No. 88-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

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

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

THAD C. MCCANSE, Guardian ad litem,
Respondent.

On Writ of Certiorari to the Missouri Supreme Court

PETITIONERS' REPLY BRIEF

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ARGUMENT

Nancy Cruzan's case is not about a governmental obligation to provide affirmative services. Brief of Missouri Attorney General at 19 ("State Br."). It is about liberty, and the proper reach of governmental power. Painful family decisions are made every day in hospitals and nursing homes concerning the appropriate medical treatment for an unconscious loved one. Absent a compelling State interest, a State should not override such personal decisions when a family chooses among acceptable medical alternatives.

It is not disputed that Nancy Cruzan is in a persistent vegetative state. She is permanently unconscious without hope of ever regaining consciousness. Pet. App. A34; Amicus Curiae Brief of the United States at 2 ("U.S. Brief"). Her family consented to the surgical insertion of a gastrostomy feeding tube when hope for her recovery remained. *See* Brief for Petitioners at 6-9. They now seek to withdraw that life-support system, with hope gone, knowing as only a family can that Nancy would want the treatment stopped. Their decision is supported almost universally by the organized medical community. The State has intervened and overruled that family decision. It has severed Nancy Cruzan's ties to the family that has remained by her side and has ordered that for the rest of her life Nancy must be subjected to invasive medical treatment, even though consent to that treatment has long since been withdrawn. She cannot go to a private hospital for different treatment, nor can she go home. Every day the State intrudes into her life.

Traditionally, this Court has required the State to prove, by clear and convincing evidence, a compelling State need to intrude so pervasively into the private life of an individual. *Santosky v. Kramer*, 455 U.S. 745, 756-57 (1982). The record is clear that the Missouri Attorney General made no such showing at Nancy Cruzan's trial. The majority below, however, did not demand this traditional proof by the State. It concluded that, since Nancy is permanently unconscious and cannot object, the State can order ongoing life-support for her based on no more than its general (but "unqualified") interest in life. In fact, the majority stood the traditional burden of proof completely on its head. It shifted to Nancy the burden of showing that, when still competent, she anticipated her current medical condition and expressed clearly her desire to reject this form of state-ordered bodily invasion.

Petitioners agree with the Solicitor General that states need "to protect the incompetent person from abuse" and that states need flexibility to experiment with a range of reasonable rules. U.S. Brief at 8. But Missouri has gone too far. The Solicitor General implicitly acknowledges this fact. *See infra* at 3-4. Incredibly, the Attorney General of Missouri argues that the State is not intruding into Nancy's life in any way at all. The Attorney General reasons that since "natural events" not set in motion by the State caused Nancy's "loss of the ability to exercise her rights," there is no "governmental action" or deprivation. State Br. at 8, 19. Under such analysis, Missouri could choose tomorrow to perform medical experiments on Nancy's organs and not violate the Constitution because the accident, not the State, caused Nancy's inability to voice her objections to such treatment. The Attorney General concludes that the State "is not constitutionally obligated to overcome such naturally occurring obstacles. . . ." State Br. at 8.

Nancy Cruzan and her family seek no affirmative act or aid from the government. All they ask is to be left alone. The Constitution affords this protection to Nancy. *See* Brief for Petitioners at 17-24.

I. THE RESTRICTIVE STANDARD OF PROOF ADOPTED AND APPLIED BY THE MAJORITY BELOW VIOLATES FUNDAMENTAL FAIRNESS

The Solicitor General strives to characterize the burden of proof shifted to Nancy Cruzan as merely requiring clear and convincing evidence of her wishes, but he candidly acknowledges that the majority below may well have gone much further than that. U.S. Brief at 30 ("Certain statements in the opinion suggest a standard so strict that it could have the effect of depriving most persons of the opportunity to exercise any right to refuse treatment . . ."); *id.* at 32 ("a rule insisting on [written]

evidence to the exclusion of other types of proof would be difficult to sustain" and the opinion below contains "suggestions . . . that petitioner's due process rights cannot be exercised 'absent the most rigid of formalities' "); *id.* at 33 ("it would be odd for a State rigidly to disregard all evidence from the patient's family members . . .").

The Solicitor General's effort to characterize the standard below as one of clear and convincing evidence cannot escape the plain language of that decision, which shifted to Nancy Cruzan a burden of proof that is essentially insurmountable. Like a statutory framework, the decision below should be read to discern its "*cumulative* effect." *Santosky*, 455 U.S. at 775 (Rehnquist, J., dissenting) (emphasis in original). The cumulative effect of the opinion is clear. *See, e.g.*, Pet. App. at A40 ("rights which are found lurking in the shadow of the Bill of Rights and which spring from concerns for personal autonomy [cannot] be exercised by another absent the most rigid of formalities"); *id.* at A41 (guardian's power arises from parens patriae, it is not derivative from the incompetent, and is not "exercisable by a third party absent formalities"). In effect, the decision has stripped incompetent persons of any right to reject state-ordered surgeries or other bodily invasions.

Indeed, when this heightened standard is applied as it was below, with the court refusing even to review a large amount of petitioners' evidence, the cumulative effect is undeniably to remove all reasonable options from incompetent persons. *See* Brief of Petitioners at 33-36. Testimony from Nancy's family and friends about how she lived, her love of family, and their lifetime of experience together, was simply not considered by the majority in determining whether Nancy had satisfied the high burden of proof imposed by the court.[1] And the State put on

[1] The Illinois Supreme Court ruled on November 13, 1989, that a daughter has the power to remove a surgically implanted gastros-

absolutely no evidence to the contrary. States need flexibility to regulate in sensitive areas, but Missouri has gone too far.[2]

II. THE STATE FAILED TO MEET ITS BURDEN OF PROOF UNDER ANY STANDARD

Historically, this Court has not shifted the burden to citizens to prove their federal rights by clear and convincing evidence or any lesser standard of proof. Rather,

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tomy tube from her permanently unconscious mother. *In re Longeway*, No. 67318, slip op. at 1 (Ill. S.Ct. Nov. 13, 1989).

The Illinois court expressly held that while specific prior statements of intent "would be helpful and compelling," a court must weigh all evidence available, particularly "intuitively felt" evidence from the family about the patient's views and "personal value system" in determining whether clear and convincing evidence is present. Slip op. at 12-13. A copy of the decision has been mailed to the parties and lodged with the Court.

[2] On many occasions this Court has closely reviewed the fact finding performed by a state court when the conclusion of law on a federal right and the finding of fact are closely intermingled and undisputed facts are reviewed in a manner that denies a federal right. *See, e.g., Feiner v. New York*, 340 U.S. 315, 322 & n.4 (1951) (citing authority). "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights." *Id.*

Deference to state court fact finding is particularly inappropriate where a lower court denies a fundamental liberty with the factual determination that the state has met the "exacting standard of proof" by "clear, unequivocal and convincing" evidence to denaturalize a citizen. *Baumgartner v. United States*, 322 U.S. 665, 671 (1944); *see also Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 517-18 & n.2 (1984) (Rehnquist, J., dissenting); *id.* at 515 (White, J., dissenting).

it is the government that must show clear proof of a specific and compelling need before it may intrude into the private life of a citizen. The more important the citizen's right to be free from government interference, the greater the government burden. Thus, before a State may deport a person, take away his children, or commit him to a mental institution, it must prove, by clear and convincing evidence, a specific evil that requires intervention and a remedy. *Santosky*, 455 U.S. at 756; *see Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) (once the father is "shown to be fit" the important State interest in intervening to protect specific minor family members becomes "de minimis"). In certain cases a State may be held to a lesser burden of proving a State interest, generally a preponderance of the evidence, where an important State interest is involved and the disutility of error in one direction does not "discernibly outweigh" the disutility of error in the other. *Santosky*, 455 U.S. at 788 n.13 (Rehnquist, J., dissenting). But eevn under this less exacting standard, the bare record below cannot justify the State's intrusion in this case.

The majority below simply discarded any burden of proof requirement for the State. It justified this result by reasoning that there was no one to protest the State action. According to the court, an incompetent person loses constitutional rights she cannot exercise. The decisions of this Court are not in accord. Incompetent persons do not lose their constitutional rights. Those rights are generally protected when an agent, most often a parent or close family member, acts on behalf of the incompetent. *See* Brief for Petitioners at 20-22 (and cases cited there).[3] Thus in *Youngberg v. Romeo*, 457 U.S.

[3] The Solicitor General acknowledges that a fundamental liberty right exists under the Fourteenth Amendment for competent persons to refuse medical treatment, and that this "Court has consistently held that all persons—not only competent adults—enjoy . . . liberty interests." U.S. Brief at 13-14, 22.

307 (1982), the mother of a profoundly retarded 33 year old man exercised her son's Fourteenth Amendment liberty right to be free from shackling in a state institution. The man had the mental age of an infant and, like Nancy Cruzan, he was unable to express his wishes.[4] Nonetheless, his liberty right was not limited by the fact that it had to be asserted by his mother.[5] It was limited, instead, by a compelling State interest in protecting the safety of others in the institution. 457 U.S. at 321-22.

If this Court had followed Missouri's logic in *Youngberg*, it would have required Romeo to prove, by clear and

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[4] To suggest that no one would want to be shackled begs the question. When not shackled at the state institution, Nicholas Romeo was injured more than seventy times and suffered injuries ranging from broken limbs to human bites. *Romeo v. Youngberg*, 644 F.2d 147, 155 (3d Cir. 1980), *vacated and remanded*, 457 U.S. 307 (1982). The point is that this Court allowed Romeo's mother to speak on behalf of her incompetent son and protect his rights even though no one could know what Romeo's own wishes were. Indeed, since Nancy Cruzan was once competent and developed views, values and even made express statements, much more can be known about her wishes than Romeo's.

[5] The majority also concluded that Nancy lost the right to have her parents speak on her behalf because as guardians their powers are limited to those powers granted by the State. Pet. App. A40-A42; *see* State Br. at 26. Obviously, this Court in *Youngberg* did not attempt to put such limits on the natural rights of a parent. Indeed, the decisions of this Court recognize the parent child relationship as one with origins beyond the bounds of State regulation. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 843-45 (1977) (" 'family' implies biological relationships" and "the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements"); *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979); *see also Cox v. Carapella*, 246 S.W.2d 513, 519 (Mo. App. 1952) ("the natural bonds of affection and the protective instinct implanted by the Creator in the heart and soul of a mother entitled that one whose very blood runs in the veins of her child to first consideration when as between her and stangers the physical custody of the child is to be determined").

convincing evidence and more, his desire to be free from shackling once the State decided that shackling generally was in the best interests of incompetents. Instead, the Court held that the Constitution does not allow such State paternalism. 457 U.S. at 315-16. State invasions of liberty, even if allegedly in the incompetent's best interest, cannot be tolerated without some specific showing of evil the State needs to regulate. *See Santosky*, 455 U.S. at 760 n.10.[6]

In the case of Nancy Cruzan, the record reveals no proof of a State interest specific to Nancy. At Nancy's trial, the Missouri Attorney General sought to prove only one issue: that Nancy Cruzan is not in a persistent vegetative state. TR. 612-835. The courts below ruled that Nancy is in a persistent vegetative state. Pet. App. A34.[7] The State offered no other proof. It did not counter

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[6] The Solicitor General contends that Nancy's case "presents far different considerations" from the question of forcing "mentally incompetent" prisoners to take antipsychotic medication. U.S. Brief at 19 n.11. Presumably the difference is that the State has a much more apparent and greater justification for forcing medical treatment on the incompetent person in the prisoner's case, when the "safety" of other patients is threatend. *Id.* Such analysis would suggest that the Constitution would afford Nancy much greater protection against state-ordered medical treatment than it does Walter Harper. *See* Brief of United States in *Washington v. Harper*, 88-599 at 20-21.

[7] The Missouri Attorney General misleads the Court when he implies that the Cruzans consented to the surgical insertion of the gastrostomy tube during a time when Nancy was eating normally. State Br. at 1. The medical records discussing rehabilitation that the Attorney General cites are from the St. John's Hospital, not from Freeman Hospital where Nancy was hospitalized after the accident. *See* State Tr. Exs. A-C. The gastrostomy tube was surgically inserted 27 days after the accident, shortly after Nancy had been removed from intensive care. At that time Nancy had in place a tracheostomy tube, intravenous tube and a nasogastric tube. Pet. Tr. Exs. 6, 8. "Malnutrition" was listed as the pre-operative diagnosis requiring insertion of the gastrostomy tube. Guardian Tr. Ex. 11.

express prior statements by Nancy that she would not "want to live" life as a "vegetable" and "she hoped that her family would know that." TR. 389-90, 395-96. Nor could the State show that the family had any financial stake in its decision or that they were acting contrary to Nancy's prior wishes. It offered no evidence to suggest the family was not acting in Nancy's best interest. To the contrary, all agree that Nancy's family is motivated solely by its deep love and concern for Nancy. Pet. App. A9-A10. In fact, the majority below admitted that its action was not narrowly tailored to protect Nancy at all. Instead, it acted to protect other (currently unknown) incompetent persons who may not be "blessed" with such a "loving family," Pet. App. A10, A43, and out of fear that in the future the State may inappropriately stop treatment for patients who, unlike Nancy, are merely handicapped and not permanently unconscious. Pet. App. A29.

The majority justified its action for Nancy as necessary to protect the State's general (but "unqualified") interest in life. Pet. App. A29, A33. The duty of a State to protect life obviously is important. But in adopting broad general rules to further the State's general interest, the majority ignored vital evidence and interests specific to the very person it was allegedly trying to protect. Nancy Cruzan has both a right to life and a right to liberty, and she will never again be able to state her wishes clearly about either right. She has only two options, and either one is permanent and irreversible. If her right to liberty is not protected, her unconscious biological shell will be maintained by strangers in a sterile hospital room for thirty years, devoid of thought or perception and without hope of recovery. Such a choice will severely compromise her personal dignity for the rest of her days and will have devastating, life-long effects for her family. In sum, she will live out her days as an unwitting slave to available medical technology. Pet.

App. A99. On the other hand, if state-ordered medical treatment is stopped, she will die. The clear evidence at trial compels the conclusion that, if she could, Nancy would choose her right to liberty over her right to life. Certainly from Nancy's perspective her interest in such a life does not "discernibly outweigh" her liberty interest to be free from such a life. *Santosky*, 455 U.S. at 788 n.13 (Rehnquist, J., dissenting).

The State did not prove by any standard its need to intervene in Nancy Cruzan's life and elevate her right to life over her right to liberty. The State offered no proof at all. Nancy's family is motivated solely out of love for her and their desire to do what they know as her family she would want. Their decision comports with all that is known about Nancy's wishes. It is a decision supported by the medical community. There is no basis for State intervention.

CONCLUSION

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

Respectfully submitted,

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