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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: NANCY BETH CRUZAN, BY HER PARENTS
AND CO-GUARDIANS, LESTER L. CRUZAN, ET UX.,
Petitioners, v. DIRECTOR, MISSOURI DEPARTMENT
OF HEALTH, ET AL.

CASE NO: 88-1503

PLACE: Washington, D.C.

DATE: December 6, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 NANCY BETH CRUZAN, BY HER :
4 PARENTS AND CO-GUARDIANS, :
5 LESTER L. CRUZAN, ET UX., :
6 Petitioners, :
7 v. : No. 88-1503
8 DIRECTOR, MISSOURI DEPARTMENT :
9 HEALTH, ET AL. :

10 -----x
11 Washington, D.C.

12 Wednesday, December 6, 1989

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 9:59 p.m.

16 APPEARANCES:

17 WILLIAM H. COLBY, ESQ., Kansas City, Missouri, on behalf
18 of the Petitioners.

19 ROBERT L. PRESSON, ESQ., Assistant Attorney General of
20 Missouri, Jefferson City Missouri, on behalf of the
21 Respondents.

22 KENNETH W. STARR, ESQ., Solicitor General, Department of
23 Justice, Washington, D.C., United States as amicus
24 curiae, supporting respondents.

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1 P R O C E E D I N G S

2 (9:59 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this today in No. 88-1503, Nancy Beth Cruzan v. the
5 Director of the Missouri Department of Health.

6 Mr. Colby.

7 ORAL ARGUMENT OF WILLIAM H. COLBY

8 ON BEHALF OF THE PETITIONERS

9 MR. COLBY: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 Nancy Cruzan is a 32-year-old Missouri woman who
12 is in a persistent vegetative case. Persistent vegetative
13 case is a specific clinical diagnosis for a patient who is
14 permanently unconscious.

15 All thought, all memory, all ability to interact
16 with the world around her in any way is gone. It is
17 undisputed in the record below that Nancy will never
18 recover from this condition and will never interact with
19 the world around her.

20 She's been in this condition for over six years,
21 the result of a car accident. Approximately three weeks
22 after the accident, when hope for her recovery remained
23 strong, her parents and her husband at the time consented
24 to the surgical insertion of a gastrostomy tube necessary
25 to feed Nancy.

1 No one told the Cruzans at that time that their
2 consent was irrevocable; no one suggested to them that the
3 purpose of this surgical insertion of the tube was to
4 perpetuate Nancy in an unconscious state indefinitely.

5 QUESTION: Mr. Colby, is it clear -- I'm -- I'm
6 not sure it -- it seems to me that there may be some
7 dispute on the point as to whether she could have been fed
8 manually if that had not been done. Apparently your
9 opponents say that it is -- it would have been more
10 difficult, but that she could have been fed manually by --
11 by massaging the food down her throat or something of that
12 sort.

13 Is that correct or not?

14 MR. COLBY: I think that is -- is not correct.
15 At the time the tube was inserted, Nancy had just come out
16 of intensive care. She was being fed through -- it's not
17 completely clear in the record, but it appears both a
18 nasogastric tube and through an I.V. tube.

19 It was clear that her long-term care was going
20 to require more nutrition, and the operational report for
21 the surgery stated that the reason for the surgery was
22 malnutrition.

23 After the tube was inserted, when she
24 transferred out of the hospital and into the
25 rehabilitation center, they attempted to feed her through

1 mouth while she still had the tube in place, but they were
2 not able to feed her sufficiently to provide for her
3 needs.

4 QUESTION: Mr. Colby, at the time the family
5 said, yes, go ahead and insert the feeding tube, if they
6 had refused that permission, would the state law have
7 required that refusal to be honored? Was the family's
8 consent required at the time for the insertion of the
9 tube?

10 MR. COLBY: The family's consent was required
11 for the surgery to insert the tube.

12 QUESTION: By state law?

13 MR. COLBY: By state law. It would have been --

14 QUESTION: Is that by statute or by some state
15 common law?

16 MR. COLBY: By common law. It would have been a
17 battery for the doctor to perform a surgery without
18 consent. And the only statutory exception to that in
19 Missouri is in the event there is an emergency. And
20 that's defined in the Missouri statute as a person is in
21 imminent danger of dying and there was no one around to
22 provide the necessary consent.

23 QUESTION: Well, what if they refused? Is there
24 a procedure then, whereby the state would go in and have a
25 guardian appointed? Or does the state, if the patient is

1 in a state hospital, simply accept that refusal and allow
2 the patient to die of malnutrition?

3 MR. COLBY: It is my belief that had they
4 refused -- refused, the state would have accepted that
5 refusal and that Nancy would have died not from
6 malnutrition, but from the severe brain damage from her
7 accident shortly before then. Had the doctor advised the
8 family --

9 QUESTION: Is that a prediction of fact or is
10 that a statement of law? You say it's your belief that
11 they would have accepted it. Would the state have to have
12 accepted it?

13 I mean suppose the parents were Christian
14 Scientists, or for some reason did not want a relatively
15 ordinary surgical procedure to be performed, would the
16 state have to -- would the state have to accept that
17 determination, or would the state not be able to appoint a
18 guardian and have the guardian make it?

19 MR. COLBY: The state would not necessarily have
20 to accept that determination, and certainly there are
21 instances like the Jehovah's Witness cases where the state
22 will intervene and take steps to -- provide the medical
23 treatment.

24 My statement is that, in this case, where the
25 parents would have been -- had a doctor come to them and

1 said, there's virtually no chance your daughter is going
2 to recover from this car accident, we want to do this
3 surgery, we need your consent to do it, and the parents
4 said, I don't want to give that consent, I don't think
5 she's going to recover, the doctors would have honored
6 that requested.

7 Now, if the decision is considered abusive, if
8 it's considered one that's not among acceptable medical
9 alternatives, then the state has an interest in
10 intervening.

11 The issue before this case -- before this Court
12 today is a narrow one. And it is whether a state can
13 order a person to receive invasive medical treatment when
14 that order is contrary to the wishes of the family, when
15 it overrides all available evidence about the person's
16 wishes from prior to the accident, when the decision to
17 forego treatment is among acceptable medical alternatives
18 and when the state gives no specific justification for
19 that intrusion other than their general interest in life.

20 We submit that the Fourteenth Amendment and the
21 liberty guarantee there protects individuals, conscious or
22 unconscious, from such invasion by the state, without any
23 particularized interest for that invasion.

24 QUESTION: Mr. Colby, do you think that a
25 competent adult has an absolute constitutional right to

1 refuse food and water?

2 MR. COLBY: I believe a competent adult has an
3 extremely strong right to refuse the surgery necessary to
4 provide a gastrostomy feeding tube when that person has
5 lost the natural ability to swallow.

6 QUESTION: How about if no feeding tube is
7 required?

8 MR. COLBY: And what would the mechanism be?

9 QUESTION: Can the -- can the adult, the
10 competent adult absolutely refuse food and water in a
11 hospital setting, and the state can't override that
12 decision?

13 MR. COLBY: There could be situations where that
14 decision may be considered irrational or abusive, and the
15 state could override that -- that decision, I believe.
16 But if we're --

17 QUESTION: The individual isn't very competent
18 then.

19 MR. COLBY: That may well be right. In the case
20 of suicide, for example, that's a situation where we
21 presume that the decision is irrational. And if that
22 person is refusing to eat, the state may well have a need
23 to override that decision.

24 QUESTION: Why do you presume it's irrational?
25 I mean, let's assume the person is in a state close to as

1 hopeless as this individual here, and the person says, I
2 want to die. I am of sound mind and it is my desire to
3 die.

4 MR. COLBY: It would be difficult --

5 QUESTION: Could a state overrule that?

6 MR. COLBY: It would be difficult for a person
7 to be in a state close to the vegetative state and -- and
8 be competent.

9 QUESTION: Well -- well, then change it from a
10 vegetative state, it's just a state of enormous pain,
11 deformity, quality of life is -- is -- is nil, and the
12 person says, I want to die.

13 MR. COLBY: Could that patient refuse surgery to
14 insert a gastrostomy tube? Absolutely.

15 QUESTION: No, I'm asking Justice O'Connor's
16 question. Must -- must the state allow that person --
17 must the state allow that person to refuse food and water?

18 MR. COLBY: I believe they -- they do have an
19 obligation and that the Fourteenth Amendment protects that
20 person's right to be free from a state intrusion. And as
21 long as that decision is not considered irrational, then
22 the state does not have a reason to intrude.

23 QUESTION: Now, can that --

24 QUESTION: Well, what -- what's your -- what's
25 your standard for -- for irrationality? Do you mean it's

1 an objective test; someone else decides whether a person's
2 particular decision is rational or not?

3 MR. COLBY: There no doubt is a continuum, and
4 all kinds of decisions will be made along that continuum.
5 There will be some situations where the state is going to
6 have a greater need to intervene where a decision is going
7 to seem inappropriate.

8 QUESTION: Well, who -- what does inappropriate
9 mean?

10 MR. COLBY: If, for example -- and take the
11 example of the Jehovah's Witness case. The decision is
12 not based on the best interest of the individual, it's
13 based on the parents' religious belief.

14 The medical community believes, in that case,
15 that a simple medical procedure will restore the person to
16 life and give them a full chance to interact in society.
17 That decision is presumed irrational.

18 I'm not certain that there's any specific test,
19 but in this specific case, where we have the factors that
20 Nancy is in a vegetative state, that she's permanently
21 unconscious, that the family -- that her wishes -- she
22 said to a friend a year before this accident, "I wouldn't
23 want to live life as a vegetable."

24 QUESTION: Suppose the evidence were to the
25 contrary, and the evidence was that for reasons of her own

1 moral philosophy she thought that life systems should
2 never be terminated. Would the state have to respect
3 that?

4 MR. COLBY: Yes.

5 QUESTION: Well, in this case, then, if the
6 state has to respect both wishes, cannot we view this case
7 as being one in which the state simply is saying that
8 there must be a mechanism where the state can make a clear
9 determination of what the wishes were one way or the
10 other, and if that determination cannot be made, the state
11 simply opts for life. Is that the -- is that the way this
12 case comes to us?

13 MR. COLBY: Certainly, the state has an
14 important interest in protecting life, and they have an
15 interest in making certain that appropriate decisions are
16 made about medical treatment, but to simply say that in
17 all situations we are going to err on the side of life, to
18 say that we have an unqualified interest in life that is
19 going to, in essence, win in every case --

20 QUESTION: No, it's not -- it's not all
21 situations. It's where the wishes of the person cannot be
22 determined with accuracy, as the state -- as the state
23 understands it.

24 MR. COLBY: And if the wishes of the person
25 cannot be determined with accuracy, then all that does is

1 get you to the second question, which is, if we don't know
2 for certain what this person's wishes are, how are we
3 going to decide about medical treatment? Is the state
4 going to decide in every instance, or is the patient's
5 family going to decide to be involved in that decision?

6 QUESTION: Don't we -- don't we have to get to
7 that question here? Because the state said that the
8 evidence is just insufficient to really know what the
9 patient's wishes were. You don't ask us to overturn that
10 factual assessment of the evidence, do you, or not?

11 MR. COLBY: Certainly, in the past, this Court
12 has, in a situation where an intermediate appellate court
13 has carved out parts of the trial record and look at only
14 specific facts, and in doing so denied an important
15 liberty interest, this Court has looked at the whole
16 record and I think you can do that here, and we submit
17 that there is clear evidence of her wishes.

18 But even assuming the evidence is unequivocal,
19 the standard that the Court below applied to the evidence
20 that they reviewed -- the Court below said the only
21 evidence we're going to look at are specific statements
22 that Nancy Cruzan made before her accident. All of --
23 other evidence that the finder of fact relied on, we're
24 disregarding.

25 And then they took that limited amount of

1 evidence and they said we're -- we have in Missouri an
2 unqualified interest in life. We're applying to this
3 limited amount of evidence a standard that is so high that
4 the state always wins.

5 QUESTION: But if you lose on that, then you
6 must get to the question of the -- of the authority of the
7 parents.

8 MR. COLBY: If we lose on that, then we get to
9 the question of, if the evidence is unclear, then who
10 decides? Nancy Cruzan said, I hope my family would know I
11 wouldn't want to live life as a vegetable, and she said to
12 her friend, that's important because families get to make
13 these kinds of decisions. That's the kind of framework
14 that she thought she was dealing with. This Court has
15 always deferred to the special competence of families to
16 know what values are important to family members. What's
17 in Nancy's best interest, how she lived, her value system
18 --

19 QUESTION: Excuse me, but you said before that
20 we don't. That in the case of a Jehovah's Witness who
21 says, my child would not want medical treatment, the state
22 will intervene and say, we don't care. Your child will.

23 Now, you say that that's a religious belief and
24 therefore it can be disregarded, but isn't -- and this --
25 but isn't this a philosophical belief? Is that any

1 different?

2 I mean, some people think living is better than
3 not living, not matter how terrible the life may be. I
4 mean, go back and read ancient philosophers fighting that
5 old battle. And other people think no, if the quality of
6 life is not good, let's end it. That's a philosophical
7 debate, just as the Jehovah's Witnesses have a religious
8 view of the matter.

9 Why can't the state take a position, we don't
10 deal with philosophy, we deal with physics, and life will
11 be preserved?

12 MR. COLBY: Because if the state does that, and
13 it says we are going to intrude in every unconscious
14 person's life if we don't have express information as to
15 their wishes, then they're going to deny important rights
16 to incompetent people.

17 At the one end of the spectrum, if you look at
18 the Jehovah's Witnesses there, Nancy Cruzan's case must be
19 at the complete other end of the spectrum, and that's the
20 only question before the Court today.

21 A permanently unconscious person, the American
22 Medical Association, the President's Commission and, I
23 would submit, even the Attorney General of Missouri would
24 say that it's different if you're permanently unconscious
25 and have no hope of ever recovering consciousness.

1 QUESTION: Well, Mr. Colby, in that situation, a
2 person acknowledged to be in a persistent vegetative
3 state, do you think that there is some kind of per se
4 rule, or presumption that federal -- the federal
5 Constitution mandates be applied, that that person would
6 prefer to die? I mean, is that your position? That the
7 state must, because of the federal Constitution, apply
8 some kind of a presumption there?

9 MR. COLBY: There certainly is a presumption,
10 Your Honor, that before the state can intrude and order
11 that person to receive medical treatment at the order of
12 the state for the rest of their life, that the state has
13 to show some specific reason for doing that.

14 The state here has showed no reason specific to
15 Nancy Cruzan that --

16 QUESTION: Well, do you think the patient has an
17 interest in making sure that the patient's fundamental
18 wishes are followed, at least?

19 MR. COLBY: Yes, absolutely.

20 QUESTION: So the patient has an interest in
21 making sure there is not some erroneous determination
22 made --

23 MR. COLBY: Agreed.

24 QUESTION: -- about the patient.

25 MR. COLBY: Yes.

1 QUESTION: Do you think the federal
2 Constitution, then, says that the state can't require
3 clear and convincing evidence, for example?

4 MR. COLBY: As applied in this case, I would
5 submit that -- the State of Missouri, the opinion of the
6 Court below, says "clear and convincing evidence" at only
7 one place, and at that place they say, "clear and
8 convincing, inherently reliable evidence."

9 At four other places in the opinion, the Court
10 below says, we won't allow an unconscious person to
11 exercise these rights absent rigid formalities.

12 QUESTION: Well, wait a minute. Please, let's
13 get back to the question. May a state, under the federal
14 Constitution, require at least clear and convincing
15 evidence of the patient's intent?

16 MR. COLBY: For a patient like Nancy Cruzan, I
17 would submit that her liberty interest is as important as
18 her right to life in this setting.

19 She only -- she has two extremely limited
20 options. If her right to liberty is protected, she will
21 not be forced to live in an unconscious shell, in a room
22 with strangers attending her, for the rest of her life.
23 If her right to life is honored, then she will exist in
24 this state.

25 From everything we know about Nancy's wishes,

1 from everything her family tells us about what they know,
2 because they're family, that she would want, she would
3 choose liberty.

4 If you look at the --

5 QUESTION: Well, of course, it seems to me you
6 assume the conclusion. You're trying to set up an
7 antithesis in the Fourteenth Amendment between life and
8 liberty, both of which are protected, but you assume that
9 there is a liberty to have -- to die without clear and
10 convincing proof, and that's the very issue in the case.
11 So you simply assume that issue when you say liberty.

12 On the other hand, life, you don't have --
13 there's no assumption to be made. We know there's life
14 here in some -- in some sense.

15 MR. COLBY: Justice Kennedy, I believe, based on
16 the decisions of this Court, that there certainly is a
17 liberty interest of people, conscious and unconscious, to
18 be free from invasions of the body that the state has
19 ordered.

20 So if we are trying to figure out -- we started
21 with Justice O'Connor's question -- what the proper burden
22 of proof is here, if you look at the decisions in
23 Matthews, the decisions in Santosky, and are trying to
24 figure out where the disutility of error falls, if one
25 right should be respected substantially more than another

1 right, based on all of the evidence in the record below,
2 if Nancy Cruzan was lucid for a moment and could come
3 before this Court, she'd say my liberty interest is more
4 important --

5 QUESTION: But that assumes --

6 MR. COLBY: -- and certainly my interest in life
7 doesn't win out over the liberty interest.

8 QUESTION: That assumes what we're trying to
9 find. You say that liberty is inconsistent with an
10 ordered procedure to find out what her intent would be.

11 MR. COLBY: Even if we assume that the state
12 sets a burden of proof and that Nancy Cruzan, the evidence
13 below did not meet this burden of proof, all that does is
14 get us to the second question as to who -- who decides her
15 medical treatment and who is the appropriate decision-
16 maker.

17 QUESTION: Well, do you think the Constitution
18 requires a state to allow the nearest relative to make the
19 decision, or can the state require a judicial proceeding
20 to make that determination?

21 MR. COLBY: The state --

22 QUESTION: Some kind of independent decision-
23 making body, such as we might require to determine whether
24 someone must be committed to a mental institution or that
25 sort of --

1 MR. COLBY: The state could certainly set up
2 procedures to ensure that the decision is carefully made.
3 We don't dispute that. I don't believe that they could
4 remove the patient's family completely from the decision-
5 making in coming to a conclusion. The -- a person's
6 family knows information about a person that the state
7 can't know. If we're talking about choosing between two
8 decision-makers, and you have the state, who never knew
9 Nancy Cruzan, and her family, who was with her all of her
10 life, then it's --

11 QUESTION: Is it enough if the family members
12 are allowed to testify and state, as an evidentiary
13 matter, their understanding of their daughter's wishes?

14 MR. COLBY: Yes. I -- that is evidence of what
15 the person would want. The appellate court here discarded
16 all that evidence.

17 QUESTION: Does -- does -- does the family have
18 any interest over and above being kind of a repository for
19 what the wishes of the patient are? In other words, once
20 the family has said what they have to say about what the
21 patient might have wanted, does the family, in your
22 submission, have any additional role? Are their own
23 wishes to -- given any particular regard?

24 MR. COLBY: We have not argued this case from
25 the start as a matter of her parents' rights, but

1 certainly families have an interest in making certain that
2 their family members are treated appropriately.

3 QUESTION: So what's your answer?

4 MR. COLBY: Yes.

5 QUESTION: The family does have an interest over
6 and above what it can say about what the patient's wishes
7 were?

8 MR. COLBY: I think so. They have an interest
9 in making certain that decisions are made appropriately
10 for -- family members that they care about, that they
11 nurture, that they have the responsibility of (inaudible).

12 QUESTION: You don't represent -- and it doesn't
13 make any difference that the person is an adult and not a
14 minor -- the patient?

15 MR. COLBY: Well, the value of family decision-
16 making is certainly not lost simply because Nancy Cruzan
17 was 25 when this accident happened rather than 17, and by
18 becoming unconscious, she becomes much like the child --
19 the adult child in the Youngberg case.

20 She needs -- competence presumes that you can
21 decide on your own. She can't. She needs someone to
22 speak for her. The family values, the family information,
23 the family love that since the time of Blackstone has
24 caused people to act in the best interest of family
25 members is still there for Nancy Cruzan's family.

1 QUESTION: Mr. Colby, I don't know any other
2 area where we allow the family to make a physical decision
3 for a family member, a child -- minor child. I don't know
4 any other area where the state will put certain limits on
5 those decisions, and when the family's decision is what
6 the state considers an unreasonable one, the state will
7 make the decision.

8 Now, is that where your -- where your argument
9 leads? That if the state decides that the family members,
10 in deciding that this person would want to live, or ought
11 to live, if the state decides that those family members
12 are unreasonable, that no one, as you say, would want to
13 live in this -- in this permanent vegetative state, can
14 the state then not make the same decision in the place of
15 the family members who are being unreasonable about it?

16 MR. COLBY: If -- absolutely, and as --

17 QUESTION: So the state can require the
18 hospital -- the state can require a hospital to cease
19 providing this kind of medical care? That's where your
20 argument leads?

21 MR. COLBY: No. My point is that the state, if
22 it has information or evidence that the family is abusive,
23 or acting inappropriately, then we welcome the state
24 intervention. In this case, there is absolutely no
25 evidence of any kind of abusive nature of the family

1 decision.

2 QUESTION: It's not a matter of being abusive,
3 any more than the Jehovah's Witness parents are being
4 abusive. The state just determines that the decision that
5 has been made is an unreasonable one.

6 MR. COLBY: And we submit that where a person
7 who is permanently unconscious, where her wishes are
8 clear, where the family's belief in her best interest is
9 clear --

10 QUESTION: Well, beyond whether her wishes are
11 clear -- that's a different question. We're arguing under
12 the Chief Justice's hypothesis: the right of the family
13 to decide. Doesn't the right of the family to decide lead
14 inevitably to the right of the state to decide?

15 MR. COLBY: But for the state to intrude in a
16 person's life, they have to articulate the specific
17 reason, and they absolutely have not done that in this
18 case.

19 QUESTION: You mean articulate reasons that are
20 specific to this patient?

21 MR. COLBY: Yes, absolutely.

22 QUESTION: But what I -- what I still don't
23 quite understand from your argument, is it your view that
24 if the actual wishes of the patient are unknowable -- in
25 many cases, I suppose, you just wouldn't know. You can't

1 really get evidence that -- people don't expect to find
2 themselves in this position -- that in that event, the
3 state can always turn down and always insist that the
4 patient continue to live?

5 MR. COLBY: No. No, I --

6 QUESTION: Because your argument seems to focus
7 entirely on trying to ascertain the intent of the patient.

8 MR. COLBY: And I tried to answer the Chief
9 Justice's question in that regard and maybe did not do so
10 clearly.

11 There still is a presumption, as there has been
12 from the start of this country, that the family is going
13 to act in the best interest of that patient. If that
14 decision is among acceptable medical alternatives, it's in
15 the best interest, and I think the state -- and there's no
16 evidence of wishes -- the state still has to show some
17 specific reason for intervening and intruding in that
18 person's life.

19 If I might reserve the rest of my time for
20 rebuttal --

21 QUESTION: Mr. Colby, let me follow through a
22 little bit on the Chief's -- the Chief Justice's inquiry.
23 In this case, the expense is entirely that of the State of
24 Missouri, is it not?

25 MR. COLBY: Yes, Your Honor.

1 QUESTION: Let's change that and make it that
2 the expense was that of the family and that Mr. Cruzan had
3 seven other children and limited resources, would your
4 argument be any different? Would the welfare of the other
5 children be a factor entering into the decision?

6 MR. COLBY: It would certainly be important, in
7 that context, for the finder of fact to determine what the
8 motives of the family were and what was in the best
9 interest of that individual, and perhaps to weigh the
10 welfare of the other children, too.

11 But the finder of fact would need to make
12 certain why the parents were making this decision, and to
13 confirm that it was being made in the best interest of
14 their child.

15 QUESTION: We seem to have overlooked, here,
16 too, what the findings of the trial court were.
17 Everyone's speaking about what the Missouri Supreme Court
18 did by a 4-3 decision.

19 MR. COLBY: I agree.

20 QUESTION: Thank you, Mr. Colby. Mr. Presson?

21 ORAL ARGUMENT OF ROBERT L. PRESSON

22 ON BEHALF OF THE RESPONDENTS

23 MR. PRESSON: Mr. Chief, Justice, and may it
24 please the Court:

25 I'm here today to defend a vastly different

1 opinion of the Missouri Supreme Court than has been
2 portrayed by the Petitioners. The Respondents believe
3 that the opinion of the Missouri Supreme Court meant that
4 in this extraordinary situation of withdrawing treatment
5 which will inevitably and ultimately lead to the death of
6 an incompetent ward of the state, such a decision should
7 be made by a judicial body, the most appropriate body in
8 the State of Missouri being the probate court, rather than
9 the guardian, and that the court can act and make such a
10 decision in instances where there is clear and convincing
11 evidence that the patient, prior to incompetency, had
12 given some evidence of intent that that would be the
13 choice made or, failing that, that there be some evidence
14 that it would be unduly burdensome, or that it would
15 otherwise be in the best interest of the patient to do so.

16 QUESTION: Or his the family?

17 MR. PRESSON: Pardon?

18 QUESTION: Patient or the family?

19 MR. PRESSON: The patient or the family what,
20 Your Honor, to make the decision?

21 QUESTION: In the best interest of -- you -- you
22 said it would be in the best interest of the patient, and
23 I'm asking --

24 MR. PRESSON: Oh.

25 QUESTION: -- do you include the family also?

1 MR. PRESSON: No, I do not, Your Honor.

2 QUESTION: The answer is no, even though the
3 expense were on the family, which it is not in this case,
4 and even though there were other siblings?

5 MR. PRESSON: I believe under Missouri law, the
6 expense would not be on the family; it would not be on the
7 guardians. They are not --

8 QUESTION: But what if it were, is my question?

9 MR. PRESSON: If it were we would have a
10 different case, and that might present some problems.

11 QUESTION: Well, you're evading the answer,
12 aren't you?

13 MR. PRESSON: But, under Missouri law, as I
14 understand it, the guardians are not responsible to use
15 their own assets to care for the ward. They would look to
16 the ward's own assets.

17 That is, in part, why the guardianship was
18 entered into in this case, so that they could handle
19 Nancy's assets, her bank accounts, receive Medicaid
20 benefits, and whatever other assistance she might be
21 entitled to. But they are not using their own assets to
22 care for her, and I don't think they'd be required to
23 under Missouri law.

24 QUESTION: Well, and if they were required so
25 under Missouri law, though, that is Justice Blackmun's

1 question. Then I presume the constitutional question
2 before us would be the question of whether they can be
3 compelled to pay under Missouri law.

4 MR. PRESSON: Well, the question would be
5 whether they could be compelled as guardians with that
6 obligation out there, Your Honor.

7 QUESTION: Yes.

8 MR. PRESSON: That I think would entail now an
9 entirely different analysis; we would be talking about
10 whether that would infringe upon the rights of a potential
11 guardian to put that sort of --

12 QUESTION: The question whether they can be
13 compelled to pay is quite separate, I assume, from the
14 question of whether they have the right to demand that the
15 -- that the life of the individual not be continued.

16 MR. PRESSON: I would agree; that is a separate
17 question.

18 QUESTION: Mr. Presson, you started your
19 argument by saying that the state has the right to have a
20 judicial officer make a decision of this kind. Under
21 Missouri law, could the judge ever authorize the
22 withdrawal of the life support procedures if there was no
23 certain evidence with regard to the intent of the patient?
24 Could there ever be circumstances that would justify that?

25 MR. PRESSON: I believe from my reading of the

1 Missouri Supreme Court opinion, yes, that could happen.

2 QUESTION: What -- what kind of circumstances
3 would justify that?

4 MR. PRESSON: Well, I don't know that we can be
5 global or totally exclusive about it. Some factors, I
6 think, were mentioned by the Missouri Supreme Court. They
7 did mention the possibility of pain, the heroic or
8 extraordinary nature of the treatment. For instance, if a
9 patient, such as Nancy in this case, were to develop
10 cancer, whether they would approve chemotherapy or major
11 surgery. I think it would present an entirely different
12 case to them.

13 QUESTION: Well, why -- why -- why would that be
14 different? Is that just because it's a different amount
15 of dollars and cents involved? Here it costs about 10,000
16 a month, supposing it cost 100,000 a month with all --

17 MR. PRESSON: I don't think, based upon the
18 Supreme Court's analysis, it's just a matter of dollars
19 and cents.

20 QUESTION: So dollars would not be relevant,
21 even?

22 MR. PRESSON: I -- I -- well, they certainly
23 didn't indicate that it would be.

24 QUESTION: The one factor that would be relevant
25 would be discomfort to the patient, pain?

1 MR. PRESSON: That's not the only -- I think
2 they --

3 QUESTION: Well, what else would be?

4 MR. PRESSON: They indicated whether it would be
5 ordinary or extraordinary care. In this instance --

6 QUESTION: But what's -- why -- why is that
7 significant, except in a dollars and cents way? What
8 difference does it make if it's three nurses instead of
9 one, or two tubes instead of one? Why does that matter?

10 MR. PRESSON: Well, it would be a more invasive
11 type procedure.

12 The Petitioners have --

13 QUESTION: But if there is no pain involved, so
14 what? Why does that make a difference? I don't
15 understand.

16 MR. PRESSON: Well, to me it makes a difference
17 because we are talking about an asserted right -- since we
18 disagree, whether it stems from the common law or the
19 Constitution, but (inaudible) --

20 QUESTION: Well, it has -- for your opponents to
21 win, it has to stem from the Constitution. We can't
22 decide this on a common law basis. We don't have the --

23 MR. PRESSON: Well, I -- I submit there -- the
24 real issue in the case is really only the procedure,
25 because there's really no difference between the

1 substantive right found by the Missouri Supreme Court --

2 QUESTION: Yes, but the procedure has to have
3 some kind of standard by which things are done. You had a
4 procedure here, and a trial judge concluded that the
5 matter could go differently. You have a procedure in
6 place, but --

7 MR. PRESSON: Well, the ultimate procedure and
8 the ultimate standard --

9 QUESTION: The question for me is what is the
10 standard? And is there any possibility of withdrawing the
11 support in the event that the patient's desires are not
12 knowable? Because I would think that would be the typical
13 case.

14 MR. PRESSON: And I respond that yes, I think
15 that is a possibility --

16 QUESTION: And that would depend on proof of
17 pain?

18 MR. PRESSON: Not limited just to pain, Your
19 Honor.

20 QUESTION: Pain or a lot -- well, a more
21 elaborate procedure than we have here?

22 MR. PRESSON: An elaborate procedure, which
23 might be, as they said in the opinion, heroically
24 invasive. I would think it would also be a question of
25 whether we are talking about some procedure where the

1 effectiveness is only 50 percent versus something where it
2 is virtually 99 percent effective. Whether you --

3 QUESTION: Effective at doing what? This is 100
4 percent effective at sustaining life, and that's all it
5 does.

6 MR. PRESSON: I think the effectiveness --

7 QUESTION: How can you have 50 percent
8 effectiveness in that sense? I don't understand you.

9 MR. PRESSON: Well, it goes back to, I think,
10 the ultimate standard under the probate court, which --
11 code, which the Missouri Supreme Court was operating
12 under, is the best interests of the incompetent ward. And
13 I think what they were trying to do, in response to
14 specific claims that the Plaintiff had brought before them
15 was identify objective factors that a court should take
16 into account in trying to make that best-interest
17 determination.

18 QUESTION: The two factors are, one, how
19 invasive is it? Which is, to me, how expensive is it,
20 because the patient doesn't really know whether there are
21 one, two, three or a hundred tubes placed in --

22 MR. PRESSON: Well, I don't think we're -- we're
23 limiting the procedure, which the Missouri Supreme Court
24 adopted here, to just a PVS patient, in which they would
25 be --

1 QUESTION: Well, that's all we have to decide is
2 a PVS patient.

3 QUESTION: Would Missouri law make any
4 distinction in that respect between the fact that this is
5 just hydration and nutrition, as opposed to another kind
6 of procedure?

7 MR. PRESSON: I think the nature of the
8 procedure and the fact that it is nutrition and hydration,
9 in this case, becomes a relevant factor. Certainly, they
10 indicated, as Mr. Justice Stevens indicated, that it's 100
11 percent effective for what it is intended to do. Other
12 forms of treatment might not be. And it might not be in
13 the best interest of an incompetent patient to insist that
14 they undergo such other treatment.

15 So the nature of the treatment, I think, and the
16 lack of any significant burdens was a factor that the
17 court said is a objective matter we can look to, to see
18 whether it is in the best interests.

19 What I would say is the Missouri Supreme --

20 QUESTION: I simply don't -- shoot, I simply
21 don't understand that argument. If one procedure will
22 sustain life for 20 years and another will sustain life
23 for 10 years, which one is the better, and why is one
24 better than the other? And they're equally invasive. And
25 the patient in each case is in a persistent vegetative

1 state.

2 MR. PRESSON: I'm not sure I understand --

3 QUESTION: How can the state draw a distinction
4 between those two?

5 MR. PRESSON: Well, I'm not sure I understand
6 the question --

7 QUESTION: Well, you said 50 percent would be
8 the different case, and I'm asking you why?

9 MR. PRESSON: Well, we are trying to make a
10 judgment as to what is in the best interest of the patient
11 presumably --

12 QUESTION: And you're suggesting it might be in
13 the best interest to keep her alive for 20 years, but it
14 would not be in the best interest to keep her alive for 10
15 years.

16 MR. PRESSON: I'm not sure that the -- the issue
17 of the state is necessarily formulated properly in terms
18 of keeping her alive for 20 years or keeping her alive for
19 30 years.

20 QUESTION: Well, what are -- what are you
21 referring to 50 percent versus 100 percent? What does
22 that mean, other than a difference in the period which the
23 patient will live?

24 MR. PRESSON: I would submit this, Justice
25 Stevens, in looking to the best interest of the

1 incompetent patient, I think the court was indicating we
2 must look to some of the same sorts of things we would
3 presume that a patient, if competent, would look to in
4 making their own decision.

5 And they would look to the risks associated.
6 Are there going to be significant side effects, is it
7 going to be painful?

8 QUESTION: And you think that rational,
9 competent patient might say, yes, I want to remain in this
10 state for 20 years, but if I can only stay in this state
11 for 10 years, I wouldn't do it? That's what you're
12 saying.

13 (Laughter.)

14 MR. PRESSON: Well, we're talking -- you're now
15 talking about the length of time, perhaps, in the state --

16 QUESTION: Well, what -- what other factor is
17 there if the patient has no sense of feeling whatsoever
18 and no pain and nothing else? The only difference is the
19 length that he or she will survive, if I understand the
20 facts. Maybe I don't.

21 MR. PRESSON: Well, I -- I don't think it's a
22 question of how long she will or will not survive in this
23 state. And I certainly didn't mean to imply that when I
24 said that the degree of effectiveness of a proposed
25 treatment could be measured in terms of the length of

1 years.

2 QUESTION: Well -- but then, what did you mean
3 by that? What did you mean by the degree of
4 effectiveness?

5 MR. PRESSON: Well, it seems to me that a
6 patient who is competent when trying to decide between
7 treatment alternatives or refusing treatment would look to
8 what are the risks here. Is this treatment really going
9 to preserve my life, or is it going --

10 QUESTION: Mr. -- Mr. Presson, maybe -- maybe
11 you're -- you're being confused by assuming that this is
12 cost-free to the state. Aren't there two situations? I
13 suppose where somebody else is paying for it, and
14 volunteers to pay as much as it will cost to provide the
15 treatment, then the only interest the state has in -- in
16 mind is the welfare of the individual?

17 But I suppose if the state is paying for it, it
18 is reasonable for the state to say, how heroic are these
19 measures? How much is it going to cost the state, versus
20 what the state can use those funds for otherwise? In that
21 situation, where the state is paying for it, I assume that
22 the state can say, well, there is a certain entitlement to
23 basic medical care, but we're not going to pay for heroic
24 measures.

25 Isn't -- isn't that one factor the state can

1 take into account?

2 MR. PRESSON: I think what the -- the proper way
3 to phrase that, Justice Scalia, is that the state -- and
4 -- and when -- I mean state, I mean probate court, the
5 appropriate decision-making body under the opinion below,
6 can take into account the resources available to care for
7 the ward. Whether that stems from some state assistance,
8 whether that stems from volunteers, I think that might be
9 a relevant consideration.

10 If state law were to change, to impose some
11 burden on the guardians, then that might be a relevant
12 consideration. I think, to look at it more broadly, it's
13 that the probate court might take account the resources
14 which are available to provide the treatment, which is
15 either proposed to be initiated or proposed to be
16 withdrawn.

17 That simply was not a relevant consideration in
18 this case. And the proper role that that might be, we can
19 only speculate.

20 I would say this, the Missouri Supreme Court
21 decided only the case before it, only decided on the basis
22 of the facts and arguments which were made. It did not
23 act legislatively, and it did not lay out a judicial
24 amendment to the probate code to guide all future
25 proceedings.

1 Now, we can glean some guidance from what they
2 have said.

3 QUESTION: Well, you -- you -- the court below
4 said guardians just don't have this kind of power. They
5 don't have that kind of authority under the state law.

6 MR. PRESSON: That's the conclusion of the
7 Missouri Supreme Court, Your Honor.

8 QUESTION: And I suppose all you need to do to
9 prevail is to say the state is entitled to prefer another
10 -- another decision-maker besides the guardian.

11 MR. PRESSON: I -- I think in a nutshell that's
12 what it does come down to, Justice White.

13 This is not a situation of the state intruding
14 as -- as the Petitioners keep saying because they are not
15 intruding or seeking to override a competent choice made
16 by a fully competent adult.

17 What we have here is really a procedure by which
18 how do we make these decisions on behalf of someone who is
19 presently incompetent to make it?

20 QUESTION: Well, Mr. Presson, do you think that
21 the State of Missouri has articulated some clear standard
22 here? It's the best interests of the patient?

23 MR. PRESSON: I think that standard is implicit
24 from the probate code itself, Your Honor, and I think --

25 QUESTION: That's not what the court said,

1 though?

2 MR. PRESSON: Pardon?

3 QUESTION: Is that what the Supreme Court of
4 Missouri said?

5 MR. PRESSON: Well, I believe they indicated in
6 response to the specific arguments now that the
7 Petitioners made that this was an unduly burdensome,
8 highly invasive procedure and, I guess, inferentially
9 against the best interests of Nancy Cruzan, they rejected
10 that approach. But I think the ultimate standard the
11 Missouri Supreme Court would be applying would absent --

12 QUESTION: I -- I'm -- I'm -- I have been
13 concerned because in reading the opinion, it was not clear
14 to me what the standard was that the Supreme Court of
15 Missouri had said.

16 MR. PRESSON: Well, I -- I can only say -- I --
17 I -- I guess I read it, perhaps, in a different context,
18 the context being the general obligation of the probate
19 code, and the general obligation imposed on the guardians
20 according to Missouri law is to act in the best interests
21 of the incompetent ward. I think that is also --

22 QUESTION: And is that the -- the objective of a
23 court review in a situation like this?

24 MR. PRESSON: I would -- I would submit that it
25 is. Even if --

1 QUESTION: And the state says the evidence must
2 meet a clear and convincing standard?

3 MR. PRESSON: I believe that is within
4 Missouri's authority to set that standard.

5 QUESTION: Now, is it within the authority of
6 the Missouri court to say that they won't consider at all
7 certain types of evidence such as was offered in this
8 case?

9 MR. PRESSON: I believe that is also within
10 their authority.

11 QUESTION: There is no federal limitation
12 whatever on the decision that a state might make about
13 what evidence is relevant to the best interest standard?

14 MR. PRESSON: I won't say there's -- there's no
15 limitation at all, but I don't see that any decision the
16 Missouri Supreme Court --

17 QUESTION: Could it say we will never listen to
18 evidence given by a family member on this question?

19 MR. PRESSON: I would think the question would
20 have to be, Justice O'Connor, what --

21 QUESTION: Yes or no?

22 MR. PRESSON: No. I would submit that the
23 question must be addressed, though, what type of evidence
24 from the family we are even talking about.

25 It seems to me to be talking in the abstract

1 that the family is excluded or the family is not allowing
2 to be heard really obscures more than it illuminates.

3 I think we would have to first say be heard on
4 what issue.

5 QUESTION: Well, the supreme court -- the
6 supreme court here said the evidence offered at the
7 hearing was inherently unreliable and insufficient.

8 Do you think all of that evidence should be so
9 characterized? Is there any limit by virtue of the
10 federal Constitution to that decision?

11 MR. PRESSON: I'm not sure I follow the import.
12 I would -- I would answer this way. Relying upon a clear
13 and convincing evidence standard, I think, is a
14 constitutionally permissible option that the Missouri
15 Supreme Court can adopt. Whether that is imposed upon
16 other states, should they choose to make it, I would
17 submit they could make constitutionally other choices.

18 QUESTION: Mr. Presson, I gather from your
19 answer that you think that Missouri could not enact a law
20 that said in the event an individual is unconscious,
21 normal medical procedures to keep that individual alive
22 will be applied unless the individual has left word in
23 writing that he does not want his life to be maintained or
24 that he wants that judgment to be made by someone else.
25 Missouri couldn't pass a law like that?

1 MR. PRESSON: Obviously that presents different
2 issues.

3 QUESTION: It excludes all sorts of evidence as
4 to what his genuine intent was, but he did not leave it in
5 writing and, therefore, Missouri says this is the
6 procedure. We, you know -- we think it's an extraordinary
7 thing to kill someone, and we're not going to assume the
8 individual writes -- wants that unless he leaves word in
9 writing beforehand. Couldn't Missouri adopt a law like
10 that?

11 MR. PRESSON: I think Missouri could, as some of
12 the amici have suggested, for instance, exclude -- treat
13 separately nutrition and hydration. That was not done in
14 this case.

15 I believe --

16 QUESTION: But then you're changing your answer
17 to Justice O'Connor. What you're saying is the state
18 could exclude all evidence other than a written instrument
19 satisfying the statute of wills or something like that.

20 MR. PRESSON: Well --

21 QUESTION: That's what Justice Scalia posits,
22 and you answer -- you give him one answer and you give
23 Justice O'Connor a different answer because you said to
24 her that, no, they could not exclude certain kinds of
25 evidence.

1 MR. PRESSON: I -- I believe the -- the question
2 was could Missouri exclude anything other than statements.

3 If, for instance, the State of Missouri said we
4 will not allow anyone, competent or otherwise, to refuse
5 nutrition, hydration because we think that amounts to --
6 state-sanctioned suicide, I would submit that that
7 presents vastly different issues because it is an exercise
8 of the state's police power.

9 Here we are talking more particularly about the
10 state's --

11 QUESTION: Well, what is your answer to that
12 hypothetical? I was going to ask you that very question
13 because here the state relied on the general interest in
14 life. Would that general interest be sufficient to
15 require that life be maintained even when the patient had
16 unequivocally executed the kind of instrument that Justice
17 Scalia described?

18 MR. PRESSON: If we are talking specifically
19 about the nutrition, hydration, I believe that would be an
20 acceptable choice.

21 QUESTION: Is that based on the assumption that
22 a -- that the state could override a competent person's
23 refusal to receive medical treatment?

24 MR. PRESSON: Not medical treatment in general.
25 I would base that on, I believe, that the state could

1 constitutionally override the -- even a competent
2 individual's choice to refuse food and water because that,
3 I believe, a state could reasonably conclude, went against
4 its interest in preventing suicide and would amount to a
5 state sanction of that.

6 QUESTION: Well, if that's -- if that's true,
7 then, in your view there's no use our even inquiring
8 whether that right survives incompetency because there is
9 no right.

10 MR. PRESSON: Well -- but the Missouri Supreme
11 Court did not make that categorical assumption in this
12 case regarding food and water.

13 I specifically made that argument before them,
14 that they should create such a separate category and treat
15 it differently, and nowhere in their opinion do I find
16 that they accepted that article -- argument. So, I
17 believe it is still a possible choice in Missouri. They
18 did not rule it out. They did not rule out any other
19 types of treatment decisions. There was no pre-judgment
20 and, therefore, I think no intrusive state intervention
21 here -- what we have is simply a question of how to decide
22 on behalf of somebody who cannot decide for themselves.
23 And is it constitutional --

24 QUESTION: Getting -- getting back to the
25 competent person, I assume your answer would be a

1 competent person could not refuse food or water if the
2 state determined otherwise, even if that person were in
3 great pain?

4 MR. PRESSON: I think the -- when we get down to
5 specifics, maybe in certain instances that might be an
6 irrational choice. But I think the state can treat food
7 and water, for instance, differently than it does other
8 treatment.

9 The question, I think, would be, Justice
10 Kennedy, as I said in the brief --

11 QUESTION: Mr. Presson, before you sit down, I'd
12 like to ask a -- an impertinent and perhaps an improper
13 question. Have you ever seen a patient in a persistent
14 vegetative state?

15 MR. PRESSON: I have seen Nancy Cruzan herself.

16 QUESTION: You have seen Nancy?

17 MR. PRESSON: Yes.

18 QUESTION: Any others?

19 MR. PRESSON: Yes.

20 QUESTION: How come?

21 MR. PRESSON: I was at the hospital, at Mount
22 Vernon Rehabilitation Center.

23 To perhaps get back to your question, Justice
24 Kennedy, as to whether or not the -- as I stated in my
25 brief, even though it's not directly presented, it would

1 seem to me the state in that instance might have to engage
2 in some very delicate decision-making. Is this just a
3 desire to die, to reject one's state of life, in which
4 case it amounts to nothing more than suicide, and does the
5 Constitution require the state to sanction and recognize
6 that, or is it a case --

7 QUESTION: Your time has expired, Mr. Presson.
8 Thank you.

9 General Starr.

10 ORAL ARGUMENT OF KENNETH W. STARR
11 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE
12 SUPPORTING THE RESPONDENTS

13 MR. STARR: Mr. Chief Justice, and may it please
14 the Court:

15 Before addressing the constitutional issue in
16 this tragic case, there are quite briefly two background
17 points that, based on my study of this record, I believe
18 merit the Court's attention.

19 First, the medical care providers in this case,
20 those who care for Nancy at Mount Vernon, are not in
21 agreement with the family's decision. The testimony at
22 trial was clear and consistent that although the medical
23 care providers sympathize deeply with the family's plight,
24 they respectfully disagree with the decision and many will
25 not participate in withdrawing nutrition and hydration.

1 Second, Nancy Cruzan --

2 QUESTION: May I ask, on that, why do they
3 disagree? What is the reason for their disagreement? The
4 same views in the state's, the general interest in life?

5 MR. STARR: No. It has to do, among other
6 things, Justice Stevens, with the mission of Mount Vernon.
7 Mount Vernon, the record shows, is a facility dedicated to
8 the care of the chronically ill, the long-term care of the
9 chronically ill. It is not an acute care facility. It's
10 entire mission is to preserve life -- the lives of those
11 who are --

12 QUESTION: So they would clearly disagree with
13 any decision to terminate life?

14 MR. STARR: I think not. I think not,
15 because --

16 QUESTION: It would be inconsistent with their
17 mission, wouldn't it?

18 MR. STARR: With respect to the method? No, I
19 think not, because if I may, the second aspect that the
20 record reveals is that Nancy and other patients at Mount
21 Vernon have, typically, a DNR -- do not resuscitate --
22 order, applicable to them in the event of a cardiac or
23 respiratory arrest.

24 But this facility has never agreed to the
25 withdrawal of nutrition and hydration, and there is a

1 reason for that. There is no consensus on this delicate
2 issue in the nation. Of the states that have living will
3 statutes, 18 of those states, ranging geographically from
4 Maine to Arizona, draw a distinction between nutrition and
5 hydration, on the one hand, and other forms of treatment
6 or care.

7 So, too, Congress has drawn that distinction in
8 the Child Abuse Amendments of 1988, and as the Missouri
9 Supreme Court noted, the distinction is seen quite
10 poignantly in the actions a decade ago, in the celebrated
11 case of Karen Ann Quinlan.

12 In that tragic case, Karen's parents secured
13 judicial permission in New Jersey to withdraw Karen's
14 respirator. It was thought that she was respirator-
15 dependent, but she was not. They refused, however, to
16 withdraw her nourishment. The parents believed that that
17 presented different moral issues. And these facts place,
18 in my judgment, in very sharp relief the Probate Court's
19 order in this case, which is what was before the Missouri
20 Supreme Court.

21 That order directs a long-term care facility, on
22 pain of civil liability, to take the action of withdrawing
23 food and drink from a patient who came there ten months
24 after this accident, when she was known to be in a
25 persistent vegetative state and was given to the care of

1 Mount Vernon for the long term. That is the context of
2 the Missouri Supreme Court's opinion.

3 Now, as to the constitutional issues before the
4 Court, we believe that in this highly sensitive and deeply
5 vexing area, that the due process clause should not be
6 interpreted to force the states and the federal
7 government, with its many health-care facilities, to
8 embrace a particular procedure or approach to the
9 treatment or care of incompetent persons.

10 To the contrary, we believe that the due process
11 clause should be interpreted to provide the states and the
12 federal government with wide latitude that -- wide
13 latitude to develop approaches that reflect reasonably the
14 values of the people, that states should not be forced to
15 use the Massachusetts model, which Missouri has now
16 embraced, a model of active state judicial involvement
17 through a probate judge.

18 Nor, on the other hand, should they be forced to
19 use the Minnesota model or the Arizona model. Those -- in
20 those models, the court is ordinarily not involved and
21 these matters are entrusted to the decision of the health
22 care providers and to the families.

23 The standard, we believe, that should guide this
24 difficult area, is that of reasonableness. Is the
25 governmental approach, or regulation, or regime,

1 reasonably designed to serve a legitimate state interest?
2 And on the evidentiary standard, what the Missouri Supreme
3 Court did here was to follow the New York approach.

4 If one reads the New York opinions, as I have,
5 in *In re Eichner* and most recently, in 1988, in the
6 Westchester County Hospital case, one sees there precisely
7 the same evidentiary standard with respect to the
8 patient's intent, and this kind of decision will not be
9 honored in New York with respect to withdrawing nutrition
10 and hydration in the absence of clear and convincing proof
11 of the patient's intent.

12 That was also the approach of the Massachusetts
13 Supreme Judicial court -- Court in the Brophy case.
14 There, they concluded that the evidence was powerful in
15 Paul Brophy's case. So, too, the New York Court of
16 Appeals, in *In re Eichner*, concluded that the evidence was
17 powerful there.

18 But I believe, based on my review of the record
19 in this case, that this case may very well have been
20 decided precisely the same way in both New York and
21 Massachusetts.

22 QUESTION: Mr. General, in New York, if the
23 evidence is clear and convincing with respect to food and
24 hydration, the choice would be honored?

25 MR. STARR: That's correct.

1 QUESTION: The state could not say this is
2 tantamount to suicide and we may override that choice?

3 MR. STARR: That is correct, as a matter of
4 common law right, and that is my reading of the Missouri
5 Supreme Court's opinion.

6 QUESTION: Yes, but suppose the state did say
7 that we just put food and hydration in a different
8 category and we never will do it no matter what the
9 evidence is. What about the due process clause?

10 MR. STARR: I think there are significant
11 limitations that the state could properly,
12 constitutionally place on any such decision.

13 QUESTION: And that's one of them?

14 MR. STARR: I beg your pardon?

15 QUESTION: And so the state could not do that
16 under the due process clause?

17 MR. STARR: Oh, I'm sorry. The state could very
18 well require, before -- before any such decision was made,
19 any number of steps to be taken.

20 QUESTION: Well, I know but suppose --

21 MR. STARR: But could there be an absolute rule?

22 QUESTION: Suppose the state says, we're never
23 going to honor a choice by the patient or by the parents
24 or anybody else where food and hydration is concerned?
25 Would the due process clause forbid that?

1 MR. STARR: It would raise very difficult
2 questions, and I'm not prepared --

3 (Laughter.)

4 MR. STARR: -- and I'm not prepared to answer
5 that authoritatively, definitively. It's certainly not
6 presented here, and this Court should not be distressed --

7 QUESTION: Well, but is there --

8 MR. STARR: -- by the question because of the
9 common law right recognized in Missouri.

10 QUESTION: But Mr. Solicitor General, I would be
11 interested, could there be a case in which the federal
12 Constitution would require relief for the patient, in your
13 view, or is it absolutely up to the states, 100 percent?
14 At least you have -- you must have a position on that.

15 MR. STARR: Oh, I think if in fact the state was
16 conducting itself in what reasonable judges viewed as an
17 oppressive way --

18 QUESTION: Well --

19 MR. STARR: -- then yes, the federal
20 Constitution would speak to that.

21 QUESTION: Let's give a specific example,
22 supposing there were evidence in this case that the
23 patient was suffering continuous pain. Maybe it's very
24 mild, but continuous discomfort, and you had clear
25 evidence of the intent of the patient; everybody agreed

1 that it would be in the best interest. Would the
2 Constitution permit the state to say, we're very sorry but
3 our interest in maintaining -- the general interest in
4 life is so strong that we will not permit this to be --

5 MR. STARR: Oh, I think not. If the patient is
6 in severe pain, I would view that as an oppressive action.

7 QUESTION: How about modest pain? That's my --
8 just the slightest, but continuous pain, a very slight
9 discomfort.

10 MR. STARR: Oh, I'm sorry. I would distinguish
11 between pain and suffering, as I think the medical
12 community and ethical community does. Pain is one thing
13 that may very well be remedied by nonheroic, non-
14 particularly invasive measures. Suffering is quite a
15 different matter.

16 QUESTION: So you would agree, though, that the
17 federal Constitution is implicated by the -- by this kind
18 of issue?

19 MR. STARR: If there is a condition of
20 suffering, and the state

21 QUESTION: All right.

22 MR. STARR: -- is requiring the individual --

23 QUESTION: Absent suffering, you just don't
24 know, notwithstanding clear intent and everything else,
25 just like the fact, clear evidence of intent, you're just

1 not sure what the answer is there?

2 MR. STARR: I beg your pardon?

3 QUESTION: I'm just -- I'm -- I perhaps am just
4 repeating a question. Is the federal Constitution
5 implicated -- I'd like to have this question answered --
6 if there is no pain but there's unequivocal evidence of
7 the patient's intent to have withdrawal of the system in
8 this situation?

9 MR. STARR: Oh, yes, I think the -- the
10 Constitution is implicated. I did not want to provide an
11 authoritative answer to Justice White. I think it is --
12 clearly is implicated in terms of the significant liberty
13 interest in being free from unwanted intrusions. I quite
14 agree that it is implicated.

15 QUESTION: Thank you, General Starr.

16 Mr. Colby? You have one minute remaining.

17 REBUTTAL ARGUMENT OF WILLIAM H. COLBY

18 ON BEHALF OF THE PETITIONERS

19 MR. COLBY: If Judge Starr is correct, I have
20 read the opinion below too broadly and all it stands for
21 is the proposition that this state hospital cannot be
22 forced to remove a tube that they didn't insert. We would
23 accept that reading of the opinion gladly, if Nancy has
24 some place else to go in the state to have this procedure
25 done that she doesn't want.

1 I would just close with, it's important to
2 understand what the practical effect of this decision is
3 going to be, which is to say to families shortly after an
4 accident, your daughter's just had an accident. We think
5 she could recover, but if she doesn't --

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Colby.
7 Your time has expired.

8 The case is submitted.

9 (Whereupon, at 11:00 a.m., the case in the
10 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Nancy Beth Cruzan, by Her Parents and Co-Guardians, Lester L. Cruzan, et ux,
petitioners, v. Director, Missouri Department of Health, et al No. 88-1503

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Alan Friedman

(REPORTER)

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