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.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

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March 13, 1989

QUESTION PRESENTED

As the result of a car accident more than five 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 interest in life, codified in the state "living will act", 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 petitioners Nancy Beth Cruzan by her natural parents and co-guardians Lester and Joyce Cruzan respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Missouri Supreme Court in this case.

OPINIONS BELOW

The opinion of the Missouri Supreme Court (App., *infra*, A1-A88) is reported at 760 S.W.2d 408. The opinion of the Missouri Circuit Court, Jasper County, Probate Division, is not reported. It is reprinted in the Appendix, *infra*, A89-A100.

JURISDICTION

The Circuit Court for Jasper County, Probate Division, entered its judgment on July 27, 1988, upholding petitioners' constitutional right to terminate artificial life support. 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 jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

AMENDMENT I

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Missouri Life Support Declarations Act, 25 V.A.M.S. §§ 459.010(3), (6); 459.015; 459.055(5), provides in pertinent part:

" 'Death-prolonging procedure', any medical procedure or intervention which, when applied to a patient, would serve only to prolong artificially the dying process and where, in the judgment of the attending physician pursuant to usual and customary medical standards, death will occur within a short time whether or not such procedure or intervention is utilized. Death-prolonging procedure shall not include . . . any procedure to provide nutrition or hydration;

'Terminal condition', an incurable or irreversible condition which, in the opinion of the attending physician, is such that death will occur within a short time regardless of the application of medical procedures.

. . . .

I have the primary right to make my own decisions concerning treatment that might unduly prolong the dying process . . . . It is not my intent to authorize affirmative or deliberate acts or omissions to shorten my life rather only to permit the natural process of dying.

. . . .

Sections 459.010 to 459.055 do not condone, authorize or approve mercy killing or euthanasia nor permit any affirmative or deliberate act or omission to shorten or end life."

STATEMENT

A. Nancy Cruzan's Condition

Nancy Cruzan lies in a Missouri state rehabilitation hospital in a persistent vegetative state ("PVS"). App., *infra*, A34. PVS is a type of permanent unconsciousness or coma in which all cognitive functioning is gone but in which the brain stem continues to function to some degree. Nancy breathes on her own and she has periods of wakefulness (with her eyes open) and reflexive sleep/wake cycles, but she is unaware of herself or her environment. Her eyes when open move randomly in all directions, but they do not track objects or persons or respond to the environment around her. There is no hope that Nancy will ever recover from her state and be restored to any cognitive functioning. App., *infra*, A34. She is completely dependent on others for care. Her body is stiff and so severely contracted that her fingernails cut into her wrists. App., *infra*, A94. Her face is red, puffy and swollen, and she drools on herself. She is missing teeth. Her bathing, oral care and personal feminine hygiene, including menses, are cared for by others. She must be turned every few hours to prevent bedsores.

Nancy's condition was caused by the severe injuries she sustained when she was thrown from her car in an automobile accident early in the morning of January 11, 1983. The state trooper who arrived first at the scene examined Nancy and believed her dead. Although emergency personnel arriving later were able to restore signs of life, Nancy never regained consciousness after the accident. Four weeks after the accident, when hope still existed for recovery, both her father and her

then husband provided separate written consent to allow the hospital to have a gastrostomy tube surgically implanted in Nancy's stomach. The gastrostomy tube is the sole means by which Nancy has received fluids and nutrition since she was moved to the Missouri state rehabilitation hospital on October 19, 1983. Nancy Cruzan was 25 years old on the day of her accident and she is 31 today. Doctors believe she has a normal life expectancy.

B. Proceedings in the Lower Courts

In the summer of 1987 Nancy's natural parents, Joe and Joyce Cruzan, who are also her court-appointed guardians, determined that hope no longer existed for recovery and that Nancy would not want the continued gastrostomy feeding. They requested the state rehabilitation hospital at Mt. Vernon, Missouri to stop the artificial feeding. The hospital administrator told the Cruzans that he could not authorize such action without a court order. Similarly, the probate judge overseeing Nancy's guardianship told the Cruzans that they did not have a right to transfer her to a private hospital or to take Nancy home to carry out her wishes without court authorization. On October 23, 1987, therefore, the Cruzans filed a declaratory judgment action in probate court on Nancy's 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 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." App., *infra*, 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. It 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 trial 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. App., *infra*, 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. Using a balancing test, 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.[1] App., *infra*, A38. The majority rejected the decision of the New Jersey Supreme Court in *In re Quinlan* and similar rulings from other state supreme courts which held that PVS patients retain constitutional rights. It charged that those courts improperly discounted the state's interest in life by making inappropriate judgments about the quality of a life for a PVS patient. App., *infra*, A30. In Missouri the state's interest is not in the quality of life, but "in life; that interest is unqualified." App., *infra*, A29, A33.

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

The majority found the basis for Missouri's strong interest in life, in large part, in Missouri's "living will" act. Life Support Declarations Act, Mo. Rev. Stat. §§ 459.010, *et seq.* App., *infra*, A27-A29. The Missouri legislature modeled the Missouri living will act on the Uniform Rights of the Terminally Ill Act, but it made several changes to the Uniform Act which dramatically limited the use of living wills in Missouri. App., *infra*, 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. App, *infra*, A27-A28. The majority in *Cruzan* held that the limitations grafted onto the Uniform living will act by the Missouri legislature evidenced a strong Missouri public policy in favor of life.[2] It ruled that the trial court erred in finding the living will act unconstitutional. App., *infra*, A29.

The majority could find no constitutional rights retained by an incompetent person like Nancy Cruzan sufficient to override this strong state policy interest in life. It held that federal privacy rights would not extend to a person in Nancy's condition, based on its reading of *Bowers v. Hardwick*, 478 U.S. 186 (1986).[3] App., *infra*, A24-A25. Moreover, the majority stated that even if incompetent persons did retain federal consti-

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2. Judge Welliver in his dissent charged that the legislature in placing these limitations on the living will had perpetrated a "fraud on Missourians who believe we have been given a right to execute a living will, and to die naturally, respectably, and in peace." App., *infra*, A81. He argued that the living will act violates the federal privacy and liberty rights of Missourians. App., *infra*, A79-A80 & n.1.

3. The majority also held that the state right to privacy in the Missouri constitution did not extend to medical treatment decisions. App., *infra*, A22. This ruling is of course not a basis for appeal to this Court.

tutional rights to refuse unwanted medical treatment, such treatment could be stopped only if it caused physical pain. App., *infra*, A36-A37. It noted that a PVS patient like Nancy Cruzan is not capable of experiencing pain. App., *infra*, A36. It also held that supplying fluids and nutrition through a gastrostomy tube is not "heroically invasive" medical treatment that can be stopped in any event; it is merely ordinary care.[4] App., *infra*, A34. The majority held that Nancy Cruzan retains no interest in stopping unwanted gastrostomy feeding which can outweigh the general interest of the state of Missouri in her life.[5] App., *infra*, A38.

The majority opinion provoked three separate dissents. Judge Welliver found the Missouri living will act, on its face, contrary to an individual's federal privacy right 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. App., *infra*, A79-A81 (Welliver, J., dissenting). Judge Higgins likewise found that the majority improperly employed the living will statute so

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4. The majority also stated that even if Nancy's gastrostomy feeding could be considered medical treatment, the statements she made to her roommate prior to the accident, standing alone, were not specific enough to constitute informed consent. Therefore, it reasoned that those statements were also not sufficient to prove Nancy's intent to be free from continued treatment. App., *infra*, A37. Judge Higgins strongly objected to this finding, charging that the majority had launched upon the "inexcusable exercise" of ignoring the trial court findings of facts and adopting its own facts to fit its conclusions. App., *infra*, A65-A66 (Higgins, J., dissenting).

5. The majority also held that, as guardians, the Cruzans had no power to withdraw treatment. Instead, a guardian in Missouri is required, after *Cruzan*, to provide all possible medical treatment to an incompetent ward without option or discretion. App., *infra*, A39.

that it could ignore the court's "responsibilities to Nancy Cruzan under the Constitution." App., *infra*, A77-A78 (Higgins, J., dissenting).

Judge Blackmar reasoned that decisions about medical treatment for family members are properly left 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." App., *infra*, A49 (Blackmar, J., dissenting).

Nancy Cruzan and her parents filed a timely petition for rehearing, which a divided court denied by a 4-3 vote. The rehearing denial again provoked extensive dissent. App., *infra*, A82-A88.

REASONS FOR GRANTING THE PETITION

Unfortunately, Nancy Cruzan's case is not unique. Thousands of people lie in hospitals across the United States in the persistent vegetative state without hope of ever recovering. The number will only increase. The highest state courts of Arizona and Massachusetts have ruled that such patients retain a federal constitutional right to refuse medical treatment, including artificially supplied fluids and nutrition. Missouri and Washington high courts have ruled to the contrary. This sharp conflict between the highest courts of four states warrants immediate review.

1. The Decision Below Conflicts With Decisions of Other State Supreme Courts

The Missouri Supreme Court cited over 50 cases from 16 different states and admitted that "nearly unanimously" the various courts of sister states have ruled in favor of an incompetent patient's constitutional right to refuse various forms of medical treatment.[6] App., *infra*, A10-A12. Four of those decisions came from state supreme courts that have directly addressed whether an incompetent patient, even though he can no longer communicate his wishes, retains the federal constitutional right to stop artificially supplied fluids and nutrition and die with dignity.[7]

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6. *See, e.g., In re Quinlan*, 355 A.2d 647, 663-64 (N.J.), *cert. denied*, 429 U.S. 922 (1976) (PVS patient has a constitutional right to privacy that encompasses removal of medical treatment, here a respirator; the "only practical way to prevent destruction of the right is to permit the guardian and family of Karen to render their best judgment"); *In re L.H.R.*, 321 S.E.2d 716, 723 (Ga. 1984) (family is appropriate party to make determination of medical treatment for an incompetent adult in PVS without hope of recovery); *In re Torres*, 357 N.W.2d 332, 339-41 (Minn. 1984) (guardian has the power, acting in the best interests of a comatose ward, to exercise the constitutional right to privacy of that ward and order removal of a respirator); *see also* *Corbett v. D'Alessandro*, 487 So.2d 368 (Fla. App.), *review denied*, 492 So.2d 1331 (Fla. 1986) (PVS patient has a federal constitutional right to privacy which requires removal of feeding tube when requested by her husband); *In re Drabick*, 245 Cal. Rptr. 840, 854-55 (Cal. Ct. App. 1988), *review denied* (Cal. July 28, 1988), *cert. denied*, 109 S.Ct. 399 (1988) (incompetent patient in PVS has a federal constitutional right to removal of a feeding tube; "it is possible for others to make a decision that reflects his interest more closely than would a purely technological decision to do whatever is possible").

7. *Rasmussen v. Fleming*, 741 P.2d 674 (Ariz. banc 1987); *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626 (Mass. 1986); *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. banc 1988); *In re Grant*, 747 P.2d 445 (Wash. banc 1987), *modified*, 757 P.2d 534 (Wash. 1988). Only one federal court has addressed this issue. *Gray v. Romeo*, 697 F.Supp. 580 (D.R.I. 1988). That court held that an incompetent person retains the federal constitutional right to refuse artificial tube feeding. The case was not appealed.

In *Rasmussen v. Fleming*, 741 P.2d 674 (Ariz. banc 1987), the Supreme Court of Arizona held that a PVS patient retains a "fundamental" federal right to refuse medical treatment, anchored "within the constitutionally protected zone of privacy."[8] 741 P.2d at 682. The Arizona court succinctly defined the modern day dilemma: "Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form continues"; not surprisingly, some people when caught in such a dilemma choose "a plan of medical treatment that allows nature to take its course and permits them to dies with dignity." 741 P.2d at 678.

Mildred Rasmussen left behind no indication of her intent. *Id.* at 686. The Arizona Supreme Court held that she nonetheless retained the federal constitutional right to have decisions made which reflected her interests as closely as possible. *Id.* at 685-86. That interest is determined by a guardian, not the state.

In Arizona, like in Missouri, this constitutional right of the incompetent is not unfettered, but must be balanced against the countervailing state interest in preserving life before unwanted medical treatment can be removed. But the Arizona court concluded that the state interest in life weakens where the "treatment at issue 'serves only to prolong a life inflicted with an incurable condition.'"

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8. In *Rasmussen*, the guardian sought an order empowering him to remove a nasogastric feeding tube and to place "Do Not Resuscitate" and "Do Not Hospitalize" notations on the medical chart of his ward, Mildred Rasmussen, a PVS patient. Mrs. Rasmussen died during the pendency of the appeal and it was unclear whether she had the feeding tube inserted at the time or not. The court chose to decide the case as one presenting novel issues capable of repetition yet evading review. 741 P.2d at 679-81 & n.1. The court found that Mildred Rasmussen also retained a common law and state constitutional right to refuse unwanted medical treatment. *Id.* at 681-83.

Id. at 684, quoting *In re Colyer*, 660 P.2d 738, 743 (Wash. 1983). The court held that the state interest in life therefore could not override a PVS patient's federal constitutional right to have unwanted medical treatment in the form of fluids and nutrition through a nasogastric tube stopped. *Id.*

The decision of the Supreme Judicial Court of Massachusetts is in accord with *Rasmussen*. *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626 (Mass. 1986). In *Brophy*, the court held that a PVS patient retains the federal constitutional right to privacy, which can be exercised by his wife, to direct removal of gastrostomy feeding in accordance with his prior expressed wishes.[9] 497 N.E.2d at 633-35. It held that the federal Constitution prohibits the state from controlling such decisions: "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."[10] *Id.* at 635.

The majority opinion in *Cruzan* is in direct conflict with *Rasmussen* and *Brophy*. The *Cruzan* majority held that incompetent persons in Missouri do not retain the federal right to privacy to refuse unwanted medical treat-

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9. The court also found that Paul Brophy retained a common law right to refuse treatment.

10. One other state supreme court has recognized the federal privacy right to reject artificial gastrostomy feeding, although it appeared to base its decision on state law grounds. *See McConnell v. Beverly Enterprises-Connecticut, Inc.*, 209 Conn. 692 (Jan. 31, 1989) (the Connecticut living will statute, which embodies the recognized federal constitutional right to privacy as well as the common law right to self-determination, allowed a family to obtain removal of artificial feeding for PVS patient in accordance with prior expressed wishes); *see also In re Gardner*, 534 A.2d 947 (Maine 1987) (PVS patient has a common law right to autonomy that allowed removal of artificial feeding in accordance with prior wishes).

ment. App., *infra*, A24-A25, A38. Indeed, the majority set up a balancing test in Missouri in such a fashion that the state interest in life will always overcome an incompetent person's interest in his own life.

On one side of the balance, the majority drastically reduced any rights an incompetent person retains. Guardians after *Cruzan* must now provide all possible forms of medical treatment that can prolong life without option or discretion. Family members and doctors no longer retain *any* interest or control of medical treatments for their loved ones and patients.[11] App., *infra*, A37-A43. And after *Cruzan*, no incompetent patient in Missouri, regardless of any expressions of intent, can refuse gastrostomy feeding. The majority determined that gastrostomy feeding was not medical treatment, but ordinary care which all patients must accept. App., *infra*, A34-A36.

Balanced against these whittled down rights of incompetent persons the majority erected a state interest in life so overpowering that it will always justify state infringement of the rights of an incompetent person. The majority stated that medical treatment can be removed if it constitutes a "burden" to the patient. But the majority determined that only treatment that caused physical pain constituted a burden. App., *infra*, A36-A37. Since a PVS patient like Nancy by definition cannot

11. In fact, the majority left open only one narrow option for an incompetent person. An incompetent person may retain the federal constitutional rights to have decisions made about medical treatment that reflect his interest only if, prior to incompetency, he executed a living will or other unspecified "formalities" that provide in advance clear and convincing evidence of his intent. App., *infra*, A20-A21, A37, A41. But it is obvious that few persons, particularly youthful accident victims like Nancy Cruzan, will execute such advance directives. All persons who do not execute such directives, whatever they might be, lose the federal constitutional right to privacy in Missouri.

experience pain, App., *infra*, A95-A36, *no* treatment can ever constitute a burden to a PVS patient. A PVS patient will always lose on this issue alone. Moreover, the majority held that Missouri's interest in life is "unqualified." App., *infra*, A29, A33. The Arizona and Massachusetts high courts held that the state's interest in life weakens for a patient in PVS, where the medical treatment serves only to prolong a life inflicted with an incurable condition. *See, e.g., Rasmussen*, 741 P.2d at 684. By contrast, the *Cruzan* majority held that Missouri's interest in life *strengthens* when a person deteriorates to a PVS, because medical treatment can sustain the body for a substantial time. App., *infra*, A26. With this lopsided balancing test the majority opinion in essence has placed Missouri's interest in an incompetent person's life above that person's interest in his own life in all situations.

The Washington Supreme Court has taken an approach similar to Missouri. *In re Grant*, 747 P.2d 445 (Wash. banc 1987), *modified*, 757 P.2d 534 (1988), involved Barbara Grant, a 22-year-old woman afflicted with a progressive neurologic illness called Batten's disease. She was in the final throes of the disease, without hope of recovery, but not yet in a PVS. She had never been competent. Barbara's mother, also her legal guardian, sought an order forbidding the state hospital from using various forms of life-prolonging treatment on Barbara as her condition deteriorated. 747 P.2d at 448. The court initially ruled in a 5-4 decision that Barbara had a federal constitutional right to privacy, which could be exercised through her mother, to prohibit the use of all forms of medical treatment, including artificial feeding through a surgically implanted tube. *Id.* at 449, 452-55. Subsequently, Justice Durham removed her name from the majority opinion and joined the opinion of

Justice Andersen, concurring in part and dissenting in part. 757 P.2d at 534. This change affected the decision of the court solely on the issue of artificial feeding. Thus, the Washington Supreme Court held that a life-long incompetent patient retains the federal right to privacy, which can be exercised by her family, to refuse unwanted medical treatment in the form of a respirator, intubation, CPR and a defibrillator. 747 P.2d at 458. But that incompetent person is denied the federal privacy right to refuse surgical insertion of a gastrostomy tube or to demand removal of that tube once surgically implanted.[12] *Id.* at 458-60.

A comparison of the holdings of these state courts reveals that the federal constitutional rights of incompetent persons to have treatment discontinued depends upon the state in which the patient is hospitalized. The Arizona court held that an incompetent person who never expressed her wishes still retains the federal privacy right to have a guardian make choices about medical treatment that reflect the incompetent's best interests. Both the Arizona and the Massachusetts courts held that the federal privacy right extends to refusing artificial provision of fluids and nutrition. By contrast the *Cruzan* majority held that, without a living will or other express prior directives regarding intent, an incompetent patient loses all constitutional rights. Further, even express directives would not protect the federal right of a patient like Nancy Cruzan to discontinue artificial feeding through a gastrostomy tube, which is considered basic patient care

12. In *In re O'Connor*, 534 N.Y.S.2d 886, 892 (C.A.N.Y. 1988), the New York high court held that a 77-year-old woman suffering from severe brain damage had no common law right to refuse medical treatment unless she left behind clear and convincing proof of "a firm and settled commitment" to terminate life support under the particular circumstances present.

in Missouri that must be administered to all incompetent patients. There is no federal right in Missouri to refuse surgical insertion of a gastrostomy tube or to request removal of such a tube.

Nancy Cruzan is constitutionally entitled to a decision about her medical treatment that most closely reflects her interests. Such a fundamental decision, which is best made by the guardians and family after a hearing to determine proper motives, should not depend on the state of residence. *See* N. Rhoden, "Litigating Life and Death," 102 Harv. L. Rev. 375, 437-39 (1988). The conflict between the majority opinion in *Cruzan* and the high courts of Arizona and Massachusetts that recognized the federal constitutional right of incompetent persons to refuse medical treatment requires immediate review by this Court.

2. The Decision Below Conflicts With Decisions of This Court

This Court has long protected individuals against governmental invasions of the body. *Skinner v. Oklahoma,* 316 U.S. 535, 541-43 (1942) (state prohibited from controlling, by sterilization, which convicts might reproduce because reproduction is "one of the basic civil rights of man"); *Rochin v. California,* 342 U.S. 165, 172 (1952); *Schmerber v. California,* 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society"); *see 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"). It has likewise long recognized and protected an indi-

vidual'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").

This right has been characterized as a liberty interest protected by the Due Process Clause of the Fourteenth Amendment and more recently as a privacy right which springs from the penumbra of personal freedoms created by the Bill of Rights. *See Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). However characterized, the right should extend to protect individuals from invasive medical treatment forced on them by the state. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (if "the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child") (emphasis in original). *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas, J., concurring) ("*the freedom to care for one's health and person*" is constitutionally protected) (emphasis in original.

This Court has not directly addressed whether a person has a constitutional right to refuse life-prolonging medical technology. Yet it is difficult to conceive of a right more implicit in our concept of liberty or more

deeply ingrained in our constitutional tradition than the right of each individual to make decisions concerning the integrity of the body without interference from the state. The four judge majority in *Cruzan*, nonetheless, concluded that federal privacy rights would not extend to Nancy Cruzan. The majority based its denial of federal rights solely on a narrow interpretation of *Bowers v. Hardwick*, 478 U.S. 186 (1986). App., *infra*, A24-A25. The reliance in *Bowers* is misplaced. In *Bowers* this Court held that the right of privacy did not extend to protect "the right of homosexuals to engage in acts of sodomy." 478 U.S. at 191. The Court found that the "right" to engage in sodomy bore no "resemblance" to the protected fundamental rights such as marriage, family and procreation. *Id.* at 191. Those rights, which are entitled to "heightened judicial protection", fall into the category of "fundamental liberties" so " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed' " and as "liberties that are 'deeply rooted in this Nation's history and tradition.' " *Id.* at 192 (citations omitted). The Court found that sodomy was not such a right. *Id.* The right to be free from state ordered medical procedures, however, is indeed the type of right long cherished by this Court. Such a right bears little resemblance to consensual sodomy.

Moreover, there is clearly no basis in the decisions of this Court to discriminate against incompetent persons with regard to these fundamental constitutional rights. In Missouri today, if an accident renders a person unable to voice his decisions about medical treatment, the state dictates that that person must receive all medical treatment possible. The constitutional interest of the incompetent person, however, is not in literally voic-

ing choices; it is in ensuring that he receives treatment that reflects his interest and desires. *See, e.g., Brophy,* 497 N.E.2d at 634 (the right to withdraw treatment must extend to incompetents as well as competents "because the value of human dignity extends to both"); *Drabick,* 245 Cal. Rptr. at 854-55 (it is "possible for others to make a decision that reflects [the incompetent's] interests more closely than would a purely technological decision to do whatever is possible . . .").

The majority in *Cruzan* has ruled that an incompetent person simply loses the federal constitutional right to have choices made about medical treatment that reflect his interest. This holding is a direct infringement on the equal protection, privacy and liberty rights of an incompetent person. Moreover, the Missouri living will act which supports such a denial is, as the trial court found, constitutionally invalid on its face. App., *infra,* A99. The majority decision has left incompetent persons and their families without medical treatment options and stripped of constitutional rights protected by other state courts and long guaranteed by this Court. It has lead Missouri to the edge of the slippery slope of state ordered medical treatment. Immediate review by this Court is warranted.

3. This Case Presents Questions of Critical National Importance

New techniques and machines have created wonderful and beneficial technological advances in medical care. Unfortunately, they have also created a dark side to medical treatment where people, trapped and helpless, are subject to the "ultimate horror not of death but . . .

of being maintained in limbo, in a sterile room, by machines controlled by strangers." *In re Torres*, 357 N.W.2d 332, 340 (1984). Whether people are deprived of their constitutional rights and sentenced to such a fate depends now totally on their state of residence. A tenuous 4-3 majority of the Missouri Supreme Court has denied incompetent persons in Missouri the right to a natural death with dignity, free from unwanted technological interference, in favor of a broad rule that all steps technologically possible to prolong life for incompetent persons must be taken. More states will face these issues,[13] and without guidance from this Court will simply add to the confusing patchwork of constitutional rights accorded incompetent patients. Families across the United States will be faced with the horrible, yet real, prospect that the only way to carry out the wishes of their now medically incompetent loved one is to move the loved one to a state which honors the constitutional rights of incompetents. Incompetent persons without families will obviously have no ability to move.

The states need guidance. Because the proper resolution of these issues depends essentially upon the nature and strength of an individual's federal constitutional rights, that guidance must come from this Court, not the state courts or state legislatures. Indeed, as in Missouri, the state legislature may be the very group seeking to deprive incompetent persons of federal rights. As Judge Welliver argued persuasively in dissent, the Missouri living will act is constitutionally invalid on its face.

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13. Other states have recently or will soon face these issues. For example, the Supreme Court of Illinois recently heard arguments in the case of *In re: Sidney Greenspan*, No. 67903, which involved the constitutional right to removal of artificial feeding from an elderly man in a PVS.

Other legislation proposed in the Missouri legislature is even more offensive to constitutional sensibilities.[14]

If an incompetent patient like Nancy Cruzan is not entitled to refuse medical care which she would refuse if she could speak, then the majority has succeeded in elevating the state's interest in a patient's life above the individual's interest in her own life. The *Cruzan* majority has ignored Nancy Cruzan's intent and the wishes of her family and ruled that all steps technologically possible must be taken to prolong the lives of incompetent patients. Review of this broad ruling by this Court is vital to determine whether individual medical treatment should be a decision for patients, families and their doctors, or for the states.

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14. Recently drafted Missouri Senate Bill No. 371 proposes to make it a criminal violation for any person to withdraw or withhold fluids and nutrition in any form from any person in Missouri, competent or not, regardless of that person's intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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