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,

v.

ROBERT HARMON, Director of the Missouri Department of Health, and DONALD LAMKINS, Administrator of the Missouri Rehabilitation at Mount Vernon,

Respondents,

v.

THAD C. McCANSE, Guardian, Ad Litem,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the constitutional right of privacy requires that nutrition and hydration, provided by means of a surgically implanted tube, be withdrawn from an incompetent ward of the state when she is not terminally ill and there is no clear and convincing evidence as to her wishes.

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COUNTER STATEMENT OF THE CASE

In the early morning hours of January 11, 1983, Nancy Cruzan was involved in a single car automobile accident in Jasper County, Missouri. At the time of the arrival of a highway patrolman some six minutes later,

there was no observable respiration or cardiac function. However, shortly after the arrival of paramedics on the scene, resuscitation attempts were initiated and cardiac function and spontaneous respiration were quickly recommenced. Petitioner's Appendix, pp. A6 through A7.

During the first few weeks following the accident, rehabilitation efforts were begun and Nancy Cruzan's condition seemed to improve. During this period, although she was able to take nutrition orally, a gastrostomy tube was surgically implanted in order to ease the feeding process. Eventually, however, rehabilitation efforts were discontinued in the belief that she was not making enough progress. Over the next several months, Nancy Cruzan was in and out of hospitals in the Jasper County area. In October, 1983, she was admitted to the Mount Vernon Rehabilitation Center for long term care. Petitioner's Appendix, pp. A7 and A92-A93. Nancy Cruzan has remained in the Mount Vernon Rehabilitation Center since that time and the cost of her care is borne by the state. Petitioner's Appendix, p. A96.

Although there was conflicting evidence, the trial court found, and the Supreme Court affirmed, that Nancy Cruzan suffered anoxia (deprivation of oxygen) as a result of the automobile accident resulting in cerebral cortical atrophy which is irreversible, permanent, progressive and ongoing. She was found to be oblivious to her environment except for reflexive responses to sound and certain noxious or painful stimuli. Her respiration and circulation are not artificially maintained and are within normal limits. At no time has an electroencephalogram reading for her registered isoelectric or flat. Nancy

Cruzan, therefore, although diagnosed as being in a persistent vegetative state, does not meet Missouri's definition of death contained in § 194.005, RSMo 1986, nor is she terminally ill. Petitioner's Appendix, pp. A7-A8 and A93-A94.

Trial Court Proceedings

On October 23, 1987, Nancy's parents (who are also her court appointed guardians) filed a petition seeking a declaration that she had a right, stemming from both common law and the federal constitutional right of privacy, which authorized them to request that nutrition and hydration be withdrawn. The petition also sought injunctive relief directing Robert Harmon, the Director of the Missouri Department of Health and Donald Lamkins, Superintendent of Mount Vernon Rehabilitation Center, to comply with the guardian's request. Following a three day bench trial to the Probate Court of Jasper County in March, 1988, a judgment was rendered on July 27, 1988. Petitioner's Appendix, p. A89.

Based upon evidence presented by the guardians, the Probate Court found that "in somewhat serious conversation" with a friend, Nancy Cruzan expressed the thought "that if sick or injured she would not wish to continue her life unless she could live at least half way normally." The court found that these statements "suggests that given her present condition she would not wish to continue on with her nutrition and hydration." Petitioner's Appendix, pp. A97-A98.

Without mentioning the constitutional right of privacy pled by the guardians, the trial court found that

Nancy Cruzan's right to liberty under the federal constitution would be denied to the extent that state statutes or public policy "prohibits withholding or withdrawal of nutrition and hydration or euthanasia or mercy killing, if such be the definition, under all circumstances, arbitrarily and with no exceptions, . . ." Petitioner's Appendix, p. A99. The court also found that to deny her guardians the authority to act in this instance would deprive Nancy Cruzan of equal protection of the law. The court therefore authorized, but did not require, the guardians to request the withdrawal of nutrition and hydration from their ward. Petitioner's Appendix, p. A99. The Probate Court also enjoined the respondents to carry out any request made by the guardians to withdraw nutrition and hydration. Petitioner's App., p. A100.

Missouri Supreme Court Decision

In both their statement of the case, as well as in the argument portion of their petition, the petitioners drastically mischaracterize the holding of the Missouri Supreme Court. Given that the petitioners' mischaracterizations appear repeatedly, respondents Harmon and Lamkins cannot hope to correct each instance without unduly prolonging their brief in opposition. However, respondents would like to correct the most extreme examples of petitioners' mischaracterizations and, in the process, give a truer picture of the holding of the Missouri Supreme Court.

Perhaps the most illustrative example of plaintiffs' mischaracterization of the holding below appears at page 7 of their petition where they state:

> . . . the majority concluded that Missouri's strong interest in life outweighed any constitutional or common law right to refuse medical treatment retained by an incompetent person like Nancy Cruzan.

Petitioners, thus, attempt to portray the opinion below in absolutist terms when the majority of the Missouri Supreme Court did not take such an approach. The citation given by the petitioners (Petitioners' App., p. A38) reveals that the decision below is based solely upon the facts of this particular case. That the decision is limited to these specific facts is borne out by examination of the majority's discussion leading up to the language cited by the petitioners. Petitioners' App., p. A36-A37. The Missouri Supreme Court did not hold that the state's interest in preserving life outweighed any constitutional or common law right to refuse medical treatment. The majority opinion dealt only with the particular factual circumstances before it, i.e., a withdrawal of nutrition and hydration. Even within the context of a request to withdraw nutrition and hydration, the court did not purport to decide that matter for all individuals. The court held only that:

> The issue is not whether the continued feeding and hydration of Nancy is medical treatment; it is whether feeding and providing liquid to Nancy is a burden to *her* . . . We refuse to succumb to the semantic dilemma created by medical determinations of what is treatment; those distinctions often prove legally irrelevant. For the reasons stated, we do not believe the care provided by artificial hydration and nutrition is oppressively burdensome to *Nancy* in this case.

(Emphasis in the original). Petitioners' App., p. A36-A37. In short, the Missouri Supreme Court did not purport to

decide all questions which might arise regarding the provision of medical care to incompetent patients. It decided only the particular case before it. Petitioners' attempts to portray the majority opinion in broader and more absolute terms is inimical to the very balancing approach adopted by the court.

Petitioners' discussion of Missouri's "Living Will" statute, § 459.010, *et seq.*, RSMo 1986, is similarly misleading. While it is true that the Missouri Supreme Court reversed the Probate Court's determination that the statute was unconstitutional, it did so on the grounds that the constitutionality of the statute was not at issue in the case. Petitioners' App., p. A29. The constitutionality of the Living Will statute was simply not ruled upon. The court's consideration of the Living Will statute was simply as an expression (and not the only expression) of the state's interest in preserving life. The petitioners' characterization of the Living Will statute as drastically limiting the use of living wills is not only argumentative but irrelevant to a consideration of the opinion below.[1]

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[1] Respondents believe that without the existence of statutory recognition of a living will, the status of any such document as a legally binding instrument would be highly questionable. The statute is more properly viewed as a grant rather than a limitation.

Further, the characterization of the Living Will statute by Judge Welliver in his dissenting opinion, referred to in footnote 2 by the petitioners, is based upon a profound misinterpretation of the statute. Judge Welliver evidently believed that a living will did not authorize a request to withhold any medication at all, when in actuality, the statute simply excludes a

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Having pointed out what the Missouri Supreme Court did not hold, it is perhaps now appropriate to explain what its actual holding was. The majority began by recognizing the common law right of individuals to make decisions as to their own health or welfare. This common law principle of autonomy has found expression in the doctrine of informed consent which has as its corollary a right to informed refusal. Petitioners' App., p. 20. In order to be informed, the patient must have the capacity to reason, the decision must be voluntary, and the patient must have a clear understanding of the risks and benefits of treatment alternatives. Petitioners' App., p. A21.

With regard to petitioners' asserted right of privacy, the court found that the Missouri Constitution contained "no unfettered right of privacy . . . that would support the right of a person to refuse medical treatment in every circumstance." Petitioners' App., p. A22. Such right of privacy as may exist under the Missouri Constitution was distinguished from the right of privacy existing under the Federal Constitution.

As to a federal constitutional right of privacy, the Missouri Supreme Court began by recognizing that this Court has never extended the right of privacy to permit a patient or a guardian of an incompetent patient to direct the withdrawal of nutrition and hydration. The court

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request to withhold medication "deemed necessary to provide comfort, care or to alleviate pain". Judge Welliver's interpretation was not only strained but was not joined by any other judge of the court.

below concluded that those decisions finding a federal right of privacy in this area seldom contained "any reasoned analysis" and often presumed the existence of the right based upon this court's opinions in *Roe v. Wade*, 410 U.S. 113 (1973) and *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Missouri Supreme Court believed that this approach was inconsistent with the *Roe* opinion which specifically stated that the right of privacy was not to be equated to "an unlimited right to do with one's body as one pleases . . . " *Roe v. Wade, supra*, at 154.

Contrary to the implication of the petitioners, the court below did not find that this Court's opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), regarding whether the right to privacy extended to homosexual conduct, had any direct relevance to the issue before it, but the Missouri Supreme Court did take to heart this Court's admonition that "[t]here should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental." *Id.* at 195. While expressing grave doubts as to the applicability of a federal constitutional right of privacy to the issues in this case, the Court below concluded that even if it did apply, it could not justify the withdrawal of nutrition and hydration under these circumstances. Petitioners' App., pp. A24-A25.

The Missouri Supreme Court concluded that whether arising from common law or constitutional right of privacy, the right to refuse treatment was not absolute and must be balanced against state interests. The state's interest in the instant case was in the preservation of life which encompasses not only the life of an individual but

an interest in the sanctity of life itself. Petitioners' App., p. A25.

The Missouri Supreme Court held that the state's interest in preservation of life was not qualified by an assessment of an individual's quality of life. Any state assessment of an individual's quality of life carries with it its own grave risks. Thus, while the Missouri Supreme Court characterized the state's interest in preservation of life as "unqualified", the petitioners' use of that term is taken out of context. The term does not imply that the state's interest is so monolithic that it overcomes any and all interests of individuals, as petitioners imply, but simply that the state's interest is not dependent upon an assessment of the quality of an individual's life. The court felt that to adopt such a quality of life approach to the state's interest arbitrarily discounted that interest. Petitioners' App., p. A33.

Turning to the facts of this case, the Court considered each of the arguments advanced by the petitioners as justifying withdrawal of nutrition and hydration from Nancy Cruzan.[2] The Court concluded that the argument based upon the prognosis that Nancy Cruzan would never make any meaningful recovery from her persistent vegetative state was simply "a thinly veiled statement that her life in its present form is not worth living," a quality of life determination that the Court felt did not

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[2] Given that Nancy Cruzan was incompetent to make any informed choices concerning her own treatment, the Court limited itself to that factual situation and did not purport to decide the scope of rights of competent persons.

support a decision to cause death. Petitioners' App., p. A34.

Neither did the Court believe that the continuation of nutrition and hydration was unduly burdensome, whether it was considered medical care or not.[3] Petitioners' App., pp. A36-A37.

Finally, the Court concluded that statements made by Nancy, which the petitioners argued justified the withdrawal of nutrition and hydration, were too informally expressed to constitute clear and convincing proof of her intent. The Court held that to justify a refusal of treatment, statements should be just as informed and definite as a decision to consent to treatment. Petitioners' App., p. A37.

Finally, the Missouri Supreme Court concluded that a guardian's power to act on behalf of an incompetent ward derives from the state's *parens patriae* authority and not the rights of the ward. Petitioners' App., p. A41. The Court found no specific statutory provision in the State of Missouri authorizing a guardian to withhold medical care from an incompetent ward. Petitioners' App., p. A39. However, this does not mean, as petitioners imply, that medical care could never be withdrawn from a ward. What it does mean is that the guardian would have to seek approval of the appropriate court,

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[3] Petitioner implies that the Court below also determined that all care possible should be provided to Nancy including the initiation of tube feeding. Respondents believe that petitioners again mischaracterized the Court's opinion which dealt only with the *continuation* of nutrition and hydration at this time, not whether it should be initiated at this time or whether any other care should be initiated.

so that the guardian does not act unilaterally and without consideration of the state's interests in preserving life. Petitioners' App., p. A42.

In short, the Missouri Supreme Court held, based upon the balancing of interests, that the state's interest in preserving life was not outweighed by the rights invoked on behalf of Nancy Cruzan to terminate nutrition and hydration.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I.

The decision below and the decisions of other state supreme courts does not present the sort of real and direct conflict of opinion which justifies issuance of this Court's writ of certiorari.

The petitioners argue that the decision of the Missouri Supreme Court, as well as the decision of the Washington Supreme Court in the case of *In re Grant*, 747 P.2d 445 (Wash. banc 1987), modified 757 P.2d 534 (1988), conflict with decisions of other state supreme courts on whether an incompetent patient has a federal constitutional right to stop the provision of nutrition and hydration; most particularly the decisions of the Arizona Supreme Court in *Rasmussen v. Fleming*, 741 P.2d 674 (Ariz. banc 1987) and the Massachusetts Supreme Court in *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626 (Mass. 1986). Respondents Harmon and Lamkins submit that this alleged conflict among state supreme courts fails to demonstrate a basis for issuance of this Court's writ of certiorari for two reasons. First, the constitutional pronouncements of the Massachusetts and Arizona

Supreme Courts were unnecessary to the Court's judgment and, therefore, to the extent there is a conflict it relates to mere dicta. Second, such conflict as there is does not relate to the provision or withholding of medical care for incompetent patients in general but to the extremely narrow question of whether nutrition and hydration should be withdrawn.

In *Rasmussen v. Fleming, supra,* at 681-682, the Arizona Supreme Court opined that the right of privacy under the Federal Constitution encompasses the right to refuse medical treatment. However, the Arizona Supreme Court held that this same right existed under the state constitution and at common law.

> We hold that the Arizona Constitution also provides for a right to refuse medical treatment.

Id. at 682.

> We hold that the doctrine of informed consent – a doctrine borne of the common-law right to be free from nonconsensual physical invasions – permits an individual to refuse medical treatment.

Id. at 683.

Similarly, the Massachusetts Supreme Court held that:

> The right of a patient to refuse medical treatment arises both from the common law and the unwritten and penumbral constitutional right to privacy.

Brophy v. New England Sinai Hospital, Inc., supra, at 633. Similar pronouncements exist in most of the cases cited by petitioners. See *In re LHR,* 321 S.E.2d 716, 722 (Ga. 1984); *In re Torres,* 357 N.W.2d 332, 339 (Minn. 1984); *Corbett v. D'Alessandro,* 487 So.2d 368, 370 (Fla.App. 1986);

In re Drabik, 245 Cal.Rptr. 840, 853, n. 20 (Cal.App. 1988); *In re Colyer*, 660 P.2d 738, 741 (Wash. 1983).

Indeed, some courts have based their decisions solely upon state law. In the case of *In re Gardner*, 534 A.2d 947 (Maine 1987), the Maine Supreme Court held that:

> The personal right to refuse life-sustaining treatment is now firmly anchored in the common law doctrine of informed consent, which requires the patient's informed consent to the administration of any medical care.

Id. at 951. The Court apparently placed no reliance upon any asserted constitutional right to render its judgment. The New York Court of Appeals similarly found a decision of constitutional issues unnecessary to its decisions in the cases of *In re Storar* and *In re Eichner*, 438 N.Y.S.2d 266 (N.Y. 1981). Additionally, the New Jersey Supreme Court which in the case of *In re Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976), dealt almost exclusively with the federal right of privacy, has apparently modified its approach. As noted by Judge Handler in his concurring opinion in *In the matter of Jobes*, 529 A.2d 434 (N.J. 1987):

> The *Quinlan* court may have been mistaken in its choice to base the decision on constitutional grounds . . . ."Viewed as a prod to intensive legislative consideration, the decision's guidelines seem defensible. But by casting its holding in federal constitutional terms, the New Jersey court may have needlessly foreclosed more intelligent legislative solutions in that state." L. Tribe, American Constitutional Law, § 15-11, at 937 (1978) . . . The *Conroy* decision was based on common law foundations, *Conroy-supra*, 98 N.J. at 348, 486 A.2d 1209, and thus the standards

promulgated were left open to judicial and legislative modification.

The New Jersey Supreme Court now holds that the right to refuse treatment "is primarily protected by the common law." *In re Farrell*, 529 A.2d 404, 410 (N.J. 1987).

Not only could these decisions have been rendered on the basis of state law, either common law or state constitutions, but there is an inherent conflict between the constitutional pronouncements of many of these courts and their statements that these issues are ones more properly resolved by the legislature rather than the judiciary. See *In re Farrell, supra* at 407-408 (N.J. 1987); *Satz v. Perlmutter*, 379 S.2d 359, 360 (Fla. 1980); and *In re Grant, supra*, at 449. Given this preference for a legislative solution, these courts could hardly have intended to totally preempt legislative action. At most, one might conclude that these courts, even though speaking in constitutional terms, were only ruling in the absence of any legislative guideline. One can only speculate whether these courts would uphold legislative guidelines which differ from their holdings. As noted by the Missouri Supreme Court, these decisions are "seldom accompanied by any reasoned analysis as to the scope of that right or its application to the refusal to life-sustaining treatment." Petitioners' App., p. A22. Thus, the constitutional pronouncements which petitioners argue produce a conflict of opinions, are not only unnecessary to the judgments of these courts but are imprecisely formulated.

This Court has long followed a policy of not engaging in unnecessary constitutional adjudication. Thus, when presented with both constitutional and nonconstitutional grounds to support requested relief, a court

should first consider the nonconstitutional grounds. *Califano v. Yamasaki*, 442 U.S. 682, 692-693 (1979) and *Jean v. Nelson*, 472 U.S. 846, 854 (1985). This is a principle which is similarly recognized in most, if not all, of the states which have considered the termination of medical care for incompetent patients. See *State v. Church*, 504 P.2d 940 (Ariz. 1973); *People v. Williams*, 547 P.2d 1000 (Cal. 1976); *Ohnstad v. City of Tacoma*, 395 P.2d 97 (Wash. 1964); *Bolduc v. Pinkham*, 88 A.2d 817 (Maine 1952); *State v. Tsavaris*, 394 S.2d 418 (Fla. 1981); *Fazio v. Fazio*, 378 N.E.2d 951 (Mass. 1978); and *Donadio v. Cunningham*, 277 A.2d 375 (N.J. 1971). Unfortunately, however, this principle seems to have been honored in the breach in this particular class of cases, for these courts have routinely engaged in unnecessary constitutional adjudication.

To grant certiorari on the basis of an alleged conflict in judicial opinion on a constitutional question, in which the constitutional pronouncements are largely *gratuitous dicta*, would be inconsistent with this Court's long-standing policy. This Court often determines whether there is an independent state ground to support a judgment prior to engaging in any constitutional adjudication. *Michigan v. Long*, 463 U.S. 1032 (1983). Since most, if not all, of the decisions relied upon by the petitioners as producing a conflict have an independent state basis for their decision, respondents submit that this Court should not grant a writ of certiorari based solely upon that alleged conflict.

Even if it be assumed there is a direct conflict of opinion, particularly among the four cases relied upon by the petitioner, it is upon an extremely narrow point. As petitioners recognize, the opinion of the Washington

Supreme Court in *In re Grant, supra,* disapproved only of the withholding of artificial feeding. The withholding of other forms of life support which were at issue in that case were approved. In the Cruzan case, the only issue before the Missouri Supreme Court was the issue of withdrawal of nutrition and hydration. The Missouri Supreme Court has not yet expressed an opinion on withdrawal of any other form of treatment and it would be premature to speculate what any such decision would be after application of the balancing test approved by the Missouri Supreme Court in such cases. Thus, the only current conflict between the supreme courts of Missouri, Washington, Massachusetts, and Arizona, is that they disagree over the proposed withdrawal or withholding of nutrition and hydration from an incompetent patient.

Despite the petitioners' attempts to the contrary, there is no general conflict regarding medical care for incompetent patients. The Missouri Supreme Court did not hold that all forms of medical care must be provided to all patients in all instances. Such a principle would have been completely at odds with the balancing approach adopted by the Missouri Supreme Court. In many respects, the decision of the Missouri Supreme Court follows principles similar to those in other cases and it is only in the narrow circumstance outlined above, that there is this alleged conflict. Respondent respectfully submits that this situation does not justify the issuance of this Court's writ of certiorari. In *Layne and Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1923), this Court indicated that certiorari should be limited to "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the

parties, and in cases where there is a real and embarrassing conflict of opinion and authority . . . " Respondents have no doubt about the importance of this case to the petitioners but firmly believe that the conflict relied upon by the petitioners in this narrow circumstance, is not the sort of situation which justifies review by this Court. This is particularly true given the gratuitous nature of the constitutional pronouncements of many of the courts which produced the alleged conflict and the often ill-defined limits of the constitutional right upon which they rely. This is simply not an instance of the sort of real and substantial conflict of judicial opinion on a constitutional principle which this Court has traditionally required before accepting review.

II.

The decision of the Missouri Supreme Court does not conflict with the decisions of this Court.

Petitioners characterize the constitutional right asserted in this case as either a liberty interest protected by the Due Process Clause of the Fourteenth Amendment or as a right of privacy arising from the penumbra of personal freedoms created by the Bill of Rights. However, in identifying liberty interests protectable under the Due Process Clause, one most often turns to state law. As this Court stated in *Paul v. Davis*, 424 U.S. 693, 710 (1976):

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but which are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they

> have been initially recognized and protected by state law.

Thus, the petitioners' attempted invocation of a liberty interest under the Due Process Clause returns to the state law matters addressed in point I. As to possible new substantive protections under the Due Process Clause, this Court has already indicated that it is not inclined to take a more expansive view in discovering new fundamental rights embodied in due process. *Bowers v. Hardwick*, 478 U.S. 186, 194-5 (1986).

As to the alleged right of privacy, the Massachusetts and Arizona Supreme Courts, as well as others, have given only the most perfunctory analysis in reaching their conclusion that the constitutional right of privacy enunciated by this Court extends to the withdrawal or withholding of treatment, including nutrition and hydration, from an incompetent patient. Most often, the beginning, as well as the ending, of this analysis are this Court's opinions in *Roe v. Wade*, 410 U.S. 113 (1973) and *Griswold v. Connecticut*, 381 U.S. 479 (1965). In the seminal case of *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976), the Court presumed that the right this Court recognized in these cases was broad enough to include a right to decline medical treatment. That conclusion appears to be based upon an interpretation that *Roe v. Wade* embodied a principle of absolute bodily integrity, a notion which this Court specifically disavowed. *Roe v. Wade, supra*, at 154. This Court has long recognized that states have the power to prohibit even consensual conduct. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 68-69, n.15 (1973). Undoubtedly, states have the power to make judgments

that certain activity "has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize in Mr. Chief Justice Warren's words, the state's 'right right . . . to maintain a decent society.' " *Id.* at 69. See also "The Refusal of Life-Sustaining Medical Treatment vs. the State's Interest in the Preservation of Life: A Clarification of the Interests at Stake" 58 Washington University Law Quarterly 85, 86 (1980). In *Bowers v. Hardwick, supra,* this Court disapproved the presumption that the constitutional right of privacy applies to new fields beyond those already recognized. As stated in *United States v. Mandujano,* 425 U.S. 564, 580 (1976) (C.J. Burger with three justices concurring and four justices concurring in result):

> . . . the dynamics of constitutional interpretation do not compel constant extension of every doctrine announced by the court.

Even assuming that the right of privacy extends into the area of decisions regarding medical care, there is no indication that such a right should be applied, as it has been, to persons incompetent to make decisions on their own behalf. The right of privacy as recognized by this Court has been characterized as a right of choice by the individual involved. *Carey v. Population Services International,* 431 U.S. 678, 684-685 (1975); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-640 (1974); *Zablocki v. Redhail,* 434 U.S. 374, 384 (1978). However, if the essential nature of the right of privacy is the right of an individual to make decisions, how and when does it apply to a person incompetent to make decisions on his own behalf? Some commentators have simply concluded that it does not.

> The right of privacy is the right to choose, and can only belong to a person competent to exercise that right. The *Quinlan* and *Saikewicz* courts were wrong in extending the right to privacy to permit a guardian to choose for a person who could not. The *Quinlan* court's fear that the patient's right to privacy would be destroyed lest her guardian assert it is not persuasive. The time for asserting the right, like the time to execute a will or vote, simply expires when the patient can no longer exercise it. *Saikewicz's* concern that incompetent persons have the same rights as competent ones is similarly misguided, particularly in cases in which the cause of the incompetency makes exercise of the right impossible.

"Refusal of Life-Saving Medical Treatment Versus the State's Interest in Preservation of Life: A Clarification of Interests at Stake", *supra*, at p. 100. Similar concerns have been voiced by Professor Laurence Tribe.

> Given the fact that these patients are irreversibly comatose or in a chronic vegetative state, attributing "rights" to these patients at all is somewhat problematic. Of course a sleeping person has rights, as does someone who has temporarily lost consciousness. On the other hand, someone who has died cannot be said to have "rights" in the usual sense; . . . To be sure, these patients are not "dead" in most of the increasingly multiple senses of the term but the task of giving content to the notion that they have rights in the face of the recognition that they could make no decisions about how to exercise any such rights, remains a difficult one.

Laurence H. Tribe, "American Constitutional Law", § 15-11, p. 1368, n.25 (1988).

The extension of *any* right of privacy to an incompetent patient is done even more cursorily than the extension of the right of privacy to medical treatment

decisions. Typical is the holding of the Massachusetts Supreme Court that a state must afford to incompetent persons "the same panoply of rights and choices it recognizes in competent persons." *Brophy v. New England Sinai Hospital, Inc., supra,* at 634. The Court apparently adopted this approach based upon a purely practical concern that the so-called right would otherwise be lost.

Although this Court has never specifically addressed the problem of applying the right of privacy to an incompetent individual, it did hold in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976) that the decision on whether or not to perform an abortion could not be exercised by a third person because the right is purely personal. What courts such as the Massachusetts Supreme Court have done is turned that around and required the states to provide this sort of third party decision-making. This was how the issue was characterized by the District Court of the Central District of California in an order denying a preliminary injunction.

> The court is essentially being asked to find not only a federal constitutional right to die when one wishes, but a constitutional right which requires states in all instances to confer the power to make life-and-death decisions upon others when the patient himself has not made his own decision and now is in a position where perhaps he or she cannot do so.

Sanchez v. Fairview Developmental Center, et al., No. CV8810129FFF (Tx) (Central District of California, March 30, 1988), *slip op.,* p. 8. Given a state's long-standing and unquestioned authority to regulate the affairs of incompetent individuals, the District Court felt that it would be anomalous to find that the state could regulate in areas

such as sterilization and property and yet be constitutionally forbidden to regulate in the area of medical care.

> The court believes that at this juncture the United States Constitution neither requires the state to allow the making of life and death decisions by a conservator nor prohibits the states from creating procedures to permit that kind of decision-making.

Id. at pp. 11-12.

It is further interesting to note that on the crucial question of who may exercise whatever rights an incompetent patient may have, the Arizona Supreme Court in *Rasmussen v. Fleming, supra,* specifically declined to rely upon constitutional law and instead based its decision upon state law. The Arizona Court of Appeals, in an earlier opinion, had ruled that a family member or the Public Fiduciary could exercise the rights of an incompetent patient to refuse treatment. The court did so on the basis of this Court's opinions in *Griswold v. Connecticut, supra; Eisenstadt v. Baird,* 405 U.S. 438 (1972); and *NAACP v. Alabama,* 357 U.S. 449 (1958). The Arizona Court of Appeals concluded from these opinions that in certain circumstances it was permissible to allow a third party to assert an individual's constitutional rights. The Arizona Supreme Court disagreed with the Court of Appeals on this point. According to the Arizona Supreme Court, finding that a third party had standing to assert someone else's constitutional rights in court was not identical to holding that a third party could *exercise* another person's rights. The Arizona Supreme Court turned to state law for its conclusion that a guardian has the implied, if not express, statutory authority to exercise an incompetent patient's right to refuse treatment. *Rasmussen v. Fleming,*

741 P.2d at 687-688. Thus, quite apart from whether the constitutional right of privacy extends to refusing life-sustaining medical care, the crucial question in this case is whether a state is constitutionally required to allow a third party to *exercise* that right on behalf of an incompetent patient. On this crucial point, respondents Harmon and Lamkins submit that there is no inconsistency with prior opinions of this Court, and petitioners identify no such inconsistency.

Finally, even if a state is somehow constitutionally required to allow a vicarious exercise of constitutional rights on behalf of incompetent patients, respondents believe that the balancing approach applied by the Missouri Supreme Court is fully consistent with prior opinions of this Court and does not justify the issuance of a writ of certiorari. As has been recognized ever since *Roe v. Wade, supra,* even the constitutional right of privacy does not constitute an absolute right to have an abortion, at all times, under all circumstances, or by whatever means an individual may wish. Thus, it has been clearly recognized that under certain circumstances, and at certain times, a state may regulate whether or how a woman has an abortion. Similarly, in the instant case, the Missouri Supreme Court considered the particular circumstances of this case and concluded that continuation of nutrition and hydration to Nancy Cruzan did not constitute a denial of any right she might have to refuse treatment, whether arising under common law or constitutional law. The Missouri Supreme Court did not hold that all conceivable treatment be provided to all incompetent patients. It did not even hold that all conceivable treatment should be provided to Nancy Cruzan.

Respondents submit that the balancing test adopted and applied by the Missouri Supreme Court, which includes an assessment of the degree of invasiveness of the medical procedure and the extent of the burdens it might impose upon a patient, is imminently preferable to that adopted in Massachusetts and elsewhere and more consistent with previous opinions of this Court.

> Although the Massachusetts court's standard might be attributable to a belief that an unchanneled right to refuse treatment might occasionally furnish a pretext for suicide, the court's qualification of the right creates deeper problems than it can possibly solve. At the same time that the court said that the invasiveness or type of treatment would no longer weigh heavily in the balance, the court insisted that the interests of state and individual continue to be balanced. But since the right of the individual will often be considered a constant in light of the indeterminacy of judgments about the invasiveness of treatment, the outcome of the balancing process would seem to turn primarily on the other side of the equation, the countervailing state interests in preserving life. If asked to weigh those interests, courts may be inclined to evaluate the quality and quantity of life that remains to be preserved. Yet, having courts focus on a patient's prognosis when determining whether a patient's desire to refuse treatment should be effectuated raises the specter of the worst kind of state paternalism: having the state regularly make judgments about the value of a life.

Tribe, supra, at pp. 1367-1368.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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