UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT
REPORTER'S RECORD

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| MICHELLE KELLER & NEW AMSTERDAM CITY GENERAL HOSPITAL, Petitioners, | ) | |
| v. | ) | CASE NO. 09-1173 |
| TYLER & FLORENCE KELLER, Respondents | ) | |

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**ORAL ARGUMENT**

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On the 30th day of January, 2010 the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorables Justice Evelyn Keyes, Justice Michael C. Massengale and Justice George C. Hanks, Justices presiding, held in Houston, Harris County, Texas:

Proceedings reported by computerized stenotype machine; Reporter's Record produced by Computer-Assisted Transcription.

A P P E A R A N C E S

FOR THE PETITIONERS:

**Mr. Matthew Kellam**
***** and *****
**Ms. Whitney Hutchison**

FOR THE RESPONDENTS:

**Ms. Kristin Rhodus**
***** and *****
**Ms. Renatha Francis**

01:38 THE BAILIFF: The case before the court is
01:56 Michael Keller and New Amsterdam General Hospital versus
01:56 Tyler and Florence Keller. The petitioner and the
01:57 respondent are each allocated 30 minutes to present
01:57 their pleadings.
01:57 JUSTICE KEYES: Can we have the
01:57 announcements of the parties, please.
01:57 MR. KELLAM: Good morning, Your Honor. My
01:57 name is Matthew Kellam, and I will cover Issue 1 on the
01:57 side of the Petitioners Michelle Keller and
01:57 New Amsterdam City General Hospital.
01:57 MS. HUTCHINSON: Good afternoon, Your
01:57 Honors. My name is Whitney Hutchinson. I, too,
01:57 represent the Petitioners and will be addressing the
01:57 second issue before this court.
01:57 MS. RHODUS: My name is Kristen Rhodus, and
01:57 I represent the Respondents Tyler and Florence Keller.
01:57 MS. FRANCIS: My name is Renatha Francis,
01:57 co-counsel for the Respondents Tyler and Florence
01:57 Keller, taking on the second issue.
01:57 JUSTICE KEYES: Thank you. Mr. Kellam.
01:57 MR. KELLAM: Yes, Your Honor. Thank you.
01:57 JUSTICE KEYES: How much time are you
01:57 planning to reserve?
01:57 MR. KELLAM: Two minutes for rebuttal, Your

Honor.

JUSTICE KEYES: Two minutes for rebuttal.

MR. KELLAM: Thank you.

JUSTICE KEYES: So you will have 15 and then you have two minutes for rebuttal, or is this --

MR. KELLAM: It will be 14 and 14 on each issue and then two minutes for rebuttal.

JUSTICE KEYES: Okay. All right. Got you. Thank you very much. So that will be 14, 14 and two.

MR. KELLAM: Correct.

JUSTICE KEYES: Fine. Thank you very much.

Okay. You may begin.

MR. KELLAM: May it please the Court. My name is Matthew Kellam of Team 36, and along with co-counsel, Ms. Whitney Hutchinson, I represent the Petitioners in this matter, Michelle Keller and New Amsterdam City General Hospital.

Today, I will argue that the federal district court has no jurisdiction because of the Rooker-Feldman doctrine. Alternatively, I will argue that if this Court holds there is jurisdiction, then abstention should apply to this case.

Co-counsel, Ms. Hutchinson, will argue that in order for a minimally conscious patient to exercise a liberty interest with respect to life-or-death

decisions, the patient must understand the decision being made.

Turning to the first issues, Your Honors, there is no jurisdiction in the federal court because of the Rooker-Feldman doctrine.

JUSTICE KEYES: There is always jurisdiction over constitutional issues, so why isn't there jurisdiction this time?

MR. KELLAM: Your Honor, because the parents could have and should have filed their federal claims in the state court because of concurrent jurisdiction. The state courts can certainly adjudicate --

JUSTICE KEYES: Concurrent means you've both got it.

MR. KELLAM: Yes, Your Honor, precisely.

And under the Rooker-Feldman doctrine, the doctrine doesn't look solely to whether the state court adjudicated the federal claims, but whether the plaintiff in the federal action could have brought those claims.

And here, the parents could have and should have filed their claims in the state court. And because they did not do so, they are barred from filing in the federal court by the Rooker-Feldman doctrine.

01:59 JUSTICE KEYES: Well, they actually did
01:59 file in the state court. My understanding of
01:59 Rooker-Feldman is that it's a -- that is a collateral
01:59 estoppel type of argument. I may be wrong because it's
01:59 actually been a number of years since I've looked at
02:00 Rooker-Feldman. But they did bring their claims in the
02:00 state court.
02:00 And you can help me out here if you would
02:00 tell me what the actual posture of this case is and if
02:00 I'm understanding it correctly because what I think has
02:00 happened, and tell me if I'm wrong, is that you -- there
02:00 was a state court action, and the state court action, as
02:00 it said in the -- in my materials, it said it asked for
02:00 an injunction.
02:00 But you also apparently asked for a
02:00 declaratory judgment, which makes sense to me because I
02:00 don't see how you can get an injunction without having
02:00 an underlying suit, so -- and it also looks like you got
02:00 the declaratory judgment, which would mean that case is
02:00 over. Is that correct?
02:00 MR. KELLAM: Precisely, Your Honor. The
02:00 state court proceedings are over.
02:00 JUSTICE KEYES: So now the question is: Is
02:00 Rooker-Feldman going to bar you from being able to go
02:00 back and argue the same issues over in the federal

court? And you're saying yes.

MR. KELLAM: Yes, it would bar the Respondents, Your Honor, because the Respondents are attempting to have the federal district court directly review the state Supreme Court decision.

Pages 11 and 12 of the record indicate that the parents filed in the federal district court only one day after the state Supreme Court decision. And unless Congress specifically grants authorization for the district court to directly review a state Supreme Court decision, the filing in federal court is barred by Rooker-Feldman, and that does apply here.

Alternatively, Your Honor, if this Court holds that there is jurisdiction, then abstention also applies here for two specific reasons. First, New Amsterdam courts have not yet interpreted the state statute in question. But if --

JUSTICE HANKS: In this particular case, counsel, aren't there federal constitutional issues that are inextricably intertwined with the state issues that the New Amsterdam Supreme Court has to decide?

MR. KELLAM: Yes, Your Honor, there are federal claims that are intertwined with the state law. And this is essentially a state law issue that the parents have cloaked in federal clothing.

JUSTICE KEYES: Not really. It -- whether or not somebody has a right to make their own end-of-life determinations has been declared by the United States Supreme Court to be a constitutional issue. And actually, there is a federal constitutional right, and the state Constitution can override that. So there is a federal question.

MR. KELLAM: Precisely, Your Honor. This Court did hold in *Cruzan* that all individuals do maintain a liberty interest in making a determination with respect to life-or-death treatment. However, *Cruzan* held that competent individuals have that right but incompetent individuals do not.

The issue here --

JUSTICE KEYES: No, it didn't. It held that competent individuals have that right. I don't recall any right that *Cruzan* said incompetent ones have no right.

And that's critical because if -- because if competent individuals have this right, then the question is: Who does the right devolve on when they're no longer competent? Plus the question: When are they no longer competent? And those are issues somebody has got to decide, and it looks like it hasn't been decided here.

Are you saying it has to be decided by the state court?

MR. KELLAM: Yes, Your Honor, because *Cruzan* really set the parameters for this area of law. Other than *Cruzan*'s main holding, as Justice O'Connor pointed out in her concurrence, these issues of laws are best left to the laboratories of the states.

This is certainly a minimally conscious state. It's a state of consciousness that is still developing that has only been around for the better part of ten years. So because of this authority --

JUSTICE KEYES: Wait a minute. A state of consciousness that's only been around for ten years?

MR. KELLAM: Yes, Your Honor.

JUSTICE KEYES: Don't you mean the legal concept of the state -- a legal concept that's only been around for ten years? Because I think the state of consciousness has probably been around longer.

MR. KELLAM: Correct, Your Honor. But medically speaking, doctors did not diagnose this state until --

JUSTICE KEYES: They didn't recognize it?

MR. KELLAM: Did not recognize it until the late 1990s.

So because of that issue and because of the

uncertainty in this law, abstention does become all the more appropriate. And under --

JUSTICE KEYES: But why? I mean, why would you abstain?

Now, let's assume that it's not barred by Rooker-Feldman. And frankly, I've got to tell you, it's pretty hard to see how Rooker-Feldman is going to bar inquiry by anybody into this -- into this issue which is so critical to so many human beings when there is no state court proceeding pending. So somebody has to resolve this.

You're not abstaining from any ongoing proceeding, I don't believe, so what are you abstaining from doing?

MR. KELLAM: Well, Your Honor, under *Railroad Commission v. Pullman*, this court would be abstaining from interpreting and forecasting what New Amsterdam law would be because in this case --

JUSTICE KEYES: So what do you do, just say, There's no proceeding, but we're going to abstain anyway?

MR. KELLAM: Under *Pullman*, Your Honor, this court can stay -- the federal district court would stay the proceeding and New Amsterdam would be allowed to interpret its state statute. And under *Railroad*

*Commission v. Pullman*, this court will then determine if that state court interpretation mooted out the federal constitutional claims.

JUSTICE KEYES: So would you send that state court question, then, under *Pullman*, do you send that back to the state court for resolution, asking them to resolve their own state court constitutional question, and then it comes back to the federal court?

MR. KELLAM: Correct, Your Honor. And the federal court would only continue the matter if the federal claims were not mooted out. And that's what this court recognized in *Pullman*.

And this court furthered *Pullman* in *Reetz v. Bozanich*, a 1970 case, when it held that if it was even conceivable that the federal claims would be mooted out by the state court adjudication, then *Pullman* would be appropriate.

JUSTICE MASSENGALE: Why is *Pullman* the appropriate standard and not *Burford* or one of our other abstention doctrines?

MR. KELLAM: Your Honor, the *Burford* abstention would be just as appropriate as *Pullman* abstention. Both are applicable here. And *Burford* abstention is appropriate because the ability to regulate end-of-life decision-making is of significant

state concern. And furthermore, the failure to abstain here creates a severe disruption in New Amsterdam's ability to establish a coherent scheme in this area of law.

JUSTICE MASSENGALE: But *Burford* didn't involve injunctive relief, did it?

MR. KELLAM: No, Your Honor. But under *Burford* there are actually two prongs, and the prong that Michelle is moving under is prong two, and these two prongs were recognized by this court in a 1989 case, NOPSI. And the second prong focuses exclusively on the significance of the state law issue and how abstention would affect the state's ability to establish a coherent scheme in that area of law.

And certainly, protecting minimally conscious patients is of significant state concern because it's intimately wrapped up with the state's police powers. States, of course, have the ability to protect their citizens' health, safety, morals and welfare, and this has been recognized as an ideal reason to apply *Burford* abstention. And that was a holding of the Fourth Circuit case in 1999, *Johnson Entertainment Company versus Collins*.

And certainly, Your Honors, this court also recognized in 1985 in *Metropolitan Life Insurance*

*Company versus Massachusetts* that states have great leeway to draft laws that protect the limbs, the comfort and the safety of their citizens.

But in addition to the magnitude of this issue to the state, this is an issue that will affect multiple residents of New Amsterdam. Now, admittedly, not every patient may be in a minimally conscious state. But this law and the interpretation of this statute will have addressed an impact on the state because citizens may have to serve as surrogate or proxy decision-makers under this law.

Also, the American Hospitals Association has held that thousands of end-of-life decisions are made on a daily basis. So certainly, this is a significant area of state law.

JUSTICE MASSENGALE: Well, shouldn't we consider that other states are going to be looking at this case as well and wondering what kind of guidance might be provided by this court as -- I mean, the question of whether there is a liberty interest and to what extent it's protected under the Constitution is common to all the states. And if this court never considers that question, then we're at risk, aren't we, of having inconsistent resolutions in all the different states?

MR. KELLAM: No, Your Honors. In fact, this court was comfortable in *Cruzan* with the fact that the laboratories of democracy process would work out and would benefit the nation as a whole.

JUSTICE MASSENGALE: Well, in *Cruzan* that would be relevant to each state's ability to determine its own procedures. But it's the same liberty interest in all the states, isn't it?

MR. KELLAM: Of course, Your Honor.

JUSTICE MASSENGALE: Okay. And isn't that the question that we have indicated we're interested in addressing in this case?

MR. KELLAM: No, Your Honor, because this court made clear in *Cruzan* that all patients do have the liberty interest in determining end-of-life treatment, but the court did leave it up to the states to determine their own burdens of proof, for example.

JUSTICE MASSENGALE: Well, I thought I had understood that the issues identified by this court that would be taken up in this case included the question of whether a person has a liberty interest on the facts presented.

And isn't that something that we can, by resolving that question, provide guidance to other states, and wouldn't -- isn't that a reason why we

should go ahead and hear the case?

MR. KELLAM: Certainly, Your Honor, this court could choose not to abstain and address the second issue. But the problem there still, there is confusion in this area of law. And Justice Scalia noted that --

JUSTICE MASSENGALE: So isn't this a great opportunity for us to provide guidance and dispel some confusion?

MR. KELLAM: Not necessarily, Your Honor, only because it's still unclear what the best course of action would be. And that's why the laboratories of democracy process is ideal because states may handle this matter in many different ways. New Amsterdam might handle the matter differently than Texas.

JUSTICE MASSENGALE: Wouldn't it help them to establish their procedures if we gave them some guidance about the scope of the liberty interest and what we would be looking for in terms of an adequate procedure from the state?

MR. KELLAM: Your Honor, that could potentially be resolved, admittedly. However, the alternative is for this court to abstain and to allow these thorny issues of law to be advanced by the states. And, therefore, the nation would benefit as a whole because the states would be able to determine what

methods have worked and what haven't.

And that's appropriate here because the minimally conscious state is especially unpredictable. Doctors are still attempting on a daily basis to determine the details of this state of consciousness.

JUSTICE HANKS: Well, wouldn't it be helpful if we, as Justice Massengale said, establish the parameters so that the states would be in a better position to develop whatever evidentiary standards that need to be developed to determine, you know, what is a minimally conscious state versus a permanent vegetative state?

MR. KELLAM: Your Honor, yes, that could be an ideal course of action. But in *Cruzan*, this court set the parameters for this area of law.

And as Justice Scalia noted in his concurrence, it would be inappropriate at this time to take an additional course of action because of the uncertainty. Justice Scalia stated that the answers to these questions are certainly not in the Constitution, and quite respectfully, he stated that they are beyond the justices of this honorable court. And for those reasons, it would be dangerous for this court to take a stance in this area. This is an issue that is perfect for the states to resolve at this time because of the

uncertainty.

JUSTICE KEYES: So your fallback position is that assuming that we find that there is jurisdiction in the federal courts, that the suit that you have pending in the federal courts should be -- should be abated and the issues referred to the state court to get resolution of them, or you will send over a question for them -- for their highest court to resolve their own, what, Constitution, I guess.

There are some state constitutional issues, I assume, and federal constitutional issues underlying that statute?

MR. KELLAM: Correct. And to answer Your Honor --

JUSTICE KEYES: Either the current one or the pending one?

MR. KELLAM: Yes, partly, Your Honor.

I see my time has expired.

JUSTICE KEYES: Please finish.

MR. KELLAM: Thank you so much.

If this court elects to abstain under *Pullman*, then yes, the action would be stayed, and then it would depend on the adjudication at the state level. However, if this court elects to abstain under *Burford*, there would be a complete dismissal. So there are

different options here.

JUSTICE KEYES: Thank you.

MR. KELLAM: Your Honor, it's for the reasons stated there is no jurisdiction in the federal court because of the Rooker-Feldman doctrine.

JUSTICE KEYES: Thank you.

MR. KELLAM: But --

JUSTICE KEYES: No. I'm going to let the next --

MR. KELLAM: Thank you, Your Honor. I apologize.

JUSTICE KEYES: Ms. Hutchinson.

MS. HUTCHINSON: Thank you, Your Honor. May it please the Court.

My name is Whitney Hutchinson, and I, too, represent the Petitioners Michelle Keller and the New Amsterdam City General Hospital.

As my co-counsel has just addressed in his time before the court, abstention is appropriate in this case.

However, if abstention is found to be unwarranted, then with respect to the second issue, we respectfully ask this court to reverse the holding of the 14th Circuit Court of Appeals as to their standard of competency to make medical treatment decisions.

Such a holding is warranted in this case for the following three reasons.

First, the 14th Circuit incorrectly lowered the standard of competency by replacing a patient's capacity to understand with the ability to communicate.

JUSTICE KEYES: Well, now, wait a minute. Aren't you asking us sitting here on the federal court, the Supreme Court, to resolve a question of state statute, how you interpret a state statute?

And shouldn't the -- shouldn't that state court be allowed -- the Supreme Court of the state of New Amsterdam be allowed to determine what its own statute means?

I believe that's pretty bedrock law.

MS. HUTCHINSON: Well, that is why we, under the first issue, argue that abstention is appropriate in this case, that New Amsterdam should be allowed to determine and interpret its own law.

JUSTICE KEYES: So you're saying that if we're going to blast right past that and we're going to do the interpretation, here is how we should interpret it --

MS. HUTCHINSON: Not --

JUSTICE KEYES: -- for the people of New Amsterdam?

02:14 MS. HUTCHINSON: I apologize.

02:14 If this court is addressing the second issue, the question is not the construction or interpretation of the New Amsterdam state statute, but rather whether or not the holding of the 14th Circuit, which created a new standard of competency, whether that standard is appropriate.

02:14 And we argue that it's not, first, because it replaces a patient's capacity to understand with the ability to communicate. Additionally, given the extreme medical uncertainty that currently surrounds the states of consciousness, the 14th Circuit's reliance upon a medical diagnosis is an improper basis for the exercise of constitutional liberty interest.

02:15 Thus, under the second issue presented, we urge this court to reject the standard put forth by the 14th Circuit and instead adopt the correct standard of competence, that a patient must be able to understand both their prognosis but also the serious effects of their decisions.

02:15 JUSTICE KEYES: So are you asking us to define the scope of the constitutional liberty interest if you're not asking us to say -- to interpret a state statute?

02:15 MS. HUTCHINSON: Here it's not defining the

scope but rather, as you noted correctly during my co-counsel's argument, Your Honor, that *Cruzan* sets forth that all individuals, whether competent or incompetent, have a liberty interest. All *Cruzan* states in its --

JUSTICE KEYES: Well, I think your colleague said that only competent individuals have a liberty interest.

MS. HUTCHINSON: I apologize.

I believe he stated that they only have the --

JUSTICE KEYES: I think that's wrong, so let's go with you.

MS. HUTCHINSON: They have the ability to exercise it. I believe that's the --

JUSTICE KEYES: So it's exercise that matters, who can exercise that liberty interest.

MS. HUTCHINSON: Yes, Your Honor, who can exercise.

So here, the question is: What is the standard of competency to determine who has the ability to exercise and who does not?

And the standard put forth by the 14th Circuit on pages 18 and 19 of the record is an incorrectly low standard because it explicitly

02:16 disregards whether a patient can understand and entirely
02:16 replaces that with the ability to communicate. That is
02:16 an incorrect standard because it creates significant
02:16 negative consequences that are applicable, and seen when
02:16 applying this lower standard to the facts of the case
02:16 such as the *Matter of O'Brien* from the New York Court of
Appeals.

02:16 The issue in the *O'Brien* case was the
02:16 competency of an 83-year-old Catholic priest who was a
02:17 stroke patient. Father O'Brien, because of his stroke,
02:17 was confined to a hospital bed. But the Court noted
02:17 that he still had self-awareness and the ability to
02:17 communicate. He could nod or shake his head in response
02:17 to yes-or-no questions and avert his gaze when asked
02:17 more difficult and complicated questions.

02:17 And thus, the argument was that
02:17 Father O'Brien was competent to decide to withdraw
02:17 nutrition and medical treatment because on five separate
02:17 occasions, he was expressing a preference that he wanted
02:17 to do so by attempting to withdraw his gastrotomy
02:17 feeding tube.

02:17 Under the 14th Circuit's lower standard,
02:17 Father O'Brien's life would be erroneously deprived.

02:17 JUSTICE KEYES: Now, I'm still trying to
02:17 figure out what your -- it's a standard of what? And

you say a standard of competency.

And so I think that you actually are, unless I'm misunderstanding you -- which is a real possibility, so you should maybe work on this, work on making sure that we're on the same page here -- that when -- what you actually are talking about is the scope of the -- of the constitutional right to exercise -- to determine your own medical fate.

And I am wondering if you're getting into the area of, okay, so the State of New Amsterdam has a statute over here and it says all this stuff, but no matter what, that stuff is going to be unconstitutional, and we can short-circuit that because we need to go and determine the bedrock of what would be a constitutional -- the scope of the constitutional right.

And that constitutional right is going to -- something is going to happen to it when a person is incompetent. Either when that person is incompetent, they have -- still have the right, if they were competent back here, to have appointed a proxy or -- to stand in for them, or they -- or the state gets to take over and set its own standards.

Now, if you want to decide that the state doesn't have the right to take over and decide when someone -- where this -- where this right runs out, then

I could maybe understand that.

Do you see where my confusion comes in that I'm not sure about what you're --

MS. HUTCHINSON: Yes, Your Honor.

JUSTICE KEYES: -- arguing?

MS. HUTCHINSON: It is still our position that the laboratories of the states are the best avenue to address the standard of competency.

However, again, if this court, as you stated, would blow past that issue and address the standard of competence, this would not undercut the statutes set forth by states like New Amsterdam. Subsection 1 of the proxy statute 294.60 from New Amsterdam only applies and is relevant if an individual is found to be incompetent.

Thus, the issue here is not the applicability of New Amsterdam's directive. It's not the standard under the proxy statute. It's this first step to determine whether an individual is incompetent.

And the 14th Circuit has put forth that all that is necessary is that an individual is self-aware and that they can express a preference, but they disregard whether or not the patient has the capacity to understand.

And that's an import -- the reason that

02:20 that's incorrect is because the goal of end-of-life
02:20 treatment is to best determine and effectuate what a
02:20 patient's wishes would be.
02:20 JUSTICE KEYES: Well, that sounds good, but
02:20 how does the United States Supreme Court have the
02:20 fact-finding ability to determine what kind of -- what's
02:20 going to count as competent or not?
02:20 It seems to me that's what state statutes
02:20 are built on is factual determinations and that, first,
02:20 you have to go back and have this standard established
02:20 somewhere else before you get up to the United States
02:20 Supreme Court to be calling for its own fact finders,
02:20 which it doesn't have any ability to go out and get.
02:20 MS. HUTCHINSON: Exactly, Your Honor, which
02:20 is why abstention is warranted in this case.
02:20 But in addressing the issue -- this would
02:20 not be asking for this court to be doing fact-finding,
02:21 for example, with respect to Stephen Keller's
02:21 competency. This court would merely set a standard if
02:21 it's addressing the second issue and then demand for
02:21 further fact-finding to determine if Stephen is
02:21 competent or not under the correct standard.
02:21 And here, the other reason --
02:21 JUSTICE KEYES: Constitutional as opposed
02:21 to statutory, I take it?

02:21 MS. HUTCHINSON: Yes, Your Honor.
02:21 JUSTICE KEYES: A constitutional standard?
02:21 MS. HUTCHINSON: Yes, Your Honor.
02:21 But here, the other reason the 14th Circuit standard is incorrect is because it heavily relies upon a medical diagnosis, the diagnosis of being in a minimally conscious state.
02:21 This is incorrect because at this time, as my co-counsel correctly noted, doctors first recognized the minimally conscious state in the late 1990s, but it was only fully recognized within the American Medical Association's Journal of Neurology in 2002, when Dr. Giacino in the Aspen convention published its studies with respect to the minimally conscious state.
02:21 Subsequent to that publication, however, doctors and neurologists readily admit that it is very difficult, if not impossible, to accurately and consistently differentiate between the persistent vegetative state and the minimally conscious state.
02:22 In fact, in 2009 Dr. Caroline Schnakers published a study that showed in multiple metropolitan hospitals as well as nursing homes in cities such as London, Milwaukee and New Orleans that patients were being misdiagnosed on an average of 20 to 43 percent of the time, showing that --

02:22 JUSTICE KEYES: Well, but now we're really getting into facts.

02:22 Now, what -- I'm just trying to think back to *Cruzan*. And in *Cruzan*, my recollection is -- and set me straight if this is wrong -- that we said we just set out general parameters of constitutionality and then said your statute back there in Missouri, or wherever it was, is fine. You go and make these determinations under your statute.

02:22 And I think the issue in that case was, is your statute constitutional? I believe that was the issue.

02:23 MS. HUTCHINSON: It was -- it was part of it. Nancy Cruzan in the 1990 case, she was in a persistent vegetative state, and there the State of Missouri had set forth a clear and convincing evidence standard to determine whether or not life-sustaining treatment could be withdrawn. In this court's holding, it first stated that all individuals do have a liberty interest with respect to the integrity of their own person, but that only competent individuals can exercise that liberty interest. If you're incompetent, you still maintain that interest, but an individual such as a surrogate or court-appointed proxy would have to exercise that interest for you. And there they found

that the clear and convincing evidence standard was appropriate, constitutional, but that the courts could set lower standards -- I apologize -- the states could set lower standards if they saw fit. Again, going back to my co-counsel's argument that the laboratories of democracy should be addressing this issue within the individual states.

Another reason for why the 14th Circuit's standard is incorrect, it results in risks that may improperly effectuate what an individual's wishes are.

Justice Scalia, in the concurrence -- in the concurrence of the *Cruzan* decision noted that end-of-life decisions are very personal, they're very intimate, and so in this area of law we must do our best to determine what an individual's wishes with respect to care would be.

Because the 14th Circuit's standard entirely disregards whether a patient understands his prognosis or the serious effects of his decisions, such as Father O'Brien, who the court found did not understand that withdrawing his gastrotomy feeding tube would result in his life -- the end of his life, it creates a risk of erroneously or incorrectly effectuating what these patients' wishes would be.

Understanding is a test that is implied by

this court in *Cruzan*, stating that incompetent individuals don't have the ability to exercise their liberty interests because they can't make informed choices.

Medicine recognizes understanding as an appropriate standard since 1977 in the American Journal of Psychiatry, which lists understanding as an appropriate benchmark for competency.

But additionally, states across our nation utilize understanding: New York in the *O'Brien* case; Michigan Supreme Court in *In Re: Martin*, which addressed whether or not Michael Martin understood his prognosis; *In Re: AC* from the District of Columbia; *In Re: Ferrell* from New Jersey; Florida state statutes. Under --

JUSTICE KEYES: So are you testing the constitutionality of this current statute that they have in New Amsterdam?

MS. HUTCHINSON: Of the proxy code?

JUSTICE KEYES: Yes, absolutely.

MS. HUTCHINSON: No, Your Honor.

JUSTICE KEYES: No?

MS. HUTCHINSON: There are issues that are unclear with the proxy code which my co-counsel addressed. Specifically, New Amsterdam has not had the opportunity to address subsection 1, whether or not that

applies to a minimally conscious state patient; subsections 2 and 3, whether they apply to only a proxy or also a surrogate.

We're not questioning the constitutionality, but rather if this court decides to set a standard of competency, we urge it to reject the 14th Circuit standard which results in far too great of a risk of incorrectly effectuating what a patient's wishes would be.

JUSTICE KEYES: So are you asking us to say, Forget about what the -- what the 14th Court said, and that wasn't really something they should be opining on, and take and have the federal courts abstain altogether from this until this issue can go back, and then send it back over to the state court and have them work out what this statute really means, and then we can see whether or not the -- what they come up with is a -- comports with constitutional law?

MS. HUTCHINSON: Yes, Your Honor.

JUSTICE KEYES: Is that your argument?

MS. HUTCHINSON: Yes, Your Honor. That would be invoking the *Pullman* doctrine of abstention that this court created in 1941.

But if this court does address the second issue, we urge -- I apologize. I see that my time has

expired. May I briefly conclude?

JUSTICE KEYES: Just finish the sentence.

MS. HUTCHINSON: Certainly. We urge this court to adopt a correct standard of competency that includes the capacity to understand.

Thank you very much.

JUSTICE KEYES: Thank you.

Ms. Rhodus.

MS. RHODUS: May it please the Court. My name is Kristin Rhodus, and along with co-counsel Renatha Francis, we represent the Respondents Tyler and Florence Keller, Stephen's parents.

There are two issues before the Court: First, whether the federal abstention doctrine is applicable when the -- when the facts of the case do not fit the narrowly defined abstention doctrines; and second, whether a person in a minimally conscious state can exercise their due process rights to terminate their own life-sustaining medical treatment. I will be addressing the first issue and my co-counsel will be addressing the second.

We ask this Court under an abuse of discretion standard to affirm the decision below and hold that the federal abstention doctrine is inapplicable.

02:28 The petitioners claim in the case that the *Burford* doctrine, the Rooker-Feldman doctrine and the *Pullman* doctrine all apply. However, this Court has recognized that they have an unflagging obligation to hear cases within its jurisdiction. However --

JUSTICE KEYES: We hear every case that's within the jurisdiction of the federal -- every constitutional question is within the jurisdiction of the Supreme Court.

MS. RHODUS: Yes, Your Honor.

JUSTICE KEYES: So why should the Supreme Court be wading in at this stage when there are all these unresolved issues?

MS. RHODUS: Because, Your Honor, there isn't unresolved issues within the state of New Amsterdam, and that would go to the *Pullman* doctrine. Whereas the *Pullman* doctrine recognizes that if there is unsettled issues that revolve around a constitutional claim and the state can resolve those issues, then abstention is appropriate. However, those claims need to be primary to the concern of the constitutional question.

JUSTICE KEYES: Well, I don't see how they can be anything else myself because when you're asking questions of what is the scope of a -- of the statute

02:29 and what are the parts of this statute, what do they
02:29 really mean, like if you get into -- there's been no
02:29 interpretation of this proxy statute. And there are new
02:29 developments in -- or at least parts of it, and there
02:29 have been -- there has been new developments in medicine
02:29 and new situations brought out. Plus, there's some
02:29 really heavily ambiguous language. Some of it is pretty
02:29 darn scary. Now, maybe that's one reason you think you
02:29 ought to get in.
02:29 But in subsection 3 it says that a proxy's
02:30 decision to withhold or withdraw life-prolonging
02:30 procedures -- first, it tells you that only sometimes
02:30 does a proxy get to wade in at all. The State can take
02:30 it over if the proxy doesn't meet its burden. And
02:30 then -- and then if it doesn't, if there is no
02:30 indication of what the patient would have chosen on
02:30 which the proxy, therefore, can face -- can show that
02:30 it's entitled to stand in, the hospital's medical ethics
02:30 committee should consult with the patient's guardian and
02:30 attending physicians to determine whether the decision
02:30 to withhold or withdraw life-prolonging procedures is in
02:30 the patient's best interest.
02:30 That's a pretty scary doctrine, and the
02:30 State can wade in, it looks like, under this statute and
02:30 make these determinations for people. Well, we'll just

leap in there and say whether or not there can be life-prolonging procedures.

When you've got a statute that allows itself to have that type of interpretation, shouldn't you give the State the chance first to decide if that's what they really meant or if it really means something else? They also have another statute out there pending.

MS. RHODUS: Well, no, Your Honor. Going to the first part of your question, it first needs to be required by the courts to determine if a person is competent or incompetent. And second, it would go to whether the person has an advanced directive and whether that advanced directive applies. Then third, if there is no advanced directive or it does not apply, then the proxy statute comes into play.

However, that first stat of whether a person is incompetent or competent is what revolves around this constitutional question of due process. So the proxy code does not even come into play until further down the line.

So a determination of competency is only what this Court is to determine, and it's a constitutional claim that is primarily concerned with the due process challenge brought before this Court as a federal constitutional question.

02:31 JUSTICE MASSENGALE: Why is it a constitutional claim? Why isn't it a question under New Amsterdam state law to determine the competency of Stephen?

02:31 MS. RHODUS: The competency of Stephen Keller is typically left in the realm of the states' courts. However, a federal constitutional claim of whether due process right is afforded to patients as an MCS state is something that this Court was asked to decide and revolves around the primary --

02:32 JUSTICE MASSENGALE: Well, that's also something the state courts are perfectly capable of deciding or at least taking their own stab at deciding, isn't it?

02:32 MS. RHODUS: Yes, Your Honor. And whereas the New Amsterdam Supreme Court made their decision that MCS patients and PVS patients were the same for an advanced directive to apply, they never determined whether there was a due process challenge. And because there was --

02:32 JUSTICE MASSENGALE: Well, was that issue ever raised in state courts in the prior proceedings?

02:32 MS. RHODUS: It was not, Your Honor, because the due process challenge did not occur or the due process issue did not occur until after the

New Amsterdam Supreme Court made their determination that PVS patients and MCS patients were sufficiently the same. And this goes to the *Rooker-Feldman* doctrine.

JUSTICE MASSENGALE: Well, isn't it possible that if these questions were actually presented to the New Amsterdam courts that they might construe their statutes in a way that would -- that would fully accommodate whatever constitutional concern we might have?

MS. RHODUS: Yes, Your Honor, it could have been.

JUSTICE MASSENGALE: Why shouldn't we give them that opportunity before we jump in?

MS. RHODUS: Because, Your Honor, as the courts have recognized, when there is a balancing act between the federal courts and the state courts, the balancing acts must look at whose interest is more primarily important. And although the New Amsterdam Supreme Court has made their determination according to the advanced directive, PVS patients and MCS patients are sufficiently the same, they did not make a due process challenge determination. And that determination is primarily a federal constitutional claim where there is no unsettled state law issues that need to be determined to decide the due process --

02:33 JUSTICE KEYES: There's all kinds. Why is there no unsettled issue? Would you please explain that to me one more time.

02:33 MS. RHODUS: Because, Your Honor, if there is any issue with -- that this Court finds in the proxy statute, it's not a determination that needs to be made to decide whether MCS patients retain their due process rights. In the step process, it's so far removed from deciding a person's competency and due process rights, it does not need to be decided by this Court, and the interpretation or unsettled issues does not need to be evaluated by the federal courts.

02:34 JUSTICE HANKS: Doesn't there need to be an evaluation of whether a mental conscious state is more like a persistent vegetative state? Isn't that something that needs to be resolved at the state level before we can step in and decide the constitutional issues?

02:34 MS. RHODUS: No, Your Honor. Whereas the MCS patient and PVS patients, where they occur throughout the country, have the ability -- or excuse me -- this Court has the ability to use the scientific evidence brought before them to make that determination, and it can be used by those federal courts to decide whether patients throughout the country in an MCS state

retain their due process rights.

JUSTICE KEYES: So we up here at the Supreme Court, we're just going to go out and order up our own scientific studies. And I believe this actually has been an issue in the federal courts. And we'll just sort of not only get rid of the state law, but we'll also get rid of the lower federal courts. And we can do it ourselves on the basis of our own wisdom and determination in scientific matters. That's where I'm afraid your argument leads, and that's a very scary prospect.

MS. RHODUS: No, Your Honor.

JUSTICE KEYES: Even though it's real nice to have the power.

MS. RHODUS: As in -- the Court has -- as this Court has recognized in *Cruzan*, setting the boundary lines is appropriate for this Court to do, and then it allows the state courts to make their statutes interpret in the way that's possible as long as they do not violate a person's due process rights. And that in this issue is primary the concern of the federal courts.

JUSTICE KEYES: Well, what's the violation of due process?

MS. RHODUS: The violation of due process in this claim is that if MCS patients are found to be

incompetent as a whole, then no patients that are MCS can ever rebut that presumption and say that they are competent and determine that they want to have their life-sustaining medical treatment continue.

JUSTICE HANKS: So basically, if somebody wants to change their mind, there's no way to do it?

MS. RHODUS: No, Your Honor, there wouldn't be because if you said -- if this Court -- or if this Court was to refer back to the New Amsterdam Supreme Court's decision, all patients -- MCS patients would not be able to rebut the presumption that they are incompetent. And further --

JUSTICE KEYES: See, you're going to end up -- if you go this route, you're going to end up overlooking and just not even allowing anybody the possibility to determine what these statutes mean, that it made just a lot of assumptions in the statutes and there's a lot of unclear language. And you will be making a unilateral determination, asking us to make it from way up here as to everything as to -- that will unsettle an awful lot of statutes, including this one which has these proxy limits in there.

It just seems to me that it's very hard to make this argument that the state -- on the basis of what you've told us, that the state shouldn't be allowed

to go back and look at some of these tangled and knotty issues and make the factual determinations and so forth. And we can -- we have the power to do that. I mean, we can abstain. We still have proceeding over here and we can abstain.

MS. RHODUS: Well, abstention is not appropriate in this case because the federal courts making a determination that MCS patients can demonstrate, if they are competent, to terminate their own life-sustaining medical treatment only means that if the federal -- or excuse me -- if the state statute interrupts that determination, then their -- then that statute may be unconstitutional.

JUSTICE KEYES: So you're asking us to determine its constitutionality?

MS. RHODUS: I'm sorry, Your Honor?

JUSTICE KEYES: I'm sorry. You are asking us to determine its constitutionality, as I understand it.

I defer to my colleague. I'm sorry.

JUSTICE MASSENGALE: My only question, Counsel, is -- I mean, you don't have a -- you're not presenting us a case where there is some factual dispute about the competency of the patient, are you? I mean, hasn't that been resolved by the state Supreme Court?

02:38 MS. RHODUS: No, Your Honor. Whereas in the state Supreme Court they've only recognized that MCS patients and PVS patients were sufficiently the same. And as recognized on the record, page 23, they only assumed at that point that Stephen was incompetent because they made this blanket determination that MCS patients were incompetent.

02:38 JUSTICE MASSENGALE: So you're asking us to reverse a factual finding from the New Amsterdam Supreme Court, in essence?

02:38 MS. RHODUS: Not at all, Your Honor, because this is a separate constitutional claim precisely going to the Rooker-Feldman doctrine. Whereas if this Court -- if the New Amsterdam Supreme Court was making a determination that was a due process challenge, then they would have been deciding that MCS patients and PVS patients all do not have this due process challenge. Instead, they made the determination that only in this advanced directive did the MCS patients and PVS patients, or in Stephen's case, did not retain a due process right because of the advanced directive that applied. They created an irrebuttable presumption with this advanced directive that Stephen or any other MCS patients within New Amsterdam cannot overcome.

02:39 And finally, turning to the *Burford*

doctrine, this Court has recognized that abstention was appropriate in only two circumstances: First, if the state law issue revolved around a complex issue of state law where it also had a substantial concern or public substantial concern; and second, if the federal judicial review would disrupt the state's coherent policies, those policies need to bear on an important -- public importance.

JUSTICE HANKS: How would this not disrupt the state's coherent policy in this area?

MS. RHODUS: Your Honor, the courts have recognized to determine if there is a coherent policy disruption, they would look at the forum at which the issue was being resolved.

And this forum within New Amsterdam, the probate court, is not special and unique, as recognized in *Property and Casualty Insurance versus the Insurance of Omaha*, where it needed to be a special and unique forum to hear the issue, whereas under *Marshall v. Marshall*, the Court recognized the probate court is not special and unique where the federal courts don't need to hear the issue. It was appropriate to hear that issue in that case, even though it came from the probate court.

And the probate courts, whereas they all

have -- every state has some type of probate court, this was not -- would not be special and unique to New Amsterdam, nor does it create a coherent policy because there are still many probate courts throughout the state, and those coherent policies would be -- only rise to the level if it actually fit under what *Burford* recognized.

Where they had a Travis County court -- one Travis County court that heard all the appeals from the commission, that creates a coherent policy, not what the New Amsterdam has set up in the probate court.

And going to the first type of *Burford* abstention, it's not appropriate for this Court to abstain under that because it isn't a complex local issue. And under this complex local issue, the Courts have recognized under *Burford* the oil regulation within Texas was appropriate for a complex local issue because they were dealing with the complex geographical locations of Texas and the economic concerns that came from the oil regulations. And it was so important to Texas and it was going into such intricacies that Texas needed to have the determination in that case.

JUSTICE KEYES: But it doesn't need to have a statute as to how you determine when people are competent to make their own end-of-life decisions

because that's not really complex and it doesn't really happen in a lot of geographic locations, it's not a recurring problem, and there are no real ramifications because it's not economic?

MS. RHODUS: No, Your Honor. Whereas under *Johnson v. Rodriguez*, the Court recognized that adoption statutes were not appropriate for abstention because they occurred in every state. And so the federal courts had the ability to look at other jurisdictions and make determinations, whereas the proxy statute in this case is occurring in every single state, so the federal courts have the ability to look at all these statutes and make a determination.

JUSTICE KEYES: So we don't need to stick with the one that isn't even before us. We're just going to go back behind that and make a determination for everybody as to what ought to be in any statutes that they ever happen to come up with? It's just hard to see your --

MS. RHODUS: I recognize my time has expired. May I respond to your question?

JUSTICE KEYES: Please.

MS. RHODUS: Your Honor, the question of the actual constitutionality of the statute does not need to be in determination by this Court or any federal

court when they're just simply determining whether a person is competent to determine their -- or to terminate their life-sustaining medical treatment. That would be the first step in the analysis. The constitutionality of a statute would be far removed from that first step.

And, therefore, we ask this Court to affirm. Thank you.

MS. FRANCIS: May it please the Court. My name is Renatha Francis, co-counsel for Tyler and Florence Keller, Stephen Keller's parents, the respondents in this case.

The second question posed is whether the self-exercise of a due process liberty interest to consent or reject life-sustaining medical treatment may be denied to a patient merely because he is minimally conscious. This is a question of law, and so the standard of review is de novo.

Respondents ask this Court to affirm the 14th Circuit and submit two critical points from the record to support this request: First, Stephen is responsive and aware of environmental stimulation as indicated on page 6, paragraph 2 of the record; and second --

JUSTICE MASSENGALE: Well, that's one

interpretation of the record. Right?

MS. FRANCIS: Not at all, Your Honor. The record explicitly states that Stephen Keller is aware of environmental stimulation, and he makes known this awareness by responding to the yes/no questions that are posed to him by answering yes or no to simple commands and by smiling at -- perhaps in recognition at his wife and child when they come in to visit him.

JUSTICE HANKS: But I thought there was a question of whether or not he understood what he was doing. I mean, he's responding, but does he understand?

MS. FRANCIS: Your Honor -- and this is where the Petitioners would have this Court conflate two medical -- distinct medical diagnoses, PVS and MCS. The fact is what the science knows about MCS patients are that they are conscious individuals, aware not only of themselves but also of their environmental surroundings, and also respond purposely with purposeful behaviors, unlike PVS patients who just act reflexively.

JUSTICE MASSENGALE: Well, that's a generalization about the medical conditions. But on the facts of this record, we don't -- we don't have any evidence that this patient is actually comprehending and responding to questions, do we?

MS. FRANCIS: We have evidence from the

record, Your Honor, that shows that there may be some -- Stephen Keller may be able to demonstrate, as the 14th Circuit correctly pointed out, that he can communicate and express a preference regarding whether or not he wants to terminate his treatment.

And the Respondents would ask this Court to at least give Stephen Keller an opportunity to demonstrate under the 14th Circuit's approach that he can satisfy this modified competency determination and make this very final decision for himself.

JUSTICE MASSENGALE: Well, what's wrong with the evidentiary standard that the State of New Amsterdam already has in place?

MS. FRANCIS: The current evidentiary standard, Your Honor, is a trustworthy evidence of what the patient would choose. Alternatively, the statute would default to what is in the best interest of the patient.

JUSTICE MASSENGALE: Okay. So let's start with: You're not going to argue that if trustworthy evidence is the appropriate standard, that there is not trustworthy evidence to support the conclusion of the state Supreme Court. Right?

MS. FRANCIS: Not at all, Your Honor.

JUSTICE MASSENGALE: Okay. So the question

02:46 is whether trustworthy evidence is an appropriate
02:46 standard.
02:46 MS. FRANCIS: It is, Your Honor. That is a
02:46 definitely appropriate question to ask. The --
02:46 JUSTICE MASSENGALE: How do you respond?
02:46 MS. FRANCIS: -- New Amsterdam Supreme
02:46 Court never supplied a definition for trustworthy
02:46 evidence, nor was it defined in the probate code itself.
02:46 The fact is even though this Court has said in *Cruzan*
02:46 that states are permitted to set their evidentiary
02:46 requirements and procedural requirements for
02:46 establishing whether a patient is competent, this Court
02:46 has also mandated that in cases that have less final
02:46 outcomes than this one, for example, oral contracts or
02:46 civil fraud cases, that only a clear and convincing
02:46 evidentiary standard could sufficiently protect the
02:46 important individual interests at stake here.
02:47 Stephen Keller's life is in the balance
02:47 here. And the Petitioners would urge this Court without
02:47 any sort of further fact-finding as to whether he is
02:47 sufficiently competent to make this decision himself,
02:47 that we should terminate his life-sustaining medical
02:47 treatment.
02:47 However, what the Respondents would urge
02:47 this Court to do is to at least offer Stephen Keller an

opportunity to demonstrate that he can do this decision for himself.

JUSTICE MASSENGALE: Well, you're asking us to find that this is necessary as a matter of federal constitutional law that the patient has a due process right to this standard.

What can you point this Court to as a matter of history or tradition in this country that would show that that's a right that's been traditionally recognized?

MS. FRANCIS: Well, in fact, Your Honor, in the *Cruzan* decision this Court explicitly noted that incompetent patients do not retain the due process liberty interest to exercise the right on their own behalf.

However, the threshold issue in this case is whether or not Stephen Keller is sufficiently competent to make this decision himself. Stephen Keller has somewhat demonstrated by evidence of the videotape that he, in fact, can make these decisions on his own. Now, to the extent his --

JUSTICE MASSENGALE: But what -- specifically what evidence are you referring to that is evidence that he can make these decisions?

MS. FRANCIS: Well, the fact is, Your

Honor, according to page 11 of the record, New Amsterdam Supreme Court agreed that Stephen Keller did demonstrate and exhibit a preference on the videotape. Now, to the extent that preference is ambiguous, the correct response is a remand for further fact-finding on Stephen Keller's competency, not a termination of the treatments that keep him alive. Such a decision is simply not susceptible to reversal.

And I would also like to address three main points that the Petitioners brought up, Your Honor. First, the Petitioners outlined that New Amsterdam -- the 14th Circuit adopted a lower standard of competency. However, what the 14th Circuit did was to define the scope of the federal right at issue here and allow MCS patients an opportunity to demonstrate that they can be considered sufficiently competent to make this life-or-death decision themselves.

The 14th Circuit expressly noted on page 20, paragraph 3, that they would leave it to the states to set their own evidentiary and procedural requirements for determining if the MCS patients had, in fact, satisfied that constitutional threshold.

Additionally, the Petitioners urge this Court not to rely on medical and scientific data to determine federal constitutional rights. However,

02:49 adopting that approach would be a huge departure from
02:49 this Court's jurisprudence. The fact is that this Court
02:49 routinely relies and other courts nationwide routinely
02:49 rely on scientific evidence in order to define the scope
02:50 of federal constitutional rights.
02:50 JUSTICE KEYES: But ordinarily that
02:50 scientific evidence is supposed to come in at the trial
02:50 court level, and there's none of it in this record.
02:50 MS. FRANCIS: You are correct.
02:50 JUSTICE KEYES: Ordinarily the United
02:50 States Supreme Court does not go out and do its own
02:50 fact-finding.
02:50 MS. FRANCIS: Not at all, Your Honor.
02:50 JUSTICE KEYES: It has tried it and it has.
02:50 It's been roundly excoriated for it. You wouldn't want
02:50 that to happen to us. Right?
02:50 MS. FRANCIS: Absolutely not, Your Honor.
02:50 The fact is in *Cruzan*, this Court relied on
02:50 the persistently vegetative patient's diagnosis to
02:50 conclude that that patient could not retain the due
02:50 process liberty interest to consent or exercise the
02:50 liberty interest at stake there.
02:50 In this case, what the science does
02:50 demonstrate is that MCS patients are sufficiently
02:50 coherent that they can act with purposeful behavior.

For example, they can reach for objects, showing a direct relation to where the object is. They can respond to yes/no questions that are posed to them. They can interact with their environments by following simple commands that are given to them. On that basis, it does demonstrate that MCS patients have sufficient consciousness and awareness about them that we should at least give these people an opportunity to demonstrate that they can make these decisions themselves.

JUSTICE MASSENGALE: But what's wrong with New Amsterdam's procedure? I mean, hasn't he already been given that opportunity?

MS. FRANCIS: In fact, he has not, Your Honor. According to page 23 of the record, New Amsterdam Supreme Court explicitly operated from a presumption of incompetency on the part of Stephen Keller himself and, according to page 11 of the record, found that there was simply no trustworthy evidence that he would want to continue medical treatment, despite the presence of this videotape that does cast some doubt as to what Stephen Keller would choose under these circumstances. Now, in doing so and in so ruling, essentially New Amsterdam Supreme Court shifted the burden from the Petitioners and forced Stephen Keller to assert an interest in staying alive.

02:52 Now, this Court and courts across this
02:52 country, particularly in *Honoree Wenlin* and *Honoree*
02:52 *Martin*, both the California decision and the Michigan
02:52 decision, all concluded that if the courts must err,
02:52 then the error must be on the side of preserving life
02:52 because the alternative is simply irreversible.
02:52 Adopting the Petitioner's approach, we
02:52 would run the risk that due process liberty interest
02:52 would be denied to certain patients under the guise of
02:52 competency determinations.
02:52 This Court has an opportunity today to
02:52 insist that in cases where the patient is neither
02:52 terminally ill nor comatose nor persistently vegetative,
02:52 then due process is not offended by affording these
02:52 patients at least an opportunity to demonstrate that
02:52 they can make these life-ending decisions themselves.
02:52 JUSTICE HANKS: So that basically, you're
02:52 saying in this situation, wherever -- we should start
02:53 from the proposition that the patient would want life
02:53 and then work from there?
02:53 MS. FRANCIS: Absolutely, Your Honor. That
02:53 is the correct position that this Court and that courts
02:53 should generally choose because the alternative just
02:53 cannot be reversed and is ultimately very final. Now,
02:53 requiring --

02:53 JUSTICE KEYES: You're asking us to set a bedrock for state statutes that they would have to use this standard and this presumption in favor of life, and then they can do whatever they want to in the way of statutes, but only so long as it comports with our determination that this is part of their liberty interest.

02:53 This person who is minimally competent -- is minimally competent and, therefore, has a right that he's entitled to exercise, you want us to go on and make that -- to set a parameter for what -- where the states can begin to operate?

02:53 MS. FRANCIS: Yes, Your Honor. The Respondents ask this Court to set a constitutional threshold for evaluating competency in MCS patients and to define the scope of the federal constitutional rights. States are free to set their own evidentiary and procedural parameters so long as they do not unduly frustrate the self-exercise of these important individual rights.

02:54 Requiring MCS patients, with their recognized limitations, to demonstrate that they understand the nature and consequences of their disease would not only frustrate MCS patients' exercise of their liberty interest; it would also deny them any

opportunity to demonstrate that they can be sufficiently competent, regardless of their abilities.

In fact, experts agree that understanding can never be truly understood nor appropriately measured. For that reason, Lauren Roth in "Test of Competency to Consent to Medical Treatment" concluded that understanding turned on inferential and unobservable mental processes rather than concrete observable elements of human behavior.

Now, to the extent the 14th Circuit's approach has its failings, this Court has already addressed that issue in *Cruzan versus Missouri Department of Health* when it stated that the Constitution does not require general rules to work flawlessly. However, the Constitution does prohibit the imposition of insurmountable hurdles to the free exercise of a liberty interest. And if courts must err, then it should err on the side of preserving life.

As to the second main reason for affirming the 14th Circuit's approach, more fact-finding is simply necessary on Stephen Keller's competency before we can determine that his life-sustaining medical treatment should be terminated.

Petitioners correctly point out that according to a 2009 BNC neurology study by Caroline

Schnakers, there is a high rate of misdiagnosis between MCS and PVS patients. However, what the Petitioners omitted to let this Court know is that those findings were based on a 1996 study previously. Now, the science has progressed exponentially since that time, and what we do know of MCS patients is that they are interactive, communicative, and act with purposeful behavior. The high rate of misdiagnosis certainly makes this issue harder to decide.

However, it is not a reason to use, for example, his advanced directive, Stephen Keller's advanced directive, essentially as an irrebuttable presumption against any change of heart that Stephen Keller might have had.

JUSTICE KEYES: So you're asking us to affirm the judgment of the federal court that a minimally conscious person who is self-aware and has the ability to express a preference regarding the continuation or withholding of life-sustaining medical treatment is sufficiently competent to have a constitutional right under the due process clause to make such a decision. Right? That's what you want us to affirm?

MS. FRANCIS: Yes, Your Honor. And the second part of the 14th Circuit's holding was that

02:57 further fact-finding would be necessary on Stephen
02:57 Keller specifically.
02:57 JUSTICE KEYES: In order to make this
02:57 determination?
02:57 MS. FRANCIS: Yes, Your Honor.
02:57 JUSTICE KEYES: That does sort of leave out
02:57 in the cold that statute, however, that New Amsterdam
02:57 has because it -- the Supreme Court hasn't really made
02:57 all the determinations that are necessary to come in. I
02:57 mean, you're going to be affecting that state statute
02:57 and its constitutionality with this.
02:57 Shouldn't they be given a chance to
02:57 determine themselves what -- whether their statute still
02:57 holds up with this kind of a standard?
02:57 MS. FRANCIS: Well, in fact, Your Honor --
02:57 JUSTICE KEYES: I see the issue's
02:57 importance. I see it's very important.
02:57 MS. FRANCIS: Yes, Your Honor. And, in
02:57 fact, New Amsterdam Supreme Court already has had the
02:57 opportunity to determine the parameters and scope of its
02:57 state probate code. The fact is that it uses a term,
02:57 "trustworthy evidence," to establish whether or not the
02:58 patient would want the treatment terminated. However,
02:58 nowhere in the code itself is that term defined, and nor
02:58 did the New Amsterdam Supreme Court, applying the facts

of this case to that statute and vice-versa, conclude that there was no trustworthy evidence Stephen Keller would want to continue his life-sustaining medical treatment.

The final point I'd like to make is that New Amsterdam's current probate code also requires -- and I recognize my time has expired. May I briefly conclude?

JUSTICE KEYES: Also requires --

MS. FRANCIS: It also requires that the termination of treatment or living with treatment be in the best interest of the patient. The fact is that terminating Stephen Keller's treatment based on a best interest standard would simply frustrate his own right to self-determination and put that right in the hands of someone else.

Therefore, we ask this Court to affirm the 14th Circuit. Thank you.

JUSTICE KEYES: Two minutes.

MS. HUTCHINSON: Thank you, Your Honor. May it please the Court. Two brief points on rebuttal.

First is to the issue of abstention. Justice Massengale, you correctly noted that allowing the New Amsterdam Supreme Court to interpret its statutes, especially Statute Number 294.60, may

alleviate the need to address the constitutional issue, something that opposing counsel, in fact, acknowledged during her argument.

And here the law is unclear with respect to that statute whether or not subsection 1 applies to minimally conscious patients and whether subsections 2 and 3 apply to both proxies and surrogates. And in fact, Ms. Francis in her time before this Court also noted unclear issues with respect to the trustworthy evidence.

JUSTICE KEYES: Ms. Hutchinson, when we rule on this, are we in a position to rule both on the constitutional interpretation of where this right runs out and still to abstain in some sense? Can you do them both, or is it either/or?

MS. HUTCHINSON: It can only occur on both if this Court applied *Pullman* abstention, which is appropriate. Then if the New Amsterdam Supreme Court did not address its issue, then the federal court may be able to exercise its jurisdiction and address the additional issue. But the fact that the New Amsterdam Supreme Court can alleviate the need to address the constitutional issue is --

JUSTICE KEYES: The constitutional issue is still going to be there, and it is raised in this case.

03:00 MS. HUTCHINSON: It is raised in this case, but it may not be there if New Amsterdam is allowed to interpret its statute. And that runs with the constitutional avoidance principle set forth by this Court in 1936 in *Ashwander versus Tennessee Valley Authority*.

And briefly, in response to the second issue, opposing counsel's argument that the standard of understanding will deprive all minimally conscious patients their due process right is a gross overexaggeration. Minimally conscious patients may very well be able to understand. They are what science recognizes as an interactive state of being minimally conscious. And thus, that is the appropriate standard.

Thank you.

JUSTICE KEYES: Thank you very much. The case is submitted.

THE BAILIFF: All rise.

03:27 (RECESS)

JUSTICE HANKS: Okay. Well, on behalf of all of us, we all thought you guys did a very, very good job. You guys did an excellent job. We just have a couple of comments just based on what we saw. But as I said, we all thought you did a great job.

I'll start with -- no particular order.

03:27 Ms. Hutchinson, very, very good job. I liked your
03:27 demeanor. I liked your composure. Nothing seemed to
03:27 get you riled up. You answered all the questions
03:27 directly.
03:27 The one thing I might suggest is something
03:28 that is helpful in thinking about oral argument is that
03:28 when judges are listening to oral argument, there are
03:28 three things that they're listening for: Tell me what
03:28 you want, tell me the law that entitles me to give you
03:28 what you want, and then tell me those facts that I need
03:28 to look at to apply the law in your favor. You got
03:28 there.
03:28 But I think I set that out at the very
03:28 beginning. Tell me -- you know, here is what we want
03:28 you to do, and you did that. We want a new standard.
03:28 You have the understanding standard. You told me that
03:28 eventually. But I think your argument would be stronger
03:28 if you'd just hit me with it. Here is what I want, here
03:28 is what I think the issue is, here is how we think you
03:28 need to resolve this issue, and here is why, straight
03:28 up. And I thought very good job.
MS. HUTCHINSON: Thank you.
03:28 JUSTICE HANKS: Ms. Francis -- as I say, no
03:28 particular order. Really impressed with your eye
03:28 contact. In fact, I didn't see you looking at your

notes. You just went up and you just argued. That was very, very impressive. I mean, all of us commented on the fact that you didn't seem to -- you knew the record.

And the other thing you did really well is that you kept giving us record references, which is very helpful. A lot of times when you make arguments, the judges need to go back in the record when they're writing their opinion or thinking about it to make sure what they heard is actually what transpired in the record and what they understood. And giving record references, I thought that was very, very good.

Ms. Rhodus, I thought you did a very, very good job. I think I might slow down a bit, just a tad. I mean, not much. I mean, I think your presentation was good, but I think if you slowed down a little bit and followed -- since you were the leadoff, like I told Ms. Hutchinson, tell me what you want, you know. Tell me the law. Tell me those facts that entitle me to apply the law in your favor with, in your case, abstention. Just hit me out there. Tell me what it is that you want, first of all, and then go from there because you might not get a chance to set out an outline. If you've got a really aggressive panel, they may start hitting you with questions from the get-go and you'll never get a chance to tell them, you know, where

it is that you want them to go. So something I'd think about. Depends on your panel.

And then Mr. Kellam, same comment. I thought you did a very good job. But again, since you were the leadoff person, definitely tell us where you are going, especially -- we were -- we weren't prepared exactly for your opening argument on the issue because it wasn't in the materials. If you're going to do that, tell us up front the whole outline of where you're going and then jump back, and that way if the Court really wants to hear that issue, then they can. If they don't, then they know where you're going next so that they don't disrupt your train of thought and your argument.

But other than that, guys, little comments, little hopefully helpful critiques. But overall, you guys did a great job. Congratulations for getting to this point, and we know how much time and effort goes into getting to this point. You know, you've had a lot of sleepless nights, a lot of preparation. And your professors still demand the same amount of coursework from you, even though you're down here, so we appreciate that and we're really impressed. It was a privilege for us to judge the competition.

JUSTICE KEYES: I think that the judge spoke very well for us. And I just want to say for

myself I thought you-all did a remarkable job of fielding my questions which you probably weren't prepared for because this is an area, as you may have noticed, of particular concern and interest to me, extremely much. I have, in fact, written on it and published on where these rights run out and start and how you actually deal with this.

And I hope that you-all took out of this competition today, but also of this whole competition, an understanding of how complex and difficult these issues are. I thought you did a most remarkable job on that tough question of -- those tough questions of thinking about -- and you prepared on it. How do these things work together, and what do I want to get out of this, and how do I get there? And as a judge, that's usually what I try to find out, too, is how do I get there? Exactly as Judge Hanks said, tell me what you need and how I get there. And I thought you-all did a remarkable job. What I would say, well, is this what you're saying? Is this how you get there? And you would come back and say, yes, that's how you get there.

I thought that Ms. Francis particularly stands out in this particular moment at one particular thing, which is, how do I get to that due process argument and make that be the argument here.

And likewise, as her counterpart, I thought you did a great job on that. I think you all did a fine job. You're an extremely poised young man. Of course, I do know Rooker-Feldman, or I had familiarity with it from way back when. I don't think it applies here. I'm sorry you brought it up. But it didn't occur -- that it's outside the materials. I thought you did a remarkable job when he did bring up Rooker-Feldman. You knew what it was, so you were clearly prepared.

I think you were all very well prepared, poised, and you could go into a courtroom and make an argument and it would be a compelling, well-made argument. And it really is important to do that research and to be able to answer those tough, tough questions which I think at least some of us threw out at you.

The bailiff had some comments, too, that were slightly different from some of the things we said.

THE BAILIFF: I thought you-all did a great job, and you-all's composure on Team 1 I think is very composed and very well rehearsed as far as answering questions and being able to separate the questions that were sometimes long into their different parts and then answering them in turn.

And then Team 2, I thought that your

03:34 composure was also very good and you really knew the
03:34 material, and that was evident from -- I don't think you
03:34 brought any notes up there, and that was very
03:34 impressive. And you were also very familiar with the
03:34 material and that was demonstrated, so great job.