

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

3 MICHELLE KELLER AND NEW *
4 AMSTERDAM CITY GENERAL *
5 HOSPITAL, *
6 Petitioners *
7 VS. * CASE NO. C09-1151-1
8 TYLER AND FLORENCE KELLER, *
9 Respondents *

10
11 ORAL ARGUMENTS
12

13 On the 30th day of January, 2010 the following proceedings
14 came on to be heard in the above-entitled and numbered cause
15 before the Honorable Justice William Boyce and Justice Elsa
16 Alcala, Justices presiding, held in Houston, Harris County,
17 Texas. Proceedings reported by computerized stenotype machine;
18 Reporter's Record produced by Computer-Assisted Transcription.
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UNIDENTIFIED, UNEDITED ROUGH-DRAFT TRANSCRIPT

A P P E A R A N C E S

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FOR THE PETITIONERS:

Mr. Adam Doupe
and

Ms. Gemma Galeoto

FOR THE RESPONDENTS:

Ms. Jennifer Schuch
and

Mr. Roy Mitchell

1 JUSTICE BOYCE: All right. On the docket is
2 No. C09-1151-1; Keller vs. Keller. Can I have announcements of
3 counsel, please?

4 MR. DOUPE: Adam Doupe and Gemma Galeoto for
5 petitioners Michelle Keller and New Amsterdam General Hospitals,
6 Your Honors.

7 MR. MITCHELL: Jennifer Schuch and Roy Mitchell
8 for the respondents.

9 THE COURT: Any time going to be served?

10 MR. DOUPE: One minute of my time and two minutes
11 of my co-counsel's time be reserved for rebuttal.

12 JUSTICE BOYCE: Okay. Petitioner may proceed when
13 ready.

14 MR. DOUPE: May it please the Court. Good
15 afternoon, Your Honors. My name is Adam Doupe. I along with my
16 co-counsel Gemma Galeoto represent the petitioners Michelle
17 Keller and New Amsterdam Hospital.

18 Two issues before the Court. First, whether
19 federal abstention is appropriate when the state of New Amsterdam
20 has articulated no general or specific legislative concern with
21 respect to minimally-conscious person prohibition statements and,
22 two, whether a minimally-conscious person has a liberty interest
23 in continuing life-sustaining treatment. In my time before the
24 Court I will address the first issue, and my co-counsel will
25 address the second.

1 In regard to the first issue, Your Honors, there
2 are three reasons why this Court should find that federal
3 abstention is appropriate in this case. First, under the
4 Rooker-Feldman doctrine, Your Honors, the federal court -- in
5 this case the district court -- lacked a jurisdiction to hear
6 this particular case; two, if this Court were to apply a
7 jurisdiction in this matter, abstention is prohibited because the
8 standards reached in Burford that there is ambiguity in the state
9 law are present in this case; and, three, Your Honors, New
10 Amsterdam has articulated no national response except for its
11 state importance of the --

12 JUSTICE BOYCE: State courts have taken their shot
13 at this. Got a probate court ruling, gone up to the supreme
14 court of the state. If the purpose behind the abstention is to
15 make sure that federal courts are not prematurely participating
16 in discussions that need to be had at the first level of the
17 state court, why hasn't that happened here?

18 MR. DOUPE: As noted on Page 1169 of the record
19 the New Amsterdam state court did not reach determinations as to
20 the competence of Mr. Keller in this matter. Given how
21 competence is a matter of state concern, as this Court held in
22 Cruzan vs. Missouri Department of Health, the Court should
23 essentially remand this to the state probate court to further
24 fact find with respect to the determination of --

25 JUSTICE BOYCE: May be an issue of giving the

1 state courts an opportunity to weigh in on an issue if they wish
2 to. I don't know that abstention goes so far as to say you have
3 to wait indefinitely until the supreme court of the state decides
4 that it wants to reach a particular issue. Is that not an
5 extension of the principles here? We have an obligation to act
6 in appropriate circumstances and being sensitive to federalism
7 concerns. It's certainly something that has to be done, but
8 we're just -- it's equally irresponsible to wait indefinitely,
9 isn't it?

10 MR. DOUPE: Yes, Your Honor. Would be equally
11 irresponsible to wait indefinitely. What we're asking this Court
12 to do is remand for the time being and allow for a fact finding
13 before the state court because, as a threshold matter, Your
14 Honor, the court -- in this case the district court -- cannot
15 have the jurisdiction which is required before the Burford
16 abstention document is applied.

17 In this case Rooker-Feldman doctrine, Your Honor,
18 the federal courts cannot be used as super appellate court to
19 collaterally attack state court judgment in this case. In this
20 particular instance the competence issue is a threshold issue.
21 Before they can determine if Mr. Keller has a liberty under
22 Cruzan, the states are permitted to establish their own
23 evidentiary standard for an individual who in a vegetative state
24 can make a decision regarding whether they should continue
25 life-sustaining treatment. In this instance no facts in the

1 record, aside from the video conversation between Steven Keller
2 and his parents, would suggest that he's aware of the fact that
3 he has this liberty.

4 JUSTICE ALCALA: Except for the fact that before
5 he became ill he had declared what his wishes were quite clear
6 and said that if he was ever in this type of situation he did not
7 want to be kept alive.

8 MR. DOUPE: Correct, Your Honor. We would argue
9 in this particular condition that he described as directive is
10 analogous to the situation he's currently in, should be permitted
11 to exercise that directive accordingly. If it's ambiguous -- if
12 your argue (Inaudible) that his wife should be able to act as his
13 proxy under state law to exercise his wishes in that regard.

14 If the Court were to find the federal court had
15 jurisdiction, ask it abstain under the doctrine from further
16 involvement in this case. As a prerequisite we would admit the
17 probate court is ambiguous, is a complex scheme; but, Your
18 Honors, the probate court has the duty in assuring the informant
19 with respect to probate law under the state laws as they're
20 currently in place under New Amsterdam.

21 The Court in Burford has a unique responsibility
22 of interpreting probate laws in the statute. This expertise is
23 quite similar to the expertise described by the District of
24 Columbia in Baza in which the Court in that case found that a
25 probate court expresses warranting the application of abstention

1 in that particular matter.

2 JUSTICE BOYCE: Do we have authority to -- are you
3 asking to us remand to a state probate court?

4 MR. DOUPE: Remand to a state -- asking you to
5 remand to the state courts in and of them themselves and the
6 supreme court -- namely, the state court of New Amsterdam -- and
7 then remand to the probate court.

8 JUSTICE BOYCE: I'm not sure we have authority to
9 remand directly to -- certainly a state trial/probate court.

10 I'm also a little confused. I think we are here
11 on a writ of certiorari, state of appeals for the 14th Court.

12 MR. DOUPE: This is the supreme court of the
13 United States for purposes of this argument.

14 JUSTICE BOYCE: I understand. Go ahead.

15 MR. DOUPE: In essence, Your Honors, we would ask
16 that this Court essentially remand to the state courts of New
17 Amsterdam and they can appropriately assess the fact finding
18 required.

19 And if the Court would essentially remand to the
20 New Amsterdam Supreme Court which is presumably incapable of
21 reaching facts on its own as it's the court of last resort for
22 the court in issue, would permit the Court to further remand to
23 the probate court for further fact finding.

24 JUSTICE ALCALA: What is the ambiguity in state
25 law that you're referring to?

1 MR. DOUPE: Referring to the record, lists out the
2 statute in issue. The statute is ambiguous to what constituted
3 persistent vegetative state. As the record notes, Your Honor,
4 Mr. Kellar's been diagnosed as in a minimally-conscious state
5 which the legislature has been trying to reassess what the
6 definition of that term would be. The Court should abstain for
7 the precise reason that definition is currently in flux. The
8 Steven Keller Act reassesses the definition for someone in a
9 persistent vegetative state. Direct bearing on any sort of state
10 determination on Mr. Keller's incompetence which would be a
11 prerequisite to reach the liberty issues in question.

12 The act takes into account several different
13 medical requirements for determining whether an individual would
14 be capable of making the decisions necessary to discontinue
15 life-sustaining treatment.

16 JUSTICE BOYCE: If I'm understanding the context
17 correctly, the statute has been passed but not been signed; is
18 that correct?

19 MR. DOUPE: Correct, Your Honor.

20 JUSTICE BOYCE: We're being asked to abstain on
21 the basis of a state statute that may or may not become law?

22 MR. DOUPE: Yes, Your Honor. Not clear as to
23 whether it will necessarily become law. However, given the
24 public sentiment in this particular matter, we argue it would be
25 best for this Court to abstain until that public sentiment is at

1 least expressed by the will of the legislature and the
2 Government.

3 JUSTICE BOYCE: That's a grave argument of
4 abstention. The bottom line is state legislatures can always
5 revisit issues of state law that find their way into federal
6 court for various reasons. It seems to me that you're asking for
7 a very aggressive approach to abstention on the grounds of the
8 continuing state activity focused on a particular statute that
9 isn't even law yet. Why wouldn't that counsel in favor of just
10 generally abstaining on state law grounds in general because you
11 know the state legislature can always come back and visit some
12 issue a little more precisely than they have? I mean, where does
13 that end?

14 MR. DOUPE: Your Honor raises several different
15 issues with respect to the abstention doctrine. The Court must
16 have jurisdiction. In this matter given the fact that the state
17 legislature has not fully defined the definition or reassessing
18 that definition --

19 JUSTICE BOYCE: To the degree it was existing in
20 the existing statute. They may or may not revise that definition
21 depending on what the state legislature and the Governor want to
22 do on that. Not sure that's enough to beat jurisdiction or
23 counsel in favor of staying federal court proceedings because it
24 seems to me that argument has no end. The state legislature can
25 always revisit some statute. It can always address some

1 previously-unaddressed issue of state common law. I mean, to
2 take your argument to its logical destination, federal courts
3 never address state law because the state legislature can always
4 come back and do something with it.

5 MR. DOUPE: Correct, Your Honor. May be the case
6 and may be the case that in several years the legislature goes
7 back and reassesses this evaluation. However, this Court,
8 through the Burford abstention doctrine, degree of expertise
9 implies it in a law-making body or in a judicial or adjudicative
10 sense -- in this case the probate court -- has developed a unique
11 brand of expertise. The 8th Court in Arrowwood chose to abstain
12 because of the probate matters being so intertwined with the
13 questions in that case.

14 JUSTICE BOYCE: If it were a situation where the
15 probate court made a decision based on statute and in the interim
16 where federal proceedings start getting underway the legislature
17 comes in and enacts a different statute, that -- I think that's a
18 more compelling situation. But it's also a different situation
19 from what we have here because what we have right now, as I
20 understand it, is the possibility -- the prospect that state
21 law -- the state statute may get changed. Well, you know, that
22 always exists.

23 MR. DOUPE: Important to note as well that just
24 because the legislature may not have fully addressed this issue
25 in its proper form, the New Amsterdam Supreme Court has entered

1 its own opinion; deemed Mr. Keller to be essentially unclear,
2 whether he was aware of his situation. And there is ambiguity in
3 the statute in the sense the supreme court does not fully address
4 this issue to its logical conclusion. And when the respondents
5 were unhappy with the decision reached --

6 JUSTICE BOYCE: May be ambiguity in the sense that
7 Mr. Keller's status as a factual matter; but given that, you
8 know, this Court is not in any position to address or resolve
9 fact issues -- I'm not sure that uncertainty about Mr. Keller's
10 factual status is the same thing as ambiguity about the statute.

11 MR. DOUPE: Correct, Your Honor. May very well be
12 the case the legislature does have a degree of ambiguity and
13 Mr. Keller's status is ambiguous. Given all these ambiguities,
14 allow the probate court to address this matter or for the supreme
15 court to reassess its opinion, to address whether these
16 ambiguities can be resolved in their entirety. And given the
17 fact there's an intertwining between the state and federal
18 issues, the state issues are best left to the state courts
19 because the probate courts, as the basser court, note reasonable
20 doubt in a new decree of expertise in determining these
21 competence questions.

22 JUSTICE BOYCE: I presume the state supreme court,
23 like the U.S. Supreme Court, has discretion about whether or not
24 it wants to take a particular case.

25 MR. DOUPE: Not aware of the degree of discretion.

1 The record is silent as to that.

2 JUSTICE BOYCE: If you assume, for purposes of
3 this question, that the state supreme court like the U.S. Supreme
4 Court has discretion in what it wants to decide and does not want
5 to decide under a particular set of circumstances, we could
6 abstain and the state supreme court could still determine that it
7 doesn't want to resolve this claim or this particular issue that
8 you say needs resolving. So where does that leave us? I'm --
9 that's a long-winded way of circling back to the question I asked
10 earlier. The state courts had their opportunity to address this,
11 they addressed it in the manner in which they addressed it; and
12 that's how it comes to us. We could be abstaining forever
13 depending on whether or not the state courts want to revisit this
14 issue. And it seems to me that at some point the line has been
15 crossed where we have -- we have an obligation to address the
16 federal constitutional challenges that have been framed based on
17 the record that's been created. May not be the best possible
18 record that one would hope for, to squarely raise up the issues;
19 but we take them like we find them.

20 MR. DOUPE: I see my time is about to elapse. May
21 I conclude?

22 JUSTICE BOYCE: Yes.

23 MR. DOUPE: Jurors prudence (inaudible) Cruzan
24 decision leaves this up to the states. May be an imperfect
25 system. As Justice O'Connor noted, it's up to the state to

1 develop as laboratories the decree of juris prudence to --

2 JUSTICE BOYCE: What if the state won't be the
3 laboratory? The supreme court of the state says, "We're not
4 going to say anything more about the issue. We've said our piece
5 on it." Where does that leave us?

6 MR. DOUPE: Cruzan noted if the state is entirely
7 ignorant of competence question or does not develop any
8 evidentiary standards at all for removing life-sustaining
9 treatment, the Court could presumably enter and make a
10 determination as to whether that standard is appropriate in that
11 case.

12 JUSTICE BOYCE: Are we being asked to abstain
13 until we know whether or not the state supreme court wants to
14 take another shot at this?

15 MR. DOUPE: We're asking this Court to abstain to
16 the point necessary to allow the supreme court to fully answer
17 the question whether Mr. Keller was competent to make decisions
18 for life-sustaining treatment. Federal abstention is appropriate
19 in this case.

20 My co-counsel will now address the liberty issue
21 question. Thank you.

22 MS. GALEOTO: May it please the Court. My name is
23 Gemma Galeoto, and I will address why this Court should reverse
24 the 14th Circuit and hold that Mr. Keller's clearly-expressed
25 wishes should be honored.

1 There are two reasons to reverse the 14th Circuit.
2 First, when in doubt, this Court should defer to state law on
3 state law issues and, secondly, also when in doubt, Mr. Keller's
4 wishes and previously-expressed directive should uphold.

5 To move to the first issue before this Court the
6 fact remains that under Cruzan vs. Missouri Department of Health
7 the Court determined -- this Court determined in 1990 that not
8 only do states have a right to determine competence of their own
9 citizens but also that states have a right to determine
10 evidentiary standards for determining that competency standard.
11 In this case respondents are asking this Court to delineate
12 entirely new liberty interest for a subset of persons -- the
13 minimally-conscious state patient -- in which a liberty interest
14 already exists for those persons under Cruzan.

15 JUSTICE BOYCE: If they're competent.

16 MS. GALEOTO: If I clarify. Both incompetent and
17 competent persons both have liberty interests at stake under the
18 14th Amendment. They simply stated that incompetent persons must
19 express that liberty interest through a proxy; and in this case
20 Mrs. Keller, Stevens' wife, has expressed her wishes for
21 Mr. Kellar in this case. And specifically the record at Page 7
22 indicates that Mr. Keller enacted, at the same time he enacted
23 his directive, a proxy statement delineating Michelle Keller has
24 his medical power of attorney. He did this in 2006 right after
25 they were engaged. This is a completely separate document from

1 the directive; and it will apply regardless of whether this Court
2 finds that the directive specifically addresses the issue at
3 hand, a minimally-conscious state.

4 Therefore, Your Honor, if we were to ignore the
5 fact that Mr. Keller made this determination while competent that
6 if in the event he was an incompetent person his wife would have
7 the ability to make that decision for him would be to negate the
8 liberty interest he has already expressed in what would happen
9 after he would become incompetent.

10 JUSTICE ALCALA: That begs the question as to
11 whether he's incompetent now.

12 MS. GALEOTO: Yes, Your Honor. It is unclear
13 whether he's incompetent now.

14 The record indicates on Page 17 --

15 JUSTICE ALCALA: It's not unclear. I thought the
16 trial court specifically found that the tape that he made with
17 his parents showed that he expressed a desire to live. Isn't
18 this just a classic situation where we deferred to the fact
19 finder who watched the tape, listened to the testimony, and found
20 in favor of the parents?

21 MS. GALEOTO: Your Honor, to answer your question
22 in two parts would defer to the fact finder if the supreme court
23 had not reversed the fact finder and found that based on that
24 evidence the fact finder reviewed it was unclear whether or not
25 Mr. Keller was competent and because of that we have to look at

1 the second -- in answer to your question is because competence is
2 a matter of state law under Cruzan, we must defer again back to
3 the state fact finder to determine if they're able to clarify
4 whether or not Mr. Keller's competent.

5 The 14th Circuit itself admits under -- on Page 27
6 of their record that Mr. Keller -- it is unclear from the
7 videotape and from the evidence presented whether or not he was
8 competent. And so we are simply saying that Mr. Keller does have
9 a liberty interest whether he's competent or incompetent but the
10 fact of whether he's competent or not is up to the states to
11 determine and the state here has reversed its fact finder and so
12 therefore -- and found it's unclear.

13 So we're asking this Court, instead of affirming
14 the 14th Circuit which creates an entirely new subset of liberty
15 interests specifically for minimally-conscious persons, to
16 instead uphold this Court's previously-enacted statute -- or
17 precedent that minimally conscious -- or that incompetent persons
18 and competent persons both have liberty interests, both of those
19 liberty interests are expressed in different ways. In an
20 incompetent person's life the liberty interest is expressed
21 through a proxy -- in this case Mr. Keller's wife as the record
22 indicates on Page 7, has been delineated as Mr. Keller's power of
23 attorney. If Mr. Keller is to go back through a fact finding
24 process and determined competent under a state (inaudible) and
25 Cruzan would uphold his ability to make a decision regarding his

1 life-sustaining treatment.

2 JUSTICE BOYCE: I don't want to cross up the
3 delineation of argument that you've made, but I'm still troubled
4 by the fact that I think both of your arguments sound like we are
5 being asked to defer indefinitely until the state figures out
6 what it wants to do with this unfortunate situation. And that is
7 a concern because the situation is not going to get any better.
8 It may get worse. And some important decisions need to be made,
9 and they may not be made with the ideally-presented clear facts
10 or the ideally-presented clear law. But at some point we've got
11 to act and either say yay or nay on the rights that are being
12 advocated for. So it seems to me your argument is tying into the
13 abstention argument in a way that troubles me.

14 MS. GALEOTO: Certainly, Your Honor. Your concern
15 is valid, that indeed decisions do need to be made and that we
16 cannot continue on indefinitely in determining whether or not
17 Mr. Keller has made a choice whether to live or die. But the
18 issue here, Your Honor, is that respondents are not offering you
19 a time either. They're simply wanting this Court to create an
20 entirely new liberty interest under the 14th Amendment for
21 minimally-conscious persons. We're simply saying that under
22 Cruzan incompetent or competent persons, whatever the states
23 determine as competence, is already protected so there's no need
24 for this Court to create an entirely new subset of liberty
25 interests.

1 And as far as an indefinite state that -- state
2 decision period where we allow states to figure it out -- we're
3 not upholding that the states take five or ten years to figure
4 out this -- this specific issue. We're simply saying that under
5 this Court's previous precedent the state should at least have
6 the opportunity, when given this issue to determine, under their
7 own law, competent standard.

8 JUSTICE BOYCE: Already had the opportunity and
9 they punted. Is it not up to us to now address this as best we
10 can on the record we have?

11 MS. GALEOTO: Your Honor, respectfully they did
12 not specifically punt because there is a bill pending in the
13 legislature that would, in a sense, clarify the issues that are
14 at hand.

15 JUSTICE BOYCE: Which may or may not get enacted.
16 Who knows?

17 MS. GALEOTO: Certainly, Your Honor.

18 JUSTICE BOYCE: One state -- I'm aware of --
19 hundreds of bills get proffered every year and a small handful of
20 them get passed by both houses and a smaller subset of them get
21 signed. All sorts of things might happen. But just because
22 there's some prospect of legislation potentially getting
23 passed -- I don't know that that is a -- that that is a
24 compelling reason for us to keep deferring and deferring and
25 deferring to a state court process that has already indicated

1 that it may well have done as much as it's going to do with this
2 unfortunate situation.

3 MS. GALEOTO: And, Your Honor, if I may address
4 your question in two parts. First, the state court may well have
5 indicated that; but the fact remains that the state -- that the
6 state supreme court found that there was not sufficient facts
7 that the probate court found in order to make a determination of
8 competence. And so in the instance the state supreme court says,
9 "No. We don't want this case anymore," it can still be taken
10 back to the probate court to make a determination of competence.

11 Second, Your Honor, I would urge this Court not to
12 be caught up necessarily on the indefinite time line because
13 respondents, through their brief and through the appeals process
14 here on certiorari to this Court, are not proposing an immediate
15 time line. They're simply proposing that this Court find this
16 entirely new liberty interest for the subset of
17 minimally-conscious persons and enact a standard that is
18 unnecessary --

19 JUSTICE BOYCE: Maybe I need to be more specific
20 with the time line that I'm focusing on. I understand that
21 depending on Mr. Keller's medical situation you could be talking
22 about some number of years if treatment's continued. The time
23 line I'm specifically worried about is coming to a decision about
24 who gets to decide. And -- without saying that the Court is
25 necessarily going to agree with the respondents or with the

1 14th Circuit about whether a liberty interest exists to this
2 extent -- if it's decided that such an interest does exist, then
3 we've at least crossed that threshold and then the other issues
4 may come up but we're no longer indefinitely postponing the
5 decision about who gets to decide. That's the concern.

6 MS. GALEOTO: Your Honor, your concern -- I'm
7 sorry I did not address it previously. But, yes, this Court
8 today may decide who gets to decide and still find for
9 petitioner. Simply because this Court has already found in
10 Cruzan -- if he's incompetent, then we're able to make a
11 determination based on a surrogate; and if he's competent, then
12 he can make that decision for himself.

13 Respondents cannot show you today -- in fact,
14 other than on certiorari to this Court -- the 14th Circuit said
15 it was unclear whether he was competent so they remanded. If
16 this Court were to make a decision today, it's impossible on the
17 facts below for this Court to decide on the 14th Circuit's
18 opinion whether or not he was competent. The only decision this
19 Court has to make today is whether or not there should be an
20 entirely new liberty interest created for a subset of persons
21 that's already protected under this Court's decision in Cruzan
22 because we already have a protected interest in competent and
23 incompetent persons' liberty. But it simply remains on who gets
24 to exercise that liberty interest; and in this case if Mr. Keller
25 is found by a state court to be found -- to be incompetent, his

1 wife has met the state evidentiary standard that's listed on
2 Page 17 as being sufficient enough to meet Mr. Keller's
3 requirements under his proxy statement.

4 And so, Your Honor, what we're dealing with here
5 is not really a question of making a decision today as to
6 competence but rather whether this Court wants to delineate an
7 entirely new liberty interest when it's unnecessary under this
8 Court's precedent because petitioners in this case are not
9 attempting to withdraw Mr. Keller's life-sustaining treatment.
10 We're simply asking this Court to honor the wishes he expressed
11 before he became in the state that he's in now. Before he became
12 in this minimally-conscious state, he specifically stated that if
13 he wanted -- if he was in a coma, a persistent vegetative state,
14 or terminal illness not be kept alive.

15 JUSTICE ALCALA: But none of those things exist
16 here.

17 MS. GALEOTO: Exactly. But he stated he wanted
18 his wife Michelle Kellar to be designated as his medical power of
19 attorney.

20 JUSTICE ALCALA: If he was incompetent which he's
21 not.

22 MS. GALEOTO: The record's unclear. The 14th
23 Circuit indicated he was not competent which is exactly why this
24 must be remanded to the states to determine if he is incompetent
25 or not. Because if he's deemed competent, this Court in Cruzan

1 has upheld his liberty interest in making that decision.

2 So here before this Court petitioners are simply
3 asking that this Court honor its decision in Cruzan and allow
4 this Court to remand back to the state courts to determine a
5 finding of competence so that we can determine whether or not
6 Mr. Keller can exercise that liberty interest himself or instead
7 have his wife exercise it for him, both of which are
8 constitutional options; and that is why we're urging this Court
9 to reverse the 14th Circuit and instead uphold Cruzan.

10 JUSTICE BOYCE: Hear from the respondents, please?

11 MS. SCHUCH: May it please the Court. My name is
12 Jennifer Schuch. And along with my co-counsel Roy Mitchell we
13 represent the respondents. In my co-counsel's time before the
14 Court he will address why the Court of Appeals correctly rejected
15 Michelle Keller's request to withdraw life support. With my time
16 before the Court I will explain why the Court of Appeals
17 correctly found that the federal district court should not have
18 abstained from hearing this case for two reasons. First, this
19 issue involves a federal question and, second, the abstention
20 doctrines which the petitioner contend apply do not apply to the
21 facts that we have before us.

22 Your Honors, this Court has been clear that
23 abstention is the exception and not the rule and that the federal
24 district courts have a virtually unflagging obligation to
25 exercise the jurisdiction that is given to them and only in very

1 narrow and exceptional circumstances should that jurisdiction not
2 be exercised. This case does not present that exceptional or
3 narrow exception that the petitioners contend it does.

4 JUSTICE BOYCE: Why isn't this on the same
5 circumstances as the Thibodeaux case where you've got a
6 potentially dispositive state court resolution that may well be
7 on the way that will greatly focus the discussion here? It is
8 awfully hard to have a thorough discussion of the extent of a
9 liberty interest when the fundamental issues regarding competency
10 or regarding definitions under state law remain in flux. I don't
11 know how we have that conversation in a useful way. So why are
12 we not in a Thibodeaux kind of situation?

13 MS. SCHUCH: Your Honor, in Louisiana Power and
14 Light vs. the City of Thibodeaux this Court directed the federal
15 district courts to first stay their hand; and in this case
16 there's nothing in the record to suggest that the federal
17 district court was staying its hand. There's everything in the
18 record to suggest they were dismissing this case entirely. And,
19 second, in Louisiana Power and Light vs. the City of Thibodeaux
20 the case revolved around this intimate area of state policy.
21 However, the areas we have before us here today are areas of
22 national concern.

23 JUSTICE BOYCE: And state concern.

24 MS. SCHUCH: Absolutely, Your Honor. And state
25 concern. However, what the respondents are asking this Court to

1 do is to define what the courts can regulate not how the courts
2 should regulate. Not how the states should regulate.

3 In Thibodeaux what was asked of the courts is to
4 make that distinguishment of how that regulation should be
5 implemented. All we're asking this Court to do is further define
6 its holding it found in Cruzan vs. the Missouri Department of
7 Health and find this minimally-conscious state does have a
8 liberty interest in their right to self-determination. Not
9 asking that this Court hold against Cruzan merely asking this
10 Court realize --

11 JUSTICE BOYCE: Asking for an extension of Cruzan
12 under circumstances that are at best very, very muddy both
13 factually and legally. That is a very unappetizing set of
14 circumstances for us to be presented with and told that this
15 interest needs to be further defined. We're being asked to
16 define an interest against a backdrop of moving facts and moving
17 law, and that is a very troubling set of circumstances for us to
18 be acting in.

19 MS. SCHUCH: Your Honor, although the facts of
20 this case may seem that they are unclear the differences between
21 somebody in a minimally-conscious state and a persistent
22 vegetative state or coma are significant; and it's that
23 difference and that distinction that we're asking the Court to
24 make today. Someone in a minimally-conscious state goes in and
25 out of competency. They may not be competent at this moment;

1 however, that competency can come and go.

2 JUSTICE BOYCE: May be assuming too much there.
3 As I understand this record you can be in a minimally-conscious
4 state and there could still be a question about whether -- even
5 at the highest level of consciousness that is achieved by this
6 person whether they're still able to make any kind of a decision
7 with some sort of rational way or whether they're just
8 physiologically responding to outside stimulus.

9 MS. SCHUCH: Your Honor, although that is -- that
10 may be true that there may be some distinction between the two
11 the distinction lies in where a minimally-conscious state is
12 different from the other states such as in Cruzan where this
13 Court found that someone in a persistent vegetative state is
14 incompetent. The difference lies in the fact that there are
15 questions to be answered, and for those reasons we ask this Court
16 to remand this case to the federal district court to answer those
17 questions and to help this Court answer that federal question of
18 whether or not there is this liberty interest that needs to be
19 protected. We're asking this Court to realize the fact that the
20 federal interests in this state are predominant to the state
21 interests.

22 As this Court told us in Burford vs. Sun Oil the
23 purpose behind the abstention doctrine is deference to the state
24 legislature, the states, and to allow the states to rule on an
25 essentially local issue. However, the interest in this case

1 belongs to the Constitution of the United States; and the
2 interests significantly outweigh the state's interests in
3 regulating this area as this Court is not going to tell the
4 states how to regulate. They're telling the states what to
5 regulate.

6 JUSTICE BOYCE: I'm not sure I follow the
7 distinction you're trying to draw because I have a concern.
8 You've got one point of view with respect to end-of-life issues
9 of physician-assisted suicide in Oregon, for example, versus New
10 Amsterdam versus Texas versus some other state. I have a concern
11 that you may be globalizing the interests that we're talking
12 about here to an extent that aren't really reflected in the real
13 world. Different localities have different views about very
14 significant issues, very difficult issues. Asking to come up
15 with a rough general average of about how people feel about this.
16 That's a tall order.

17 MS. SCHUCH: Not asking this Court to come up with
18 a uniform standard such as in Oregon where they allow
19 physician-assisted suicide or anything to that effect. What
20 we're asking this Court to do is to say there is interest that
21 must be protected in the states with due process. We're not
22 asking this Court to say what that process is or to --

23 JUSTICE BOYCE: But to do that intelligently don't
24 we have to say what the interest is? If we have to say what the
25 interest is, I think we're unavoidably being called upon to make

1 some of these exquisitely fine and distinctions that the states
2 are not in agreement on, and it's -- it's an aggressive -- a
3 request for aggressive action by this Court for us to make those
4 distinctions and say the liberty -- the liberty interest exists
5 and it extends to "x" -- Point X. We've got to define Point X,
6 and that's a tall order.

7 MS. SCHUCH: Your Honor, you're correct. That is
8 a tall order; however, it's an order that this Court accepted in
9 Cruzan vs. Missouri Department of Health director. Apologize.

10 JUSTICE BOYCE: With respect to competent
11 persons -- you know, where there's no dispute -- and prior to the
12 onset of whatever the illness is or the condition it's concerning
13 that you're asking for what I perceive to be an extension of
14 existing standards under circumstances where there is no
15 consensus that's revealed by this record and been against the
16 backdrop of muddy facts and muddy state law in the locality where
17 this occurs -- that's not a very comforting set of circumstances
18 for us to be asked to declare what the new standard is.

19 MS. SCHUCH: Two points of things that you
20 mentioned. First, as for those muddy facts the respondents are
21 here to ask this Court to remand this to the federal district
22 court to make those factual determinations. It is those facts
23 that we need to clarify this case, and those facts are necessary.
24 And although the petitioners contended that this case can be
25 remanded to a state court, the state courts have already had

1 their opportunity and they've had their say. The New Amsterdam
2 Supreme Court made their decision saying that a persistent
3 vegetative state and minimally-conscious state were close enough
4 for Steven Keller's directive to apply, and that's all the
5 responsibility that the State court chose to take. If this state
6 had wanted to regulate any further, they had that opportunity at
7 that time.

8 Moreover, Your Honors, said that Cruzan would
9 determine that -- a competent person has that 14th Amendment
10 liberty interest. A competent person, much like you or I, who
11 could decide what those end-of-life decisions would be; however,
12 implicit in that holding is that an incompetent person may not
13 have the ability to exercise that liberty --

14 JUSTICE BOYCE: Why is that implicit? Didn't
15 address the issue presented in the case. How do you get the
16 implicit holding out of that?

17 MS. SCHUCH: Reverse of the competency holding,
18 that a competent person has that liberty interest. And as this
19 Court held in the Cruzan case that Nancy Cruzan who was in a
20 persistent vegetative state her wishes could be determined by
21 proxy, and pursuant to the state rules that was allowable. As we
22 have those two new bookends, if you will, right now we're in the
23 middle. We're in this gray area where the Court's holding is not
24 necessarily enough to define the state of mind that Steven Keller
25 is in.

1 JUSTICE BOYCE: Come back to what I think the
2 issue we're circling around: What comes first, the interest or
3 the facts? How do we articulate in an intelligible and
4 understandable way what the interest is until the facts stop
5 moving around? I understand you to be asking us to remand for
6 further fact determination. Doesn't that need to come first
7 before we can declare some interest?

8 MS. SCHUCH: Your Honor, that may need to come
9 first. However, in this case, again, we're only asking for a
10 remand. We're asking for the federal court to make those factual
11 determinations, asking this Court to say that the federal court
12 should not abstain from hearing this case.

13 Moreover, Your Honors, the abstention that the
14 petitioners contend apply to this case we don't have the facts
15 for that case to apply. Louisiana Power and Light Company vs.
16 the City of Thibodeaux revolved around a case where the federal
17 courts were staying its hand and a case where there was intimate
18 areas of state policy that needed to be protected. But,
19 moreover, this Court said that it was necessary in that case to
20 allow the state courts to sort it out; however, in this case the
21 state courts have sorted it out. The New Amsterdam Supreme Court
22 made its own decision. They had the opportunity to make whatever
23 decision they saw fit, and they chose to not weigh in on this
24 issue.

25 Moreover, in Burford vs. Sun Oil as the petitioner

1 contended also applies to this case the facts are not there
2 either. In Burford this Court found it necessary to protect this
3 sweeping legislative scheme, a scheme that was centered on an
4 administrative body. We don't have that administrative body in
5 this case. And the --

6 JUSTICE BOYCE: Not sure why that makes a
7 difference. In some circumstances got bioethics panels which
8 sound like a quasi-administrative body to me -- obviously not a
9 state agency but it's this administrative construct, I guess,
10 within a hospital context. I'm not sure that the presence or
11 absence of an administrative regime really controls the analysis
12 here.

13 MS. SCHUCH: Your Honor, that's true. It's that
14 the presence or absence does not control. Therefore, Burford
15 cannot apply.

16 Regardless of if this Court may disagree it's that
17 lack of administrative body -- the fact that this Court is having
18 a question or wavering on whether or not that administrative body
19 may be in place -- is enough reason to say the Burford should not
20 apply. Moreover, the Burford case --

21 JUSTICE BOYCE: I guess what I'm asking is why
22 isn't the contemplated bioethics panels, which are sort of
23 quasi-administrative in a hospital context -- why isn't that
24 close enough to make Burford potentially applicable?

25 MS. SCHUCH: In Burford we had not only a

1 legislative arm, we had this administrative body that was
2 protected by a judicial review. It was simply an administrative
3 body in that case; however, that administrative body was highly
4 specialized. It only --

5 JUSTICE BOYCE: What could be more specialized
6 than hospital bioethicists weighing a particular patient's
7 condition and deciding whether or not care -- medical care and
8 feeding are going to continue? That's pretty darn specialized
9 and something that courts are uniquely ill equipped to try to
10 decide.

11 MS. SCHUCH: I absolutely agree; however, as we
12 can see in the record at Page 31 the procedures in play at New
13 Amsterdam allow one hospital not the hospitals across the state
14 to weigh in on this issue wherein Burford (inaudible) Texas
15 Railroad Commission which governed all hospitals across the
16 states. We have the ethics committee in one individual hospital
17 wherever the patient may be found. That ethics committee may
18 have -- although it does have the expertise their views may defer
19 from another hospital anywhere else within the state of New
20 Amsterdam.

21 Moreover, the petitioner contended that there's
22 this need for specialization in this case. However, we're not --
23 the respondents are not taking the position we're trying to take
24 away from the state's autonomy and disable them from exercising
25 that specialization. We're merely asking this Court to state

1 what the states should exercise that specialization on and direct
2 that specialization to someone in this minimally-conscious state
3 and how that regulation should be fitting.

4 Your Honors, in this case we're asking this Court
5 to err on the side of accuracy. The decision that this Court
6 makes will end -- will begin or end in Steven Keller's life
7 rather than as the petitioners say is to find for the state's
8 autonomy and allow deference to the states to sort this out. And
9 who knows what kind of time -- Steven Keller's time is almost up,
10 and Steven Keller's life hangs in the balance. It's for these
11 reasons we ask this Court affirm.

12 MR. MITCHELL: May it please the Court. My name
13 is Roy Mitchell. Along with my co-counsel Jennifer Schuch I,
14 too, represent the respondents Tyler and Florence Keller.

15 It was improper for the federal court to abstain
16 in this matter. With my time before the Court I will argue why
17 the Court of Appeals below correctly rejected Michelle Keller's
18 request to remove Steven Keller's life-sustaining treatment for
19 two reasons. First, there's insufficient evidence in the record
20 to indicate that Steven Keller would like that life-sustaining
21 treatment removed and, second, a competent person in a
22 minimally-conscious state has a liberty interest to make these
23 decisions.

24 Your Honors, the issue before this Court today is
25 one of autonomy at the expense of accuracy. We understand it's

1 important for a state or individual to make a decision. Was just
2 as important to make sure the decision is the correct one. And
3 the record is very clear in two parts. First, the medical
4 directive Steven Keller signed found on Page 26 through 29 does
5 not use the term minimally-conscious state once and, second, on
6 Page 5 of the record we can see that Steven Keller can follow
7 simple commands. He's aware of himself and the surroundings, can
8 respond with nods or shakes to yes or no questions. He has
9 presumptive reflexes.

10 Brings me to Michelle Kellar's first point,
11 insufficient that Steven Keller would like to have his
12 life-sustaining treatment removed. In Cruzan the Missouri
13 Director of Health when a person is in this condition, we can
14 never assume what they would like. Have to look to a biomedical
15 directive or clear and convincing evidence. In this case we have
16 neither.

17 JUSTICE BOYCE: I have a concern about how -- what
18 comes after this. Let's assume that the liberty interest that's
19 being advocated for is recognized. So we're going to say that a
20 person in this MSC status has some manner of interest. All
21 right? Where does that take us? We have an initial dispute
22 regarding administering food or withholding food. Are we going
23 to have subsequent circumstances where every time there's a fork
24 in the road the decision has to be made about one course of
25 treatment or another, that we're going to have the circumstances

1 of a videotape, of the question being put to Mr. Keller to try to
2 gage whether or not he catches what is being asked and gets some
3 kind of indication from him? How far -- are we setting ourselves
4 up for an infinite series of muddy factual determinations about
5 whether he understands enough about what he's being asked for --
6 each specific little decision -- that this is just going to go on
7 in perpetuity as long as treatment is available?

8 MR. MITCHELL: No.

9 JUSTICE BOYCE: Why not?

10 MR. MITCHELL: A competent person has a liberty
11 interest. All that's left to decide for Steven Keller is whether
12 he has the ability to make the determination of whether for sure
13 he's, in fact, competent and that is the proper job of a federal
14 district court in this case and the reason it was brought before
15 the Court is because it's a constitutional issue to exercise
16 under the discretion of the federal court, to decide if the
17 interests exists and if it does how it effects Steven Keller in
18 this case, Your Honor.

19 In this case the directive that was wrongfully
20 exercised by the Supreme Court of New Amsterdam does not apply to
21 Steven Keller as it does not address at all the situation that
22 Steven Keller's in. As the Court of Appeals below correctly --

23 JUSTICE BOYCE: I'm not sure you fully answered
24 the question. Let me take another run at it. I'm concerned that
25 endorsing the position that there is a liberty interest here is

1 going to set up a never-ending series of proceedings centered on
2 the fact of does Mr. Keller understand this option that he's
3 being presented with, does he understand that option that he's
4 presented with for any of the multitude of decisions that are
5 going to come around presuming that treatment continues
6 indefinitely. That is a -- that is a troubling prospect.

7 I think implicitly in what I hear you saying is an
8 assumption that his competency or understanding level is going to
9 maintain -- is going to be constant. It appears to me from what
10 we have in the record that that is a highly fluctuating sort of a
11 thing. So we're -- are we not setting ourselves up for a
12 never-ending series of disputes at each fork in the road of his
13 treatment, to go through this very difficult and painful
14 exercise?

15 MR. MITCHELL: Once again, I answer your question
16 no. Let me try to be more clear with my response. If we find
17 there's a liberty interest, that means that presently in his
18 current state Steven Keller would have the ability to refuse or
19 accept treatment -- and more important distinction whether to
20 choose life or death --

21 JUSTICE BOYCE: Going to ask you to be more
22 specific. Step 1: Keep providing nutrition or withdrawing
23 nutrition; Step 2 -- let's assume that all these proceedings lead
24 to a conclusion that Mr. Keller has an interest and let's assume
25 the record confirms a sufficiently-demonstrated request by him

1 for nutrition to be provided. Okay? So he's not going to starve
2 to death. Now we come to the next fork in the road. He's got a
3 life-threatening infection that needs to be treated in one of
4 multiple ways all of which have their own upsides and downsides
5 and risks. Are we going to go through the proxy statements again
6 of asking him whether he wants Treatment Option A or Treatment
7 Option B or C for his infection? Then Step C, he needs a major
8 surgery. Are we going to go through this thing again and again
9 and again? It sounds like you're suggesting that this is a
10 one-time decision that has to be made, and I have concern that
11 we're setting ourselves up for a never-ending fight at each
12 juncture where some critical decision needs to be made about his
13 care. Are we -- why are we not opening up the Pandora's box to
14 this sort of situation if we recognize the liberty interests
15 that's being advocated?

16 MR. MITCHELL: Because, Your Honor, if this Court
17 were to determine there is a liberty interest to be advocated
18 much in the same way the Court did in Cruzan. My co-counsel said
19 that telling the states what they can regulate not how they can
20 regulate -- and if Steven Keller does have a liberty interest he
21 has with that the right to choose every step of the way. May not
22 be something that's decided before a court such as this.
23 Something that's decided in that hospital room in New Amsterdam.
24 Because he not only has a 14th Amendment liberty interest to
25 choose his treatment or to choose to live or die -- if he has

1 that ability now, he will forever have that ability until he's
2 determined to be unable to answer the decision; and that's
3 something the United States Constitution protects, Your Honor.
4 Protects his ability to have that decision and have the ability
5 to make it with due process. And before we take that away from
6 him, he's given the process he's due, Your Honor; and that's why
7 this one time determination of this Court granting the liberty
8 interest to a person who's competent on which this Court already
9 said in Cruzan is a one-time determination for this Court and
10 then, thus, leaving a perpetual decision for the individual.

11 JUSTICE ALCALA: Is his directive irrelevant?

12 MR. MITCHELL: Currently it is since it does not
13 apply because it does not deal with the state he's in. The
14 Court --

15 JUSTICE ALCALA: What about the fact where the
16 directive says -- let me find it very quickly. Says, "If in the
17 judgment of my physician I'm in a coma or persistent vegetative
18 state so that I cannot care for myself or make decisions for
19 myself --" isn't that what the situation -- isn't that the
20 situation that we're in, that he cannot make decisions for
21 himself so we have to defer to his wife?

22 MR. MITCHELL: No, Your Honor. The evidence in
23 the record indicates not only that there's insufficient evidence
24 to show he can't make determinations for himself there's a
25 possibility that he could -- that he could express a preference

1 for life. On Page 5 of the record all his physicians agree that
2 he has the ability to shake his head -- nod or shake his head in
3 response to yes or no questions.

4 JUSTICE ALCALA: That's an entirely different
5 thing from understanding the situation he's in, the long-term
6 consequences that he's facing. It's one thing to nod, yes, "I
7 want peas today." And it's something else all together to say
8 that "I want to live in this condition for the rest of my life."

9 MR. MITCHELL: Yes, Your Honor. I think there's a
10 further distinction to be made. There's a difference between
11 saying, "I would like to receive some type of treatment" such --
12 if he had cancer, to receive chemotherapy and to say, "I want to
13 live or die." Judge Lo in the probate court said Mr. Keller has
14 the right to make the determination whether he lives or dies, and
15 there's evidence in the record to support that with his ability
16 to respond to the questions by his parents both recognizing
17 through -- maybe the only way he knows how.

18 JUSTICE ALCALA: He didn't tell his parents he
19 wanted to live or die. The question that they asked was
20 internally inconsistent. No way to know what he was answering
21 when he answered the question.

22 MR. MITCHELL: Precisely, Your Honor, the reason
23 the federal district court is the proper venue to establish
24 precisely what Steven Keller wants when dealing with his liberty
25 interests and why we're asking this Court to remand the case to

1 the federal district court for that factual determination as it
2 involves the federal question and his liberty interest.

3 Moreover, as you say --

4 JUSTICE ALCALA: Except for the fact that if you
5 disregard the tape, which I think you have to because it's just
6 unclear what he meant in the tape, then you have to look at the
7 other evidence in the case which includes his directive and
8 you -- if you look at the fair inference from the entire contents
9 of the directive, it seems very clear that he never wanted to
10 live in this condition; he never wanted to be, quote, a burden to
11 his family according to his friends at the fire department
12 according to the directive. He never wanted to be in that
13 condition.

14 And so it seems as though the only inference from
15 the evidence is that he does want his life to be ended.

16 MR. MITCHELL: Your Honor, I would start by
17 stating that the respondent's very conscious of making an
18 inference particularly when it deals with a man's life. When you
19 look at the directive itself --

20 JUSTICE ALCALA: Inferences are done all the time.
21 Do that in death penalty cases. In every life-and-death
22 situation you take a piece of evidence and then you decide what
23 reasonable inference can come from that evidence or from the
24 record. So I beg to differ that there's anything improper about
25 a --

1 MR. MITCHELL: Two points to that, Your Honor.
2 First, in death penalty cases the person on death row has
3 currently received more due process than Steven Keller because a
4 jury of 12 of his peers have found unanimously what's supposed to
5 happen to that individual. The directive taken within the four
6 corners does not give rise to the situation Steven Keller's in as
7 he's not in a persistent vegetative state.

8 JUSTICE ALCALA: If you take the directive in
9 conjunction with the testimony by his friends and his wife who
10 said that he never wanted to live in this condition, that should
11 be enough.

12 MR. MITCHELL: Your Honor, the Court told us in
13 Cruzan that statements by friends and relatives are not
14 admissible, not reliable. So we cannot take that evidence into
15 context particularly when looking at a situation where a
16 directive does not apply and there's not sufficient evidence to
17 the contrary to show that it should, Your Honor. It's for those
18 particular reasons that we see there's insufficient evidence to
19 indicate that Steven Keller wants his treatment to be removed.

20 Turning to my second point, a competent person
21 does have a liberty interest to make these determinations. What
22 makes Steven Keller different than the other individuals where
23 courts such as this one and the states have dealt with this
24 decision is he is not in a persistent vegetative state.

25 JUSTICE BOYCE: I want to explore that because I'm

1 looking at the definition on Page 29 of the record. It's defined
2 to mean that the patient, one, demonstrates some arousal and
3 general responses to pain. If I understand it, that pain applies
4 to Mr. Keller. No. 2, has sleep/wake cycles, respiratory
5 functions, and digestive functions -- that applies as I
6 understand it.

7 MR. MITCHELL: Yes.

8 JUSTICE BOYCE: Does not have the ability to
9 interact with his or her environment. Perhaps he does and
10 perhaps he doesn't. Perhaps he's having some interaction with
11 his environment, perhaps he's just having physiological
12 expressions that those around him who want him to be better are
13 interpreting as expressions of desire or emotion. My question to
14 you is is he really not in a persistent vegetative state, and
15 what is the best indication on this record that we have that the
16 state he's in is something other than a persistent vegetative
17 state?

18 MR. MITCHELL: That would be on Page 5 of the
19 record where every doctor has stated it's uncontroverted that
20 he's in a minimally-conscious state, a state as the court of
21 appeals below most correctly noted on Page 16 is undoubtedly
22 different.

23 JUSTICE BOYCE: Court of appeals said that. May
24 be some more room for doubt there than perhaps is being
25 expressed. This goes back to underlying concern that both

1 lawyers and judges are uniquely ill suited to be making these
2 kinds of exquisite distinctions about whether minimally conscious
3 state is somehow different from persistent vegetative state. I
4 mean, those are difficult medical questions that I have concerns
5 that we are wading into in a big way if we accept the liberty
6 interest that's being advocated here.

7 MR. MITCHELL: I do see my time is about to
8 expire. May I address your questions?

9 JUSTICE BOYCE: Please.

10 MR. MITCHELL: I agree as judges or lawyers we may
11 not be best able to determine the difference between the two, but
12 the doctors in this case who are best able to determine -- who've
13 examined Steven Keller, who's seen what he's able to do and not
14 do -- he's undoubtedly in a minimally-conscious state. He has
15 the ability to have these interactions both by shaking or nodding
16 his head and is aware of his environment, Your Honors. For these
17 reasons we request the Court to affirm.

18 JUSTICE BOYCE: Rebuttal?

19 MR. DOUPE: May it please the Court. Your Honors,
20 in rebuttal I would address three points with respect to what was
21 raised by the respondents during their oral arguments. First,
22 the respondents argued the federal courts have an unflagging duty
23 to hear this case given the underlying Constitution question.
24 However, Your Honors as I pointed out during my oral arguments as
25 this Court held in the Feldman doctrine there's essentially no

1 basis in which to hear this case given this is essentially being
2 used to collaterally attack state court judgment.

3 Second, Your Honors, respondents misstated the
4 doctrine with respect to Cruzan -- cannot take into account the
5 statements of spouses, family members in regards to a family
6 member's life-sustaining treatment. Cruzan decision in stating
7 the state was not required to accept substantiated judgment of
8 close family members of the patient in persistent vegetative
9 state to withdraw life-sustaining treatment, proof that their
10 views reflecting the views of the patients -- here on Page 16 of
11 the record Michelle Keller met that by establishing her views
12 were consistent with Mr. Keller's advanced directive.

13 Three, Your Honor, I would like to point out the
14 fact that the individuals in this particular instance do have an
15 underlying liberty interest. We're not contesting, however,
16 there's a factual ambiguity as to whether Mr. Keller is aware of
17 his liberty interest which requires this to remand to a state
18 court to assess the competence question in accordance with the
19 Cruzan decision and address those evidentiary standards.

20 JUSTICE ALCALA: Why not remand to the federal
21 district court as your opponent suggests?

22 MR. DOUPE: Have to address the state court
23 question; and given the fact the federal court is not able to
24 make declaratory judgment what state law would be in this
25 instance, have to make the decision based on the competence

1 question before the liberty interest question could be fully
2 addressed.

3 Address again, Your Honors, the question regarding
4 the time line of this case given the muddy law and muddy facts
5 that Your Honors pointed out, to a great degree, create a new
6 area of law and a new rule that would essentially supersede
7 Cruzan as it currently stands, further muddy facts and muddy law,
8 and creating additional litigation to further identify the
9 paradigm upon which medical diagnosis would apply to the law
10 itself.

11 In conclusion, Your Honors, we ask this Court
12 reverse the 14th Circuit and remand to a state court to address
13 the competence question. Thank you.

14 THE BAILIFF: The honorable court is now
15 adjourned. Will the spectators and participants please exit the
16 courtroom so the judges may deliberate?

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