. Pet. App. A95.

There is no hope that Nancy will ever recover from this condition and be restored to any cognitive functioning. Pet. App. A34. "She will remain in a persistent vegetative state until her death." Pet. App. A34. Nancy is completely dependent on others for care. Her body is stiff and so severely contractured that her fingernails cut into her wrists. Pet. App. A94. Her knees and arms are drawn into the fetal position and permanently contractured. Nancy has been in this persistent vegetative state for over six years. Doctors believe she can live 30 more years in this condition. Pet. App. A8, A26, A38.

Nancy Cruzan is 32 years old, the second of three daughters born to Joe and Joyce Cruzan. TR. 407. Nancy grew up in the family home in Carterville, Missouri, where Joe and Joyce still live. TR. 406-07. Family and friends recognized early on that Nancy was a special child. Joe and Joyce identified Nancy as the independent and vivacious (and sometimes impudent) one in the family. TR. 511. Joyce told a story at trial about Nancy as a three year old, when she stomped on her grandfather's foot after he kidded her too hard. TR. 511. Likewise, Nancy riled her grandmother sufficiently to get spanked, the only spanking Joyce's mother ever gave to any of Joe and Joyce's three girls. TR. 511-12. At school Nancy made friends easily, and she was active in everything from the grade school queen contest, TR.

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1. All Record cites in this Brief are to the Trial Transcript ("TR."), which is bound and paginated separately in the Record prepared for the Court by the Missouri Supreme Court.

408, to playing flute in the grade school band, to being a twirler at Webb City High. TR. 515, 557. Nancy was a doer. ("[W]hatever fad there was, she wasn't afraid to be the first to wear it, or do it"). TR. 514.

As Nancy grew older she blossomed, by all accounts, into an extremely attractive young woman who took great pride in her appearance. TR. 512-13, 534. People remember her as a trim, pretty woman, with a deep tan, wide smile and bright clothing. TR. 398, 514, 534, 550. Her older sister Christy, who was also Nancy's best friend, emphasized at trial that personal hygiene as well as physical appearance were extremely important to Nancy. TR. 532-34. Nancy's physical beauty came with an outgoing, vibrant, friendly, fun-loving personality. TR. 410-11, 549-50. Nancy continued as an adult to have the gift of her childhood for making friends easily wherever she went. TR. 396-97, 414, 535.

Nancy was also fiercely independent, as all witnesses at the trial emphasized. TR. 415, 397, 433, 511, 532-33. Her father testified "that's the thing I remember the most about Nancy was how independent she was." TR. 415. Nancy's sister Christy recounted that Nancy came home from work near midnight one night and found the door of her home, where she lived alone, ajar. Rather than walk to her sister's house one block away, Nancy stuck the tips of her keys out between her fingers, made a fist, and ventured in to check the rooms and closets. Nancy told Christy that she just planned to hit any burglars she found. TR. 533. Her friend and housemate Athena Comer described Nancy as a "very independent" person who "didn't want anyone else to tell her what to do either. She would do it the way she wanted it no matter what." TR. 397.

Finally, and perhaps most important, Nancy deeply loved her family—it was the focus of her life. TR. 415, 544, 559. She was extremely close to both of her parents, TR. 544, her sister Christy, only two years older, was her constant companion and best friend, TR. 400, 532, 545, and to her two nieces, Angie and Miranda, Nancy served as a "second mother." TR. 415-16, 532, 546. Miranda called Nancy the "best aunt in the world . . . better than God." TR. 416. Nancy was the family organizer for holidays and other family get togethers. TR. 503, 552. She was the center of the family, "the glue" that held the family together. TR. 503, 559.

B. Nancy Cruzan's Statements About Death

Nancy's personality is reflected in the specifics known about three different occasions on which she discussed her views on death, and life as a "vegetable." Approximately one year before her accident, Nancy talked to her housemate Athena Comer for at least one half hour about facing life as a "vegetable." TR. 388, 393-95, 402-03. Athena remembers the time of the conversation, the table where they sat and the specifics quite vividly. TR. 390. They discussed a sister of Athena's who had recently died overnight in a hospital from a septicemia infection. When Athena and her family had arrived at the hospital the night of the sister's death, they were told if the sister lived she would be in a vegetative state for the "rest of her life." TR. 387-88, 393. While discussing this situation, Nancy told Athena "several times" that if faced with life as a "vegetable," Nancy "didn't want to live." TR. 389-90, 395-96. Nancy told Athena that if she "couldn't do for herself things even halfway, let alone not at all, she wouldn't want to live that way and she hoped that her family would know that." TR. 389.

Nancy also discussed dying on two occasions in the fall of 1981, a year and a half before the accident, with her sister Christy. The discussions came in the wake of the death of their grandmother and the stillborn birth of their younger sister's baby. TR. 536-41. Christy remembers clearly the place, time and circumstances of both conversations, in her kitchen having coffee together, and the substance of both conversations. TR. 536. Nancy told Christy that the stillborn, deformed baby "would not have been normal, by life as we know it," that it could not laugh and play "and lead a normal existence" and that the baby's death was maybe part of "a greater plan" so the baby did "not have to face the possible life of mere existence." TR. 536-37. Similarly, when their grandmother died the two girls discussed the woman's journeys in and out of hospitals and that "she wasn't ever really getting better." TR. 541. Nancy told Christy that "death is sometimes not the worst situation you can be in" when compared to being "sent to the point of death and then stabilized" without hope of "ever really getting better." TR. 541.

C. The Family Decisions to Start and Stop Medical Treatment

The Cruzans did not give up hope for Nancy's recovery easily. On the night of the accident, Joe, Joyce and Christy arrived at the hospital before the ambulance did. TR. 418-20. When the ambulance got there Nancy was unconscious. Attendants rushed her into the emergency room where doctors performed an emergency laparotomy to repair a lacerated liver and repaired multiple facial lacerations. Pet. App. A91-A92. The family waited most of the night and when the nurse came out of surgery and told them that Nancy would be "all right," Joe turned to Joyce and said, "I feel like I can breathe again." TR. 420.

But the neurosurgeon later that day expressed serious concern about the long period of anoxia (lack of oxygen). TR. 421. Every night during the first weeks at Freeman Hospital the Cruzans talked to the neurosurgeon, and every night he expressed the same concern about the anoxia and indicated that Nancy's condition had not changed. TR. 422. Approximately three weeks after the accident, a #20 gastrostomy T-tube was surgically implanted in Nancy's stomach. Pet. App. A92. The hospital obtained two separate written consents prior to performing this surgery, one from her father, and one from Nancy's (then) husband. Pet. Tr. Exs. 9, 10, TR. 303-04.[2] These consents were given at a time when hope for recovery remained, and Nancy's prognosis was uncertain. Pet. App. A92.

Even as the length of her period of unconsciousness grew, the Cruzan family did not give up hope for Nancy's recovery. From Freeman Hospital Nancy was moved to the Brady Rehabilitation Center, where the family vigil continued. Every morning before work Nancy's father would visit and make efforts to feed Nancy by mouth, inserting a spoon when her mouth opened and rubbing her throat in hopes of getting her to swallow. TR. 424-25. In an effort to stop the footdrop (the contraction of limbs following massive brain damage), the family bought Nancy high-top tennis shoes and laced them up tight. TR. 425. The family saw no cognitive response from Nancy during the initial months after the accident. TR. 426.

Nine months after the accident Nancy was moved to the Missouri Rehabilitation Center in Mt. Vernon. Joe,

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2. The trial exhibits were lodged with the Missouri Supreme Court and returned to the parties on publication of its opinion. Copies of all trial exhibits cited in this brief will be lodged with the Clerk of the Court.

Joyce and Christy continued efforts to elicit a response from Nancy. They prayed, TR. 430, begged her to "blink your eyes if you understand," TR. 546, bribed her with cars, TR. 546, brought her dolls and presents, told her what her favorite nieces were doing, brushed her hair, touched her, TR. 523, and tried anything they could think of, all without success. TR. 431, 524, 547. At Christmas in 1983, the Cruzans took a tree to Nancy's hospital room. TR. 431. At Christmas in 1984, they brought Nancy home for three days, to be among all of her family and relatives, in the hope of evoking a response. TR. 431. The family no longer visited Nancy every day at the state rehabilitation center, which is 45 miles from the Cruzan home, but during their weekly visits they continued to talk and work with Nancy, in hopes of some response. TR. 431. During the more than six years since the accident, neither Joe nor Joyce nor Christy has ever seen a response from Nancy. TR. 431, 518, 536.

Gradually, the Cruzans gave up hope that Nancy would recover. TR. 425, 429-30, 518, 536. Also gradually, they each reached an identical decision: Nancy would not want to continue mere biological existence, with no ability to think or move, hooked up to a machine. TR. 535 ("Nancy would be horrified" by her current state and treatment); TR. 526 (I know "as her mother" that "Nancy would not want to be like she is now"); TR. 444, 543-44. Armed with this strong conviction, the family requested the state rehabilitation center to stop all medical treatment.[3] The hospital administrator told the Cruzans that the state hospital could not honor their request without a court order. TR. 343-44. The probate judge over-

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3. The family has no financial stake in Nancy's case. The entire cost of her care, $130,000 per year, is borne by the state. Pet. App. A96; TR. 347, 349.

seeing Nancy's guardianship also told the Cruzans they could not take Nancy home and remove the tube, that they needed a court order. TR. 436. The family then began legal proceedings.

The Cruzans did not reach the decision to withdraw artificial fluids and nutrition without deliberation or professional guidance. TR. 436-38, 519-21. They talked with other families who had been through similar experiences, as well as with doctors, clergy, and ethicists, and read voluminous material on PVS and medical ethics. TR. 432-34, 519-20, 497-98. Throughout this ordeal, the motivation and resolve of the family has remained clear: we "know in our hearts that Nancy wouldn't want to be this way and for us to sit back and do nothing is the greater injustice." TR. 543.

D. Proceedings in the Lower Courts

In the fall of 1987, the Cruzans filed a declaratory judgment action as Nancy's parents and on her behalf. The petition sought a declaration that Nancy had a common law right to be free from unwanted medical treatment and a state and federal constitutional right to privacy which protected her right, exercised on her behalf by her parents, to refuse unwanted medical treatment.

After a bench trial, the trial court concluded that Nancy's "lifestyle and other statements to family and friends suggest that she would not wish to continue her present existence without hope as it is." Pet. App. A94. The trial court also held that Nancy has a fundamental right to liberty, found in both the Due Process Clause of the Fourteenth Amendment and in the Missouri Constitution, to be free from unwanted medical treatment. The court further ruled that to deny Nancy's parents the right to carry out her will would deny Nancy her

federal constitutional right to equal protection of the laws. Finally, the court ruled that if the Missouri "living will act" were construed to bar the exercise of Nancy Cruzan's right to decline further treatment, then the Act violated Nancy's federal constitutional rights. Pet. App. A99.

The Missouri Attorney General appealed directly to the Missouri Supreme Court. That court, in a sharply divided 4-3 decision, reversed the trial court. The majority concluded that Missouri's "unqualified" interest in life outweighed any constitutional or common law right to withdraw medical treatment retained by an incompetent person like Nancy Cruzan.[4] Pet. App. A38. The majority rejected the decision of the New Jersey Supreme Court in *In re Quinlan,* which held that PVS patients retain constitutional rights, and similar rulings from other state supreme courts that have considered the issue. Pet. App. A32-A33. It charged that those courts improperly discounted the state's interest in life by making inappropriate judgments about the quality of life for a PVS patient. Pet. App. A30. In Missouri the state's interest is not in the quality of life, but "in life; that interest is unqualified." Pet. App. A29, A33.

The majority found the basis for the state's unqualified interest in life in broad policy statements underlying several different state statutes. First, it looked at the Preamble to the state abortion statute which grants "the right to life to all humans." Mo. Rev. Stat. § 188.010 (1986). Pet. App. A26. Next, it cited the definition of "viability" under that statute and emphasized that viability exists when the fetus can be sustained outside

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4. The majority opinion described Nancy's constitutional rights as encompassing the " 'right to liberty', 'the right to privacy', equal protection and due process." Pet. App. A9.

of the womb on "*artificial life support systems.*" Mo. Rev. Stat. § 188.015(7) (1986). Pet. App. A26 (emphasis in original). Third, the majority noted that Missouri "denies a cause of action for wrongful life and wrongful birth." Pet. App. A26-A27. Next, the majority emphasized that the state guardianship statute favors life because it "makes no provision for the termination of medical treatment," but instead places "an express, affirmative duty" on a guardian to obtain treatment. Mo. Rev. Stat. § 475.120 (1986). Pet. App. A39. Finally, the majority concluded that the Missouri "living will act," and changes made in adopting that statute from the Uniform Rights of the Terminally Ill Act, further evidenced the state's "policy strongly favoring life" at "the end of life." Pet. App. A27.[5]

The majority did not directly apply the living will act or any of these other statutes to Nancy Cruzan. Pet. App. A29. It examined the statutes solely to determine the state's interest in Nancy Cruzan's life.[6] It then balanced this interest against Nancy's federal constitutional rights. Pet. App. A29-A38.

The majority could not find any constitutional rights retained by a PVS patient like Nancy sufficient to override the general, unqualified state interest in Nancy's life. It held that federal rights would not extend to Nancy based on its reading of *Roe v. Wade*, 410 U.S. 113 (1973),

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5. The Missouri legislature modeled the Missouri living will act, Mo. Rev. Stat. §§ 459.010, *et seq.*, on the Uniform Rights of the Terminally Ill Act, but it made changes to the Uniform Act which limited the use of living wills in Missouri. Pet. App. A27-A28. For example, the legislature added language which removed artificial nutrition and hydration from the list of medical procedures that a person could choose to forgo through use of the living will. Pet. App. A27-A28.

6. Since the majority concluded the living will act did not apply to Nancy, it held that the trial court erred in ruling that act unconstitutional. Pet. App. A29.

and *Bowers v. Hardwick*, 478 U.S. 186 (1986). Pet. App. A24-A25. The majority stated that even if incompetent persons did retain federal constitutional rights to refuse unwanted medical treatment, such rights could exist in only two limited situations: 1) if the patient prior to incompetency left express directives regarding medical treatment, or 2) if the treatment caused physical pain. Pet. App. A36-A38, A41-A43.

Although the majority did not expressly overturn the trial court's findings of fact, it looked only to statements Nancy made to her roommate prior to the accident to determine her intent and chose not to consider evidence from Nancy's friends and family about her lifestyle and values. It held that Nancy's statements, standing alone, were not specific enough to satisfy its prior directives standard. Pet. App. A37. It further held that by definition a PVS patient like Nancy Cruzan is not capable of experiencing pain and thus cannot have treatment withdrawn on that basis. Pet. App. A36. The majority also concluded that Nancy Cruzan retains no right to have her family participate in medical treatment decisionmaking for Nancy. Pet. App. A41-A42. It analyzed their rights as guardians, not parents, and held that guardians in Missouri have no power to withdraw treatment, they are required to provide all medical treatment possible to an incompetent ward. Pet. App. A39. Finally, the majority determined that while the initial surgical insertion of the gastrostomy tube was medical treatment, the ongoing provision of artificial fluids and nutrition through the tube is not "heroically invasive" medical treatment that can be stopped; it is merely ordinary care. Pet. App. A34. The majority concluded that as an incompetent Nancy Cruzan retains no federal interest in stopping unwanted gastrostomy feeding which can outweigh the general, unqualified interest of the state of Missouri in her life. Pet. App. A38.

The majority decision provoked three separate dissents. Judge Blackmar reasoned that decisions about medical treatment for incompetent family members are properly left where they historically have been made, to the family, without interference by the state. He also found the absolutist characterization of Missouri's interest in life simply wrong on at least two grounds: (1) "The very existence of capital punishment" suggests that "some lives are not worth preserving," and (2) the living will statute "in fact allows and encourages the preplanned termination of life." Pet. App. A49 (Blackmar, J., dissenting).

Judge Higgins argued that the majority improperly ignored the court's "responsibilities to Nancy Cruzan under the Constitution" in "deference to some yet unspecified and unconsidered legislation" that could address cases like Nancy's. Pet. App. A77-A78 (Higgins, J., dissenting). He also admonished the majority for the "inexcusable exercise" of ignoring the trial court's findings of fact on Nancy's intent and adopting its own findings of fact, limited solely to her conversations, to fit its conclusions. Pet. App. A65-A66 (Higgins, J., dissenting).

Finally, Judge Welliver found the Missouri living will act, on its face, contrary to an individual's federal rights to control fundamental decisions about his own body. Specifically, Judge Welliver found it constitutionally impermissible to exclude surgically supplied fluids and nutrition from the list of medical treatments that a person may choose to forgo. Pet. App. A79-A82 (Welliver, J., dissenting).

Nancy Cruzan and her parents filed a timely petition for rehearing, which was denied 4-3. The rehearing denial again provoked extensive dissent. Pet. App. A82-A88.

SUMMARY OF ARGUMENT

This case involves the constitutional right of Nancy Cruzan, an incompetent person, to refuse unwanted medical treatment, and her right to have her family express those wishes on her behalf. Nancy is permanently unconscious, and has no hope of recovery. Three clear principles of law govern the case. First, the guarantee of liberty in the Due Process Clause protects individuals against unwarranted bodily intrusions by the state. *Rochin v. California,* 342 U.S. 165 (1952). Second, incompetent persons in our society retain the right to freedom from such intrusions, even though they can no longer express their wishes. *Youngberg v. Romeo,* 457 U.S. 307 (1982). Third, our society is built on a bedrock of family, *Michael H. v. Gerald D.,* 109 S. Ct. 2333 (1989), and a loving family is the best surrogate decisionmaker for an incompetent family member. *Parham v. J.R.*, 442 U.S. 584 (1979).

A 4-3 majority of the Missouri Supreme Court ignored these fundamental principles. First, the majority completely removed Nancy Cruzan's family from her medical treatment decisions. While the family had the power to consent to insertion of the gastrostomy tube originally, they have now lost the power to withdraw that consent. Nancy is subject to ongoing, state-ordered medical treatment, and her family simply has no role in decisions about that treatment.

Second, the majority erected a standard of proof that essentially no incompetent person can ever meet. thereby denying rights to incompetents on the basis of their incompetency. The majority discarded as "inherently unreliable" all trial evidence except evidence of

express statements about life-prolonging treatment made prior to incompetency. But common sense suggests that most young, healthy people will not talk much about their own deaths or execute prior directives. They nonetheless have clear views and values. When Nancy Cruzan's clear statements that she would not want to live as a "vegetable" are analyzed in the context of significant additional testimony about Nancy, as they were by the trial court, they compel the conclusion that she would want this gastrostomy tube removed now that hope of recovery is gone.

The analysis of the majority is founded on a faulty premise, which infected its entire opinion. The majority concluded that Missouri has an "unqualified" interest in life, based on its belief that the state cannot make decisions about the quality of life. Pet. App. A29. The state, however, is not the individual or his family. No one would dispute that the state cannot dictate medical treatment based on its assessment of the quality or value of a life. But individuals have a tremendous interest in the quality of their own lives. A permanent, completely vegetative existence without thought, while the biological shell is mechanically preserved, is an unfortunate condition that we all have a fundamental liberty right to reject. This confusion of the state's and the citizen's roles no doubt caused, in part, the ruling against Nancy Cruzan and her family in the face of a nationwide legal and medical consensus to the contrary.

Although Nancy Cruzan's situation is by no means unique, a narrow ruling can resolve her case. Decisions about life, death, and life-prolonging medical treatment must be continually confronted in our society. At pres-

ent, those decisions are most often made for incompetent persons by loving families, with the advice of physicians. In this way the fundamental rights of incompetent persons are honored. By reversing the decision below, this Court would remove the specter of state-ordered medical treatment for all incompetents and return such decision-making to its rightful place.

ARGUMENT

I. THE MAJORITY BELOW ERRED IN HOLDING THAT INCOMPETENT PERSONS LOSE THE CONSTITUTIONAL RIGHT TO WITHDRAWAL OF UNWANTED MEDICAL TREATMENT, AND THAT THE STATE, RATHER THAN THAT PERSON'S FAMILY SHOULD MAKE DECISIONS ABOUT APPROPRIATE TREATMENT

On a cold January night over six years ago emergency personnel rushed to the scene of a serious car accident. Through use of various emergency procedures, they were able to start Nancy Cruzan breathing again. But, tragically, Nancy's brain had gone too long without oxygen. Pet. App. A92. These valiant emergency efforts, so often heroic, thus failed Nancy Cruzan and her family miserably. They left Nancy trapped in a state of limbo in which medical technology has advanced far enough to keep a person technologically "alive", but not far enough to restore any kind of meaningful life. Her father consented to surgical insertion of the gastrostomy tube shortly after the accident, when hope for Nancy's recovery remained. *See supra* at 7. But now hope is gone, and the majority below has deprived him of

the power to withdraw his original consent.[7] Pet. App. A42-A43.

Indeed, the majority below completely excluded the Cruzan family from decisions regarding Nancy's medical treatment. Moreover, it disregarded important evidence of Nancy's values and wishes. The majority rejected as unreliable all evidence in the case except express statements Nancy made before the accident about death and refusal of life-prolonging treatment. In effect, the majority elevated Missouri's interest in Nancy's life over Nancy's own interest in her life. The decision below is flatly inconsistent with decisions of this Court acknowledging the rights of incompetents and deferring to the special competence of families as surrogate decisionmakers.

A. All Persons Have A Fundamental Liberty Interest To Stop Unwarranted Bodily Intrusions By The State

The Due Process Clause of the Fourteenth Amendment protects the fundamental liberties of citizens against unjustified intrusions by the state. *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2341 (1989) (plurality opinion). This Court described the scope of these traditional protections in *Meyer v. Nebraska*, 262 U.S. 390 (1923):

> "Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge,

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7. Nancy was married at the time of her accident and her husband at the time also provided written consent. Pet. App. A92. After the accident he was divorced from Nancy. Pet. App. A46 n.1 (Blackmar, J., dissenting).

> to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

262 U.S. at 399.

Unwarranted physical invasions of the body are clearly prohibited. *Rochin v. California,* 342 U.S. 165, 172 (1952); *Skinner v. Oklahoma,* 316 U.S. 535, 541-43 (1942) (state prohibited from controlling, by sterilization, which convicts might reproduce because reproduction is a "basic liberty" cherished as "one of the basic civil rights of man"); *see also Winston v. Lee,* 470 U.S. 753, 763-66 (1985); *Schmerber v. California,* 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society"); *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men"). This Court has likewise long recognized and protected an individual's right to self-determination, which allows a person to control decisions made about his own body. *See, e.g., Union Pacific Ry. Co. v. Botsford,* 141 U.S. 250, 251 (1891) ("No right is held more sacred . . . than the right of every individual to the possession and control of his own person").

These traditional notions of autonomy fostered the doctrine of informed consent. As the majority below recognized: "The doctrine of informed consent arose in recognition of the value society places on a person's autonomy and as the primary vehicle by which a person can protect the integrity of his body. If one can con-

sent to treatment, one can also refuse it." Pet. App. A20. At common law a doctor who administered medical treatment without consent committed a battery. *See* W. Keeton, Prosser & Keeton on Torts 189-90 (5th ed. 1984); *Slater & Baker v. Stapleton*, 95 Eng. Rep. 860 (K.B. 1767). This Court has also recognized the fundamental principle that medical treatment cannot be administered to an individual without informed consent to that treatment. *See, e.g., Bowen v. American Hospital Association*, 476 U.S. 610, 627-31 (1986) (plurality opinion); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 803-04 (1986) (White, J., dissenting).

Major medical groups similarly conclude that a doctor cannot administer medical treatment without informed consent and that he must likewise stop such treatment when consent is withdrawn. *See, e.g.*, President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, "Deciding to Forego Life-Sustaining Treatment" 43-44, 196 (U.S. Govt. Printing Office 1983) ("President's Commission").[8]

The bare majority below did not dispute that these long protected autonomy rights exist for competent persons. Pet. App. A38. It erred dramatically, however, when it held that because Nancy is permanently unconscious, she has lost the constitutional right to have choices made about her medical treatment which reflect her

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8. In 1980, President Reagan appointed a special commission composed of leaders in the fields of medicine and ethics to study various ethical problems created by modern medical technology, including the unfortunate situation of PVS patients. The Commission's 552 page report, cited above, reflects the carefully considered judgments of many of the leaders of our country in the areas of ethics and medicine. It was in evidence before the trial court and is mentioned throughout this brief.

interests and values. Pet. App. A41. Since Nancy can no longer speak and since she did not execute express directives before her accident, her right to have her family or any other surrogate decisionmaker participate in her medical treatment decisions, and her right to be free from unwarranted, state-ordered physical invasion of her body, are lost in Missouri. Pet. App. A41. The decisions of this Court are expressly to the contrary.

B. Incompetent Persons Retain Constitutional Rights Even Though They Cannot Now Voice Their Choices

The protection of the Constitution has long been extended to persons unable to speak for themselves. Constitutional liberty and privacy interests of bodily integrity are not cancelled when a citizen falls unconscious or incompetent and thus cannot directly exercise those rights. Generally, parents or close family members are called upon to exercise the incompetent person's rights. In *Youngberg v. Romeo*, 457 U.S. 307 (1982), for example, this Court held that a profoundly retarded 33 year old man, with the mental age of an infant and no ability to speak, retains substantive liberty rights to reasonable safety in his confinement, freedom of movement and proper training in a state hospital. 457 U.S. at 315-16. His claim to those constitutional rights was properly raised on his behalf by his mother. *Id.* at 309-10. The Court did not hold that the severely retarded man lost his right to liberty simply because he was not competent to make decisions about his medical treatment or did not execute express directives prior to incompetency. *Id.* at 320-21.

Similarly, this Court has found that a retarded child who cannot express his own wishes nonetheless enjoys a "substantial [procedural] liberty interest in not being confined unnecessarily for medical treatment." *Parham v. J.R.*, 442 U.S. 584, 600 (1979). This Court found that the "interest at stake is a combination of the child's and parents'" and it is exercised by the parents acting in the child's best interest. 442 U.S. at 600-02. The "statist notion" that a government agency rather than the parents should make the decision about how to exercise the child's liberty is "repugnant to American tradition." *Id.* at 603. *See Thompson v. Oklahoma*, 108 S. Ct. 2687, 2693 n.23 (1988) ("Children, the insane, and those who are irreversibly ill with loss of brain function, for instance all retain 'rights', to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind"); *Jackson v. Indiana*, 406 U.S. 715, 717, 730-31 (1972) ("mentally defective deaf mute" with the mental level of an infant retained equal protection and due process rights to fair confinement); *Addington v. Texas*, 441 U.S. 418, 433 (1979) (allegedly mentally ill person retained procedural due process right to a determination of mental illness by a standard of proof greater than a preponderance of the evidence prior to commitment to a mental institution); *Breithaupt v. Abram*, 352 U.S. 432, 435-436 (1957) (unconscious man retained liberty interest; here those rights not violated by a blood test); *see also DeShaney v. Winnebago Dep't of Social Services*, 109 S. Ct. 998, 1002-03 (1989) (severely retarded boy retained substantive guarantees of liberty, here those rights were not violated by state omission to act); *Prince v. Massachusetts*, 321 U.S. 158, 165-66 (1944) (the "rights of children" to exercise their reli-

gion, the "child's right to receive" religious with secular schooling, and "children's rights to receive teaching in languages other than" English have been repeatedly guarded by this Court "against the state's encroachment").

There is no question that Nancy Cruzan cannot state today what her wishes are. But medical treatment choices are being made every day for Nancy. At present those decisions are dictated by the state. As the decisions above make clear, she retains the constitutional right to have such decisions made in a manner that reflects her beliefs and values. The only issue then is who is in the best position to make a decision consistent with Nancy's values and the protection of her rights.

C. The Concept Of Family Decisionmaking Is Deeply Rooted In The Traditions Of This Country

Nancy Cruzan retains the right to have her family make decisions about her ongoing medical treatment. As now Chief Justice Blackmar observed in his dissent below, there "is nothing new in substituted decisionmaking" by family members. Pet. App. A47 (Blackmar, J., dissenting). State courts outside of Missouri have recognized that incompetent persons and their families retain such rights:

> Family members are best qualified to make substituted judgments for incompetent patients not only because of their peculiar grasp of the patient's approach to life, but also because of their special bonds with him or her. Our common human experience informs us that family members are generally most concerned with the welfare of a patient. It is they

> who provide for the patient's comfort, care, and best interest, and they who treat the patient as a person, rather than a symbol of a cause."

In re Jobes, 529 A.2d 434, 445 (N.J. 1987).

The decisions of this Court directly support this kind of family decisionmaking. Historically, this Court has acknowledged the importance of the family and has looked to the family to make decisions for, and to protect, incompetent or other family members who cannot speak for themselves. *See Michael H. v. Gerald D.*, 109 S. Ct. at 2342 (even greater than "historic respect," historical "sanctity" has been "traditionally accorded to the relationships that develop within the unitary family"); *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) ("The intangible fibers that connect parent and child . . . are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self evident that they are sufficiently vital to merit constitutional protection in appropriate cases"); *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984) ("family relations, and any relationships which foster creation and sustenance of the family, are" protected by the Court historically); *Parham v. J.R.*, 442 U.S. at 602 ("historically [the law] has recognized that natural bonds of affection lead parents to act in the best interest of their child," citing 1 W. Blackstone, Commentaries 447; 2 J. Kent, Commentaries on American Law 190); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) ("the traditional relation of the family" is "a relation as old and as fundamental as our entire civilization");

Prince v. Massachusetts, 321 U.S. at 166 (there is a "private realm of family life which the state cannot enter"); *Pierce v. Society of the Sisters,* 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska,* 262 U.S. at 399-400.

While this Court has recently cautioned against the expansion of substantive due process rights to areas not "deeply rooted in this Nation's history and tradition," *Bowers v. Hardwick,* 478 U.S. 186, 191-92, 195 (1986), it has also recently reaffirmed that families like the Cruzans are the bedrock of that history and tradition. *Michael H. v. Gerald D.,* 109 S. Ct. at 2342 ("sanctity" accorded the liberty rights vested in the "unitary family"). It is difficult to conceive of a scenario more deeply embedded in our history and tradition than a father and mother rushing to the side of a child felled by an accident, making the decision to start medical treatment, and then, heartbroken, deciding to stop treatment when hope is gone.

This Court also has often cited a national consensus on a particular issue in connection with identifying those constitutional interests that are recognized as "fundamental." *See Michael H. v. Gerald D.,* 109 S. Ct. at 2341-42; *Thompson v. Oklahoma,* 108 S. Ct. 2687, 2706 (1988) (O'Connor, J., concurring); *Bowers v. Hardwick,* 478 U.S. 186, 192-94 (1986). There can be no dispute that the consensus of state courts outside of Missouri,[9]

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9. *See, e.g., Rasmussen v. Fleming,* 154 Ariz. 207, 741 P.2d 674 (1987); *In re Gardner,* 534 A.2d 947 (Me. 1987); *In re Peter,* 108 N.J. 365, 529 A.2d 419 (1987); *Brophy v. New England Sinai Hospital,* 398 Mass. 417, 497 N.E.2d 626 (1986); *In re Conroy,* 98 N.J. 321, 486 A.2d 1209 (1985); *John F. Kennedy Hosp. v. Bludworth,* 452 So.2d 921 (Fla. 1984); *In re Torres,* 357 N.W.2d 332 (Minn. 1984); *In re L.H.R.,* 253 Ga. 539, 321 S.E.2d 716 (1984); *In re Hamlin,* 102 Wash. 2d 810, 698 P.2d 1372 (1984);

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as well as the consensus of the organized medical community, support the efforts of the Cruzan family on Nancy's behalf. President's Commission at 43-45; American Hospital Association, "The Patient's Choice of Treatment Options," (1985) (family surrogate decisionmakers "must seek and take note of any information reflected in oral statements, life style commitments" and any other information about the patient); American Medical Association, "Withholding or Withdrawing Life-Sustaining Medical Treatment," Current Opinions of the Council on Ethical and Judicial Affairs 2.20 (1989); American Academy of Neurology, "Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient," (1988) ("Academy of Neurology Statement").

The President's Commission studied in detail the question of withholding or withdrawing treatment from incompetent patients. It concluded that the rights of self-determination and treatment with dignity for patients unable to voice their preferences are best protected by appointment of family members as surrogate decisionmakers. Families share a special bond. They are most knowledgeable about a patient's values and preferences and the "family is generally most concerned about the good of the patient." *Id.*

Footnote continued—

In re Colyer, 99 Wash. 2d 114, 660 P.2d 738 (1983); *Eichner v. Dillon*, 73 A.D.2d 431, 420 N.E.2d 64, *cert. denied*, 454 U.S. 858 (1981); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (N.J.), *cert. denied*, 429 U.S. 922 (1976); *Corbett v. D'Alessandro*, 487 So.2d 368 (Fla. App.), *review denied*, 492 So.2d 1331 (Fla. 1986); *In re Drabick*, 245 Cal. Rptr. 840 (Cal. App. 6 Dist. 1988), *review denied* (Cal. July 28, 1988), *cert. denied*, 109 S. Ct. 399 (1988); *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 516 N.Y.S. 2d 677 (1987); *Leach v. Akron General Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809 (1980); *Severns v. Wilmington Medical Center*, 425 A.2d 145 (Del. Ch. 1980); *see also Gray v. Romeo*, 697 F. Supp. 580 (D.R.I. 1988).

at 127-28. The family decisionmakers should be guided by the same two values important in decisionmaking for competent persons—promoting patient welfare and respecting patient self-determination. *Id.* at 132. The family members should attempt to reach the decision they believe the incompetent person would reach, based on their knowledge of the person as supplemented by any specific statements the person made prior to incompetency. *Id.* at 132-34. One specific factor that must be weighed is the impact of medical treatment decisions on the family of the incompetent person because "most people . . . have an important interest in the well-being of their families." *Id.* at 135, 183, 192-93; *see also* Livingston, *Families Who Care,* 291 Brit. Med. J. 919 (1985).[10]

Guidance is also found in the clear consensus among the state courts outside of Missouri, as well as among the medical profession, regarding the treatment of patients in a persistent vegetative state. Uniformly, these state courts and medical groups recognize that the 10,000 persistent

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10. Families have always been involved in medical treatment decisions for incompetent family members. Medical literature contains anecdotes from the early years of this country about doctors who were forbidden by family members from performing surgery on a patient when the doctor could offer no "promise that an improved state of health would follow." Faden & Beauchamp, *A History and Theory of Informed Consent,* 79 (Oxford Press 1986). Even under the historical doctrine of beneficence, under which doctors believed that informing a patient of his condition would only cause it to worsen, the family of the patient was fully informed and involved. Fourteenth century French surgeon Henri de Mondeville advised his colleagues: "Promise a cure to every patient, but tell the parents or friends if there is any danger." *Id.* at 102.

Decisions about death and dying, to the extent there were such decisions in the early years of our country, were made with or by the family. The "deathbed" was a real place, and most people died at home with their families. President's Commission at 17. Even people who did get admitted to medical care facilities "were discharged to the care of their families" when their "conditions proved incurable." *Id.* at 17.

vegetative state patients across the country represent a narrow class of patients who cannot benefit from aggressive medical treatment.

PVS patients are afflicted with the most severely debilitated condition possible short of death. The President's Commission described the societal consensus:

> "Most of what makes someone a distinctive individual is lost when the person is unconscious, especially if he or she will always remain so. Personality, memory, purposive action, social interaction, sentience, thought, and even emotional states are gone. Only vegetative functions and reflexes persist."

President's Commission at 174-75. For such patients aggressive treatment is required during the time that "improvement is thought possible," both to reverse unconsciousness and to overcome any other problems. *Id.* at 181. When a patient is reliably diagnosed as being permanently unconscious, however, treatment provides no benefit. *Id.* at 181-82. "Pain and suffering are absent, as are joy, satisfaction, and pleasure. Disability is total and no return to an even minimal level of social or human functioning is possible." *Id.* at 181-82. Moreover, continued treatment can put an emotional strain on the patient's family, "whose welfare, most patients, before they lost consciousness, placed a high value on." *Id.* at 183. It is not unethical therefore to remove all life-prolonging medical treatments from such patients at the request of the patient's family acting on the patient's behalf. *See, e.g.,* Academy of Neurology Statement III.B.[11]

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11. The consensus of the medical community is further evident from the amicus curiae support for the Cruzans in this Court. The amicus briefs in support represent the carefully considered positions of most of the doctors, nurses and hospitals in this

(Continued on following page)

The decisions of the state courts that have addressed the issue support the medical consensus regarding PVS patients.[12] Such patients outside of Missouri retain an extremely powerful federal privacy and liberty right not to be subjected to unwanted medical treatment. *See, e.g., In re Jobes*, 529 A.2d at 444 ("we find it difficult to conceive of a case in which the state could have an interest strong enough to subordinate a patient's right to choose not to be sustained in a persistent vegetative state"); *Rasmussen v. Fleming*, 741 P.2d at 678 ("Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form con-

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Footnote continued—

country. This Court on several occasions has reasoned that courts should defer to the medical judgments of the medical profession. *See, e.g., Youngberg*, 457 U.S. at 322 ("we emphasize that the courts must show deference to the judgment exercised by a qualified [medical] professional"); *Bowen v. American Hospital Ass'n*, 476 U.S. at 627 & n.13 ("As long as parents choose from professionally accepted treatment options the choice is rarely reviewed in court"); *see also Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3056 (1989) (the decision as to viability of a fetus is "a matter for the judgment of the responsible attending physician"); *Jacobson v. Massachusetts*, 197 U.S. 11, 34-35 (1905) (vaccination can be compulsory when "it is accepted by the mass of people as well as by most members of the medical profession").

The majority below removed the doctor from the medical treatment decisions about Nancy Cruzan and other similar patients. Once a treatment is started, the doctor's view as to its benefit, his understanding of a patient's wishes and interests, and his relationship with the patient's family, are simply no longer factors.

12. Results of citizen polls also support the Cruzans. A 1986 American Medical Association poll found that 73% of 1,510 respondents favored "withdrawing life support systems, including food and water, from hopelessly ill or irreversibly comatose patients if they or their family request it." American Medical Association, "Public Opinion on Health Care Issues-1986," (Chicago 1986). A recent survey conducted by the Colorado University's Graduate School of Public Affairs revealed that 85% of those surveyed would not want to have their life maintained with artificial feedings if they became permanently unconscious and could not eat normally. Fort Collins Coloradoan, Sept. 29, 1988, p. 1.

tinues"; not surprisingly, some people when caught in such a dilemma choose "a plan of medical treatment that allows nature to take its course"); *Brophy*, 497 N.E.2d at 635.

Even though now incompetent, Nancy Cruzan retains a constitutional liberty right against unwarranted bodily invasions ordered by the state. She retains the right to a decision about medical treatment which reflects her beliefs and values. And she retains the right to have that decision made by an appropriate surrogate decisionmaker —her family.

D. Missouri's General Interest In Prolonging Life Is Not Sufficient To Override Nancy Cruzan's Constitutional Rights To Withdrawal Of Unwanted Medical Treatment

Even in her completely debilitated state, Nancy Cruzan's liberty interest is not absolute. It must be balanced against the demands of organized society and the "State's asserted reasons for restraining individual liberty." *Youngberg*, 457 U.S. at 320. The majority below attempted to perform such balancing,[13] but it simply did not accord ample weight to the constitutional rights just discussed: that people, including incompetents, cannot be subject to unwarranted bodily invasion by the state. The majority below ignored important evidence from the trial about Nancy's beliefs and values because she is incompetent, and it erected a standard of proof that in practice will compel state-ordered medical treatment for most incompetent Missourians regardless of their

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13. The majority below did not apply a Missouri statute in its ruling. To the contrary, it expressly stated that no Missouri statute applied, Pet. App. A29, and it invited the legislature to pass guidelines to govern cases like Nancy Cruzan's. Pet. App. A44.

values. But most importantly it completely removed the family of Nancy Cruzan from the decisionmaking about Nancy's medical treatment, notwithstanding the family's special competence as a surrogate decisionmaker.

Moreover, the majority erected a state interest in life that it described as "unqualified." Pet. App. A29, A33. By definition, such an absolute interest can never be balanced, regardless of the strength of the individual's claim. In this manner the majority below has forced Nancy Cruzan to receive ongoing, state-ordered medical treatment in direct violation of her federal right to reject unwarranted physical invasion by the state. *See supra,* discussion at 17-29.

1. The Majority Below Ignored Federal Constitutional Rights By Removing The Family From Decisionmaking About Medical Treatment For A Loved One

The majority below simply eliminated the family of Nancy Cruzan from her medical decisionmaking. After *Cruzan,* the family in Missouri has absolutely no role in making the decision to withdraw medical treatment for a family member once that treatment is started. Pet. App. A39-A41.[14] This wholesale exclusion of an incompetent person's family is directly at odds with this Court's precedents protecting incompetents and the sanctity of the family. *See supra* discussion at 20-29. It denies Nancy Cruzan the federal right to have decisions made by family members who know, based on a lifetime to-

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14. As discussed below, *see infra* discussion at 33-36, incompetent persons in Missouri can have medical treatment withdrawn only if such a treatment causes pain (recognized as an impossibility for a PVS patient), or in the highly unlikely event that a person executed an express directive rejecting treatment prior to incompetency. Pet. App. A40-A41.

gether, that she would want this state-ordered medical treatment stopped.

Understandably, the majority could cite little legal precedent to support its substitution of the state for a patient's family. Instead, it developed strained interpretations of different concepts related to medical treatment. To begin, it turned the law of informed consent on its head.[15] The majority acknowledged that one who has the power to consent to treatment also has the power to refuse or withdraw consent. Pet. App. A20. But it then concluded that "Nancy's statements alone" about not wanting to live life as a "vegetable," made prior to her accident, cannot now constitute "truly informed" consent to withdrawal of treatment. Pet. App. A37.

Remarkably, the majority ignored that *Nancy* never consented to the treatment in question initially—her father did. *See supra* at 7. One cannot miss the irony that the Cruzans' decision now to seek withdrawal of the tube is far more informed than their decision to insert it more than six years ago, shortly after their daughter's accident. Then Nancy's prognosis was uncertain and hope of recovery existed. Now her sad prognosis is clear. Moreover, no one told the Cruzans

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15. While questions of informed consent and regulation of gastrostomy treatment generally may present issues of state law, when state law is construed as it was below, to deny directly and arbitrarily federal rights, then a federal question is presented. The majority below considered Nancy's federal privacy and liberty rights as interwoven with different state law considerations. Pet. App. A9, A29, A31-A34, A38, A40 ("casting the balance between the patient's common law right to refuse treatment/constitutional right to privacy and the state's interest in life"). Its analysis regarding informed consent and medical treatment directly infringes federal rights. No effort was made to separate federal from state concerns or to identify a separate state law basis "clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). To the contrary, the majority considered Nancy to have one single federal/state right, which it denied.

then that they were forfeiting the power to later withdraw consent on Nancy's behalf. Such consent, therefore, was not truly informed. If the power to consent includes the power to refuse or withdraw consent, then Nancy's family must retain the power to withdraw treatment to which they originally had the power to consent. *See* President's Commission at 73-77 (the power to consent necessarily includes the power to withdraw consent).

The majority's interpretation of the law of informed consent has thus sentenced countless Missouri families to wrestle with an incredibly unfair (and unnecessary) dilemma. Parents like the Cruzans will be forced to choose to consent to (or refuse) gastrostomy surgery early on when prognosis is uncertain, knowing that if their daughters do not recover they cannot withdraw their consent because "*continuation* of feeding through the tube is not heroically invasive."[16] Pet. App. A34 (emphasis in original). A family will have to weigh the slim yet real chance [17] of recovery, against the probability of condemning a loved one to a perpetual artificial existence.[18]

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16. This distinction between initially withholding and subsequently withdrawing a gastrostomy tube is contrary to good medical practice. President's Commission at 76; Academy of Neurology Statement IV ("It is good medical practice to initiate the artificial provision of fluids and nutrition when the patient's prognosis is uncertain, and to allow for the termination of treatment at a later date when the patient's condition becomes hopeless").

17. *See, e.g.*, Levy, et al., "Predicting Outcome From Hypoxic-Ischemic Coma," 253 *J.A.M.A.* 1420, 1422-23 (1985) (discussing rare possibility of recovery for patients like Nancy in the first weeks after an accident).

18. The President's Commission decried the very rule that the majority below adopted: "An even more troubling wrong occurs when a treatment that might save life or improve health is not started because the health care personnel are afraid that they will find it very difficult to stop the treatment if, as is fairly likely, it proves to be of little benefit." President's Commission at 75.

Nancy Cruzan is being subjected to ongoing, state-ordered medical treatment against her wishes. The removal of Nancy's family from decisions about her medical treatment denies Nancy Cruzan the right to have those who love her and know her best make fundamental decisions, reflecting her values, which she no longer can make. By removing her family, the majority below thus denied an incompetent person her constitutional right to be free from unwarranted, ongoing bodily invasion by the state. The removal of her family also denied Nancy the right, long acknowledged by this Court, to protect fundamental, private decisionmaking, and the sanctity of the family, from state intervention.

2. The Majority Below Compromised Federal Constitutional Rights By Ignoring Significant Evidence Of Nancy's Wishes

The majority below chose to reject all testimony about Nancy Cruzan, her life and her values, as "inherently unreliable." Pet. App. A43. It considered as evidence only the express statements Nancy made, prior to her accident, about death and life-prolonging medical treatment. By limiting the evidence in this way, the majority erected a standard of proof that virtually no incompetent person will ever be able to meet. As with removal of the family, this heightened standard of proof denies Nancy Cruzan and other incompetent persons the federal right to be free from unwarranted bodily invasion by the state. *See supra* discussion at 17-29.

The trial court, after a three day bench trial, concluded that Nancy's "lifestyle and other statements to family and friends suggest that she would not wish to continue her present existence without hope as it is." Pet. App. A94. While the majority chose not to consider the

evidence of Nancy's lifestyle that the trial court found important,[19] it did not state specifically what standard it would apply. Instead, it simply evaluated Nancy's statements about death and life as a "vegetable," and concluded that those statements, when viewed in isolation, were insufficient to "constitute clear proof" of her present intent to withdraw medical treatment. Pet. App. A37.

But common sense suggests, and the testimony at trial confirmed, that few people will talk much about their own death, particularly young, healthy, independent people.[20] Similarly, most young people will not execute any type of express directive in anticipation of serious disability or injury. These people nonetheless have clear values and views. TR. 397-99, 433, 524-25, 532-34, 557-59, 580. The evidence relied on by the trial court in this case is exactly the kind that will be available in most cases.

Witness after witness testified that Nancy, always independent in every way, would be aghast at her permanent inability to think, her contractures and quadriplegia, and her inability to walk, talk or do anything for herself. TR. 394-97, 542-43, 561, 584. Many witnesses testified about Nancy's deep love of family. *See supra* at 5. There is little question that her plight and the inability of her

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19. The majority did not explain by what rule it could disregard, at the appellate level, significant evidence relied on by the trial court. As Judge Higgins pointed out in his dissents on the merits and to the denial of rehearing, this action by the majority violated the clear rules of appellate review. Pet. App. A55, A83-A86 (Higgins, J., dissenting).

20. *See, e.g.*, President's Commission at 193 (only "infrequently" will an unconscious person have expressed clear wishes regarding treatment prior to his accident); *Barber v. Superior Court of California*, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484, 489 (Cal. Ct. App. 1983) ("the typically human characteristics of procrastination and reluctance to contemplate the need for . . . [prior directives relating to death] makes [such directives] a tool which will all too often go unused by those who might desire it").

family to fulfill what they know her wishes to be is subjecting Nancy's family to "continuous torture which no family should be forced to endure." Pet. App. A51 (Blackmar, J., dissenting) (Her parents and sister Christy have suffered, among other things, physical illness, sleeplessness, marriage strain and the need for professional counseling). TR. 494-98, 508, 543-44. Those who knew Nancy best testified that she would absolutely not want to see her family treated in this manner by the state, allegedly acting on her behalf. TR. 389-90, 399, 544, 584, 590.

This evidence, when coupled with the significant additional evidence of express statements Nancy made about life-prolonging treatments, is absolutely compelling. Nancy made repeated statements just a year before the accident that she would not want to live life as a "vegetable." TR. 388-89, 396. Far from being "unreliable for the purpose of determining her intent," Pet. App. A37, these statements, made shortly before the accident, directly corroborate what Nancy's family and friends know based on their 25 years together: Nancy would want this treatment stopped.

To ignore the significant evidence of Nancy's beliefs and life-long values, or to view the statements made by Nancy prior to incompetency in isolation from important evidence of Nancy's beliefs and values, ignores reality. Such an arbitrary rule sentences most incompetent persons in Missouri, including Nancy Cruzan, to an artificial existence that the evidence makes clear they would never choose. When coupled with the removal of families from such decisionmaking, the decision amounts to state-ordered medical treatment for all incompetents. Pet. App. A10 ("We decide this case not only for Nancy, but for many, many others who may not be surrounded

by the loving family with which she is blessed").[21] The intrusion by the state is thus pervasive and clearly violates individual federal rights.

3. Missouri's Refusal To Protect Individual Assessments Of Quality Of Life Is Inconsistent With The Consensus Of Our Society And Unnecessary To Further The State Interest In Protecting Vulnerable Persons

The majority below recognized that it stood alone. It admitted that "nearly unanimously" the courts of states other than Missouri have deferred to doctors and

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21. The recent decisions of this Court in *Webster v. Reproductive Health Services* and *DeShaney v. Winnebago Dep't of Social Services* illustrate how far beyond the bounds of permissible state intervention the majority below has stepped with its ruling. *DeShaney* found no violation of liberty interests by the failure of a state agency to take action to stop child abuse. According to the Court, when the state agency returned Joshua DeShaney to his abusive father, "it placed him in no worse position than that in which he would have been had it not acted at all." 109 S. Ct. at 1006. Similarly, in *Webster,* the state's choice not to perform abortions in public hospitals left a woman with the same private choices "as if the State had chosen not to operate any public hospitals at all." 109 S. Ct. at 3052.

Nancy Cruzan and her family have no option in Missouri. The state's broad prohibition against these private medical choices is exactly the type of situations this Court warned about in *Webster*: "Constitutional concerns are greatest . . . when the State attempts to impose its will by the force of law." 109 S. Ct. at 3052.

The asserted state interest in this case is significantly different from the Missouri state interest in *Webster*. In *Webster,* Missouri's legal position rested on its asserted interest in protecting the fetus from the moment of conception. Here, Nancy Cruzan is not pregnant and there is no fetus that the state is trying to protect. Instead, Missouri is claiming the right to maintain Nancy Cruzan in a persistent vegetative state for the rest of her life—a period of time that may extend for 30 more years. Nor it is necessary to speculate about issues of human potential. The record in that regard is unfortunately clear. Nancy will never emerge from the permanent unconsciousness in which she has existed on some purely biological level since 1983.

families. Pet. App. A10-A12 & n.4. And, it did not cite "a single case, old or new," *Michael H. v. Gerald D.*, 109 S. Ct. at 2344, in which a state legislature has removed decisionmaking for incompetent family members from the family and doctors of the incompetent person. Nor did it attempt to dispute that the medical community is opposed to its decision. It also did not suggest that the people of Missouri or from other parts of the country support its decision.[22]

The majority grounded its solitary stand on its belief that the state cannot make decisions about the quality of life. Pet. App. A29 ("Were quality of life at issue, persons with all manners of handicaps might find the state seeking to terminate their lives"). To protect against such improper Missouri state action, the majority determined that Missouri's interest in life must be "unqualified." Pet. App. A40. It is at this point in its analysis that the majority faltered, and thereby departed dramatically from decisions of courts in its sister states and from the teachings of the Constitution. The error infected the entire decision.

No one would dispute that in a democratic society the state cannot dictate medical treatment based on its assessment of the worth of someone's life. *See, e.g., Brophy*, 497 N.E.2d at 635 ("It is antithetical to our scheme of ordered liberty and to our respect for the autonomy of the individual for the State to make decisions regarding the individual's quality of life"). Our tragic history teaches us that the state's willingness to impose medical treatment, without regard for a person's autonomy, gravely threatens society's most vulnerable persons. *See generally* J. Katz, Experimentation With

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22. *See supra* note 12.

Human Beings (1974) (discussing human experiments on chronically ill patients, among others, without consent). But the state is not the individual. Individual assessments of quality of life are critical to preservation of individual liberty.

All persons have a tremendous interest in the quality of their own lives—how they live, how they die, and their ability to pursue their goals and happiness. A permanent, completely vegetative existence without thought, while the biological shell is mechanically preserved, is a condition we all have a fundamental constitutional right to reject. That right is not lost by reason of incompetency. *See supra* discussion at 20-22.

Nancy Cruzan retains the constitutional right to be free from ongoing, unwanted, stated-ordered medical treatment. When hope for recovery existed, her family aggressively sought all medical treatment on her behalf. Now that hope is gone they know, as only a family can, that Nancy would want to be set free. Quality of life is an absolutely appropriate factor for a family to consider when decisions about life-prolonging medical treatment for a loved one must be made and family members are trying to decide what choice their loved one would make. *See* President's Commission at 135. Such intimate family decisionmaking has nothing to do with the slippery slope of state-ordered decisions about quality of life. Our Constitution stands as a bastion of protection for individuals against such abuse by the state.[23]

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23. As the majority recognized, many states outside of Missouri have allowed family members acting on the incompetent patient's behalf to withdraw medical treatment once PVS is reliably diagnosed. The majority, however, cannot and does not cite one instance from the literature or case law in these other states in which such a ruling led to discrimination by

(Continued on following page)

No one would dispute that the state has an interest in the lives of its citizens, and in ensuring reasoned decisionmaking for incompetent patients.[24] But, as other states have realized, the legitimate role of the state is a narrow one in the sad family decisions thrust on families like the Cruzans. The intimate decisionmaking involved in cases like Nancy Cruzan's is, and always has been, an intensely private matter between a family acting on their loved one's behalf, and the patient's doctor. The state should not be involved at all in such private decisionmaking, unless it has evidence of lack of decisional capacity on the part of the family decisionmaker, disagreement among the family, conflict of interest between the family and patient or evidence the family decisionmaker intends to ignore the values or previously expressed wishes of the patient.[25] President's Commission at 127-28, 196. *See*

Footnote continued—

the state against the handicapped. Judge Blackmar's admonition rings far more true than the fears of the majority: "The courts are open to protect incompetents against abuse." Pet. App. A50 (Blackmar, J., dissenting). *See also Webster v. Reproductive Health Services,* 109 S. Ct. at 3058 (fears that a court decision will lead to immoral action by our citizens and legislatures "does scant justice to those who serve in such bodies and the people who elect them").

24. Examples of cases in which a state is justified in its intrusion are those involving denial of blood transfusions to the children of Jehovah's Witness by their parents. Pet. App. A32-A33 & n.17. Those extreme cases are obviously distinguishable from Nancy's case. In such cases, the state intervenes to provide simple medical procedures needed to give a child a meaningful life. The intervention is on behalf of a specific individual to stop a specific abuse, not a broad general rule of intervention. The courts hold that the parent is not free to force his religious views on his child in the face of medical advice that a decision to withhold the transfusion is "irrational and abusive." Pet. App. A48 (Blackmar, J., dissenting). No such potential for meaningful life exists here and the Cruzans' decision, far from being considered abusive, is supported by the medical community.

25. There is no such evidence in the Cruzans' case. *See* Pet. App. A10.

Missouri State Medical Association Resolution 14 (April 15, 1989) ("Resolved, that ethical decisions such as the right to refuse treatment be left to the individual, family and/or Health Care Surrogate, and not to the State").

Evidence of such a conflict justifies intervention by a state.[26] It is important to remember that one of the most common procedures to protect the state's interest, appointment of an independent guardian ad litem for the incompetent person, was used here. Nancy's guardian ad litem concluded based on "clear and convincing testimony of many witnesses at trial about Nancy Cruzan, who she was, what she said and how she lived, that she would not want the medical treatment the Missouri Supreme Court has forced on her." Guardian's Response to Cert. at 5.

Missouri's fear of the state making quality of life decisions is a real one. But the arbitrary, insurmountable standard of proof it erected, and its removal of the family from intimate family decisions, involves the state in just such decisions. The majority below has decided that Nancy must be preserved on machines, regardless of her wishes and values or the wishes of her family. The Constitution prohibits such unfettered state intrusion. Nancy Cruzan, though now incompetent, retains the right to reject ongoing state-ordered invasions of her body, which the evidence at trial made overwhelmingly clear she would reject now that hope for her recovery is long gone. She likewise retains the right to have her family participate in decisions about her medical treatment. The decisions of this Court protect her federal right to have those wishes honored.

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26. Some state courts have looked to an ombudsman and others have appointed a guardian ad litem when family members are in disagreement or there are no family members. *See, e.g., In re Jobes*, 529 A.2d at 447-50.

II. THE DECISION BELOW VIOLATES THE EQUAL PROTECTION CLAUSE BY MAKING ARTIFICIAL DISTINCTIONS REGARDING INCOMPETENT PERSONS

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985). "This is essentially a direction that all persons similarly situated should be treated alike." *Id.* When social or economic legislation is at issue, states are given wide latitude. *Id.* at 440. But classification in legislation or state court action that impinges on "basic civil rights" is subject to "strict scrutiny" by this Court. *Skinner v. Oklahoma,* 316 U.S. 535, 540-41 (1942). State court actions can be upheld "only if they are suitably tailored to serve a compelling state interest." *Cleburne,* 473 U.S. at 440. The majority decision below fails this test. Indeed, it cannot survive the less restrictive rational relationship test. *Michael H. v. Gerald D.,* 109 S. Ct. at 2346, for although the end of protecting vulnerable people is surely legitimate, the means is not rational.

The complete exclusion of the family and the high standard of proof set up for incompetent persons by the majority below will in practical effect deny virtually all incompetent persons, as a class, the right of fundamental liberty. Except for the extremely limited few who execute prior directives, all other incompetent persons are denied the right to a decision that reflects their beliefs and values. This broad, arbitrary rule, which makes no provision for assessing individual values, does not protect the rights of incompetent persons. To the contrary, it stops important decisionmakers from participating in treatment decisions for incompetents. In addi-

tion, other incompetent persons in the future will suffer a different but equally substantial denial of equal protection under this rule. There will be incompetent people who could benefit from treatment, but whose parents or other family members will refuse initiation of treatment, fearing the case of Nancy Cruzan. These people also lose important rights under the majority decision below.

A New York appellate court analyzed a case similar to Nancy Cruzan's, and could find no rational basis for treating incompetent and competent persons differently:

> "[B]y standards of logic, morality, and medicine the terminally ill should be treated equally, whether competent or incompetent. Can it be doubted that the 'value of human dignity extends to both'? What possible societal policy objective is vindicated or furthered by treating the two groups of terminally ill *differently?* What is gained by granting such a fundamental right only to those who, though terminally ill, have not suffered brain damage and coma in the last stages of the dying process? The very notion raises the spectre of constitutional infirmity when measured against the Supreme Courts recognition that incompetents must be afforded all their due process rights; indeed any State scheme which irrationally denies to the terminally ill incompetent that which it grants to the terminally ill competent patient is plainly subject to constitutional attack."

Eichner v. Dillon, 73 A.D.2d at 464-65.

In addition to denying Nancy Cruzan's fundamental liberty interests to refuse state-ordered medical treatment, the majority decision below denied her the equal protection of the laws because she is incompetent. The decision below should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Missouri Supreme Court should be reversed.

Respectfully submitted,

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