IN THE

SUPREME COURT

OF THE UNITED STATES

No. C09-0115-1

OCTOBER TERM, 2009

MICHELLE KELLER & NEW AMSTERDAM CITY GENERAL HOSPITAL,

Petitioners

v.

TYLER & FLORENCE KELLER,

Respondents

FOR THE PETITIONERS:

Mr. Adam Doupe
and
Ms. Gemma Galeoto

FOR THE RESPONDENTS:

Ms. Whitney Hutchinson
and
Mr. Matthew Kellam

UNIDENTIFIED, UNEDITED ROUGH-DRAFT TRANSCRIPT

CHIEF JUSTICE ELROD: Would you please call the docket, please?

THE BAILIFF: Your Honor, this is the case of Michelle Kellar and New Amsterdam General Hospital vs. Tyler and Florence Kellar.

CHIEF JUSTICE ELROD: Thank you very much.

It's nice to be here today on this Court. I am Jennifer Elrod. To my left is Justice Dale Wainwright, to my far right is Justice William J. Winslade today, and Justice Hal DeMoss today. So... thank you all for being here.

You may proceed.

WAYNE: May it please the Court. Good afternoon, Your Honors. My name is Adam Doupe. Along with my co-counsel Gemma Galeoto we represent the petitioners Michelle Kellar and New Amsterdam General Hospital. Your Honors, before I begin my argument, I ask that I reserve one minute of my time and two minutes of co-counsel's time for rebuttal.

There are two issues before the Court. First, whether federal abstention is appropriate when the state of New Amsterdam has enumerated no clear legislative pronouncement with respect to minimally-conscious persons proxy statements and, two, whether a minimally-conscious person has a liberty interest in continuing life-sustaining treatment. In my time before the Court, Your Honors, I will address the first issue; and my co-counsel will address the second.

In regard to the first issue, Your Honors, there are three reasons why this Court should find that federal abstention is appropriate in this case. First, under the Rooker-Feldman doctrine, Your Honors, the federal district court in this case lacked jurisdiction to hear the matter because it would collaterally attack the state court judgment in this particular case; second, as a threshold issue in addition to the Rooker-Feldman, Your Honors, Burford abstention is appropriate in this case because the state law in this area is ambiguous; and, third, the state of New Amsterdam has a state interest in the health and safety of its citizens warranting abstention in this particular matter.

To address my first point, Your Honors, that the Rooker-Feldman doctrine is important in this case because the district court lacked jurisdiction under that doctrine to hear this matter. First of all, Rooker and Feldman cases, Your Honor, the courts were faced in this particular case with Feldman with two law students from the District of Columbia who wish to practice law in that particular arena, and upon receiving an unsuccessful judgment in that case then went to the federal district court of District of Columbia and asked the district court to intervene as a super appellate court in hearing the matter that had already been adjudicated by the District of Columbia.

Similarly in this case, Your Honors, as noted on

Page 12 of the record, the state supreme court has adjudicated with respect to the competence question but has stated specifically that it's unclear whether in this particular instance Steven Kellar is capable or at least aware of his liberty interests in this particular matter. Respondents unhappy with their judgment in this case have now asked the federal district court to involve itself in such a way as to essentially act again as in those Feldman and Rooker cases as a super appellate court and essentially collaterally attack the state supreme court judge in this case --

JUSTICE WAINWRIGHT: Counsel, was the Constitutional question we're considering here today raised in the state court proceedings?

MR. DOUPE: No, Your Honor, it was not raised in the state court proceedings.

JUSTICE WAINWRIGHT: Since it is a federal question, then a federal court could certainly disagree with even the highest state court on that federal question. And if the federal court that decided it is the U.S. Supreme Court, would be binding on that state supreme court. So you would acknowledge that there is some ability for there to be federal jurisdiction of this question even after the state judiciary has decided it; right?

MR. DOUPE: Yes, Your Honor; however, the state court does have concurrent jurisdiction to hear these federal

questions. Given the fact that respondents did not raise this federal question in the state court, it begs the question as to whether the respondents waived their federal question jurisdiction in this particular matter as a result. And Rooker-Feldman, Your Honor, would essentially preclude the respondents from arguing their federal question and argument in this particular court because the state court dispenses with all claims before it. In this particular incident the federal question claim was not raised.

CHIEF JUSTICE ELROD: Assuming we're not persuaded by your Rooker-Feldman doctrine argument can you tell me about your Burford abstention and explain to me about the new state statute that was passed and whether it's been passed upon by the supreme court in the state.

MR. DOUPE: I believe, Madam Chief Justice, you are referring to the Steven Kellar Act which is now on the desk of the Governor of New Amsterdam. And essentially the Steven Kellar Act would modify the way in which a person in a minimally-conscious state would have certain rights or would have to go through a certain step of various procedures before he could be deemed competent -- at least aware of his surroundings to the extent necessary to essentially act and at least demonstrate that he would like to continue life-sustaining treatment.

CHIEF JUSTICE ELROD: When does it become law in

the state of New Amsterdam if it sits on the Governor's desk? How long?

MR. DOUPE: Well, Your Honor, the Governor must sign the legislation in order for it to become law.

CHIEF JUSTICE ELROD: He doesn't -- there's not a period at which the governor takes no action, that it becomes law anyway in the state of New Amsterdam?

MR. DOUPE: No, Your Honor. The record is silent as to whether there would be essentially a lapsed period in which the law would essentially become law without the Governor's signature.

But, moreover, Your Honor, this essentially falls within the Burford abstention case in particular given the fact that there's an ambiguous area of state law that while the persistent vegetative state language of the New Amsterdam statute noted in the Appendix B within the Court's record does not specifically address minimally-conscious persons. The act itself, by essentially involving the federal courts in this matter, would modify the state court's ability to essentially act on this new law if it were to pass.

In particular in Burford, Your Honor, the court was faced with, in that particular instance, the Texas Railroad Commission adjudicating with respect to oil revenues in the state of Texas. And similarly here, Your Honor, the state of New Amsterdam has an inherit interest in the health and safety of its

citizens. And as this Court held in Cruzan vs. Missouri Department of Health competence is a question of state law and, thus, the appellate court in the particular instance in New Amsterdam was faced with reaching that competence question but did not do so.

CHIEF JUSTICE ELROD: But if this law has not ever -- is not passed -- is not law yet and it may never become law, then what are we abstaining to be considered?

MR. DOUPE: Well, essentially we're asking this Court to abstain to the extent necessary to allow the state process to run its course. At the current moment the Steven Kellar Act is on the desk of the Governor, has not essentially run its course throughout the entire process. The Governor has not vetoed this particular legislation nor has he or she suggested that the legislation should be vetoed.

CHIEF JUSTICE ELROD: But it could sit forever and never -- no action could be taken. It's not a time period with which something's going to happen, is there?

MR. DOUPE: Right, Your Honor; however, we're not aware from the record whether the Governor possesses a pocket veto, essentially allowing the legislation to lapse overtime.

But presumably, Your Honor, if the legislation were to sit on the Governor's desk for several years and never be signed, then that question would never have been resolved --

JUSTICE WAINWRIGHT: What are you asking this

Court to issue? That the appellate case be dismissed, abated? I think I understand that you'd like the remand order coming from the New Amsterdam Supreme Court to the trial court for more fact finding. You would like that to proceed. But you think dismissal or abstention is better?

MR. DOUPE: We would ask that this Court abstain to the extent necessary to allow the state procedure to run its course; and a remand to the state court system would be appropriate in this particular instance, Your Honor, given the fact that the New Amsterdam Supreme Court inadequately addressed the competence issue. The court merely stated that it was unclear as to whether Mr. Kellar possessed the requisite awareness to exercise any inherent liberty interest that he may have under the 14th Amendment.

CHIEF JUSTICE ELROD: How would we remand to the state system from this procedural posture?

MR. DOUPE: In this particular instance, Your Honor, we'd ask the Court to abstain and allow for the state procedure to run its course. So it would not be --

JUSTICE DEMOSS: What is the pending state action?

MR. DOUPE: There is no pending state action, Your Honor, because the state supreme court has issued a judgment saying it's unclear at this particular moment. And given the fact that respondents were unhappy with that judgment, they then went to federal court and asked the federal court to involve

itself essentially --

JUSTICE DEMOSS: Has there been any scientific developments that would inform the state as to the questions that it said were not properly evident?

MR. DOUPE: The only developments that have occurred, Your Honor, are the ongoing legislative debates that are occurring in the New Amsterdam legislature as well as the ongoing medical dialogue between those who believe that minimally-conscious persons have some additional level of awareness that those in a persistent vegetative state may lack. And given this degree of ambiguity it warrants Burford abstention for the precise reason that there is a level of debate ongoing in the state. And for the Court to essentially involve itself in this matter would essentially cloud that judgment and basically allow for the Court to not have a degree of competence necessary to address those issues fully in this matter.

JUSTICE WAINWRIGHT: You've said that state law is unclear, and your explanation of that is that the New Amsterdam Supreme Court ordered that the case be remanded for further fact findings. But the lack of clarity that's really pertinent here is lack of clarity about the law not about fact findings. There's always facts to be found and may still be disputes among the parties about the facts, but appellate courts tend to deal more with law than with the facts.

What issues of law are unclear because the New

Amsterdam Supreme Court has ruled there was a minimum -- minimally-conscience state and persistent vegetative state are similar for the medical directive to apply, that Mr. Kellar signed; and even if not, the evidence didn't establish that he would want to continue living but remanded it for more facts. What was unclear about the law that's coming out of the supreme court?

MR. DOUPE: The law itself, Your Honor, is the fact that there was not a -- a specific pronouncement with respect to what a vegetative person would essentially constitute. And given this ongoing dialogue that's occurring in the state of New Amsterdam in the legislature --

JUSTICE WAINWRIGHT: You think that's a question of law defining a persistent vegetative state?

MR. DOUPE: It's a question of law and a question of fact, Your Honor; and given the probate court's unique expertise in dealing with these competent issues on a daily basis, that court would have the unique expertise to address these particular concerns more fully.

As the 8th Circuit noted in Baza vs. Arrowwood probate courts possess the unique degree of expertise to deal with those competence questions. Then the 8th Circuit in that particular case chose to abstain as a result. In that case particularly dealt with unique probate concerns as this particular case concerns as well.

To address my third point, Your Honors, that the State of New Amsterdam has an inherent state interest in the health and well-being of its citizens warranting further abstention of Burford -- as the Burford Court noted in that particular decision the state courts that have an inherent interest in that particular case that was oil revenues as well as other abstention cases such as Thibodeaux and Holeman all dealt with specifically state concerns. Your Honors, as this Court noted in Cruzan vs. Missouri Department of Health the competence of an individual to make decisions regarding life-sustaining treatment is one of state concern. As Justice O'Connor noted in her concurrence in that case the states are laboratories for essentially developing the evidentiary standards required to make competence determinations. In this particular case, Your Honor, the competence --

JUSTICE WAINWRIGHT: Let me jump in with a question. You seem to pin your jurisdictional argument primarily on Burford.

MR. DOUPE: Yes, Your Honor.

JUSTICE WAINWRIGHT: And you explained the facts to Burford. It's separate from this case, though, isn't it? Perhaps materially so. In Burford there was an attempt to review the Railroad Commission's Rule 37 spacing order in the district court before the state regulatory and judicial process had a chance to run its course. In Burford the Railroad Commission

order didn't get to get reviewed by the rest of the hierarchy in the state judiciary. That's a different animal.

If in New Amsterdam -- in this case the parties have gone immediately from the first state court action or decision to the federal courts, maybe you'd have something similar; but isn't Burford materially different on that grounds? How does that -- and if it is, after you answer that -- assume that it is. How does that affect your argument?

MR. DOUPE: Well, Your Honor, the procedural posture of Burford is, in fact, different; and we're not going to dispute the fact that the federal court was reviewing an administrative decision in that matter. However, the Burford Court did not say that that was the full extent of the abstention doctrine. Did not factually limit the holding of that matter. It did pronounce four other elements that essentially went above and beyond the procedural hurdle of an administrative scheme.

And, moreover as the 8th Circuit noted in Baza vs. Arrowwood the federal court in that instance did abstain from involving itself in specific probate court-related matters. While Your Honor is correct that the procedural matter is very different from, say, this particular case, it does not materially limit the petitioners' ability -- at least petitioners' ability to argue the abstention is warranted in this case.

Additionally -- I return to the Cruzan case holding, in particular the health and safety of citizens is one

of state concern. Incompetence emanates from that concern directly. If this Court were to essentially involve itself in the matter before the state court, it would, in and of itself, basically eliminate the ability of the states to continue their ongoing dialogue and continue to exercise the laboratories inherent under the Cruzan decision.

CHIEF JUSTICE ELROD: How is this case not similar to Cruzan where Justice O'Connor said the majority opinion doesn't reach or decide what facts give a surrogate decision maker? Why isn't this similar to that --

MR. DOUPE: This is a similar case.

CHIEF JUSTICE ELROD: -- such that it would have --

MR. DOUPE: Sorry, Your Honor. The case is --

CHIEF JUSTICE ELROD: You go ahead.

MR. DOUPE: Yes, Your Honor.

The case is similar to Cruzan in the sense that in this particular instance the competence question has not necessarily been determined.

CHIEF JUSTICE ELROD: But does it have to be determined? I mean...

MR. DOUPE: Yes, Your Honor, it does have to be determined before the Court can then go to the evidentiary standard adequacy question.

CHIEF JUSTICE ELROD: There's a procedural problem

I'm trying to figure out with the case. What was remanded to the state trial level court -- the probate court? There's no competency proceeding ongoing there. So what is the mechanism by which the competency would ever be determined?

MR. DOUPE: Your Honor, I see my time is about to elapse. May I have a moment to answer your question and briefly conclude?

CHIEF JUSTICE ELROD: Yes.

MR. DOUPE: The competency question, Your Honor is correct, is not ongoing because the respondents were unhappy with the state supreme court's unwillingness to rule that Steven Keller was, in fact, incompetent to make decisions regarding his current desire to have life-sustaining treatment; and when he --

CHIEF JUSTICE ELROD: Basically -- I mean, aren't they ruling that he is incompetent -- that he hasn't shown that he is competent? So he hasn't clearly shown that he has a preference for living, and so they find that his directive applies?

MR. DOUPE: The state supreme court stated the directive does apply because of the fact that he did not express any preference through the facts that were presented before the lower court.

JUSTICE WAINWRIGHT: The sole facts were the video?

MR. DOUPE: The sole facts were the videotape as

well as the directive that Mr. Kellar presented when he joined the fire department.

It is for these reasons, Your Honor, we ask the federal abstention doctrines be applied in this case. My co-counsel will now address the liberty issue question. Thank you.

MS. GALEOTO: Madam Chief Justice and may it please the Court. My name is Gemma Galeoto, and I will address why this Court should reverse the 14th Circuit and hold that Mr. Keller's previously-expressed wishes should be honored.

There are two reasons why the 14th Circuit should be reversed. First, rather than defining a separate liberty interest in this case, this Court should defer to state law competency questions and, secondly, when in doubt Mr. Keller's previously-expressed wishes and directive should be upheld.

CHIEF JUSTICE ELROD: How can we defer to state law competency decisions where there's been no competency decision which your colleague just argued?

MS. GALEOTO: Your Honor, that's exactly the problem here. This -- the respondents are asking this Court to make a decision based on the competency of a person where we're not sure that they are competent. And we're exactly asking as petitioners in order to have this remanded to a state court so that the competency determination --

CHIEF JUSTICE ELROD: How do we remand? We can't

remand to the probate court and say, "Have a competency hearing." I don't know of any authority we would have to do that.

MS. GALEOTO: Certainly, Your Honor. You're not able to remand directly to the probate court, but you are able to deem that this is a state law proceeding as this Court did in Cruzan. And as competency is a state law question, this Court is able to refer to the state system of courts -- maybe to the state supreme court which can then make a fact finding -- or not make a fact finding but remand to --

CHIEF JUSTICE ELROD: How would we get this back -- to do what you want to have happen, how would this occur?

MS. GALEOTO: Well, your Honor, you would simply -- as this Court determined in Cruzan that you would be able to leave this decision to the states to make a competency determination.

Now, that is exactly why my co-counsel is advocating that this Court abstain from this issue simply because this Court's decision in Cruzan delineated that because competency is a matter of state law it's best left to the state courts to decide that --

CHIEF JUSTICE ELROD: That doesn't tee it up. That issue's still not teed up if we just abstain.

MS. GALEOTO: Certainly, Your Honor. But the issue isn't teed up either if you follow respondents' argument and remand it to the federal district court because the

competency determination is a threshold state law question that has to be answered before the federal district court can make a determination on the liberty interest question.

And so while -- while I am not specifically clear on exactly how this case would get to the state probate court, the fact remains that respondents must overcome this competency threshold determination which is a state law issue --

CHIEF JUSTICE ELROD: Well, federal courts have hearings on state law issues all the time. Couldn't the federal district court do a fine job and have a hearing and bring in witnesses and determine the competency in light of deciding a federal constitutional issue?

MS. GALEOTO: Well, Your Honor, federal district courts can't make declaratory judgments as to state law --

CHIEF JUSTICE ELROD: They wouldn't be. They would be deciding a factual issue that would be a predicate for a federal constitutional question.

MS. GALEOTO: But, Your Honor, in order to decide -- in order to decide that factual issue that would be the constitutional predicate, it must be able to determine the facts in the case which is what is at question here, is the competence here. And so without that initial fact finding as to state law competence -- and this -- the New Amsterdam state law is not clear as to what constitutes a competent person in an MCS or a PVS, and because it's not clear --

CHIEF JUSTICE ELROD: What do you mean it's not clear? How is that -- how do we know that it's not clear? We have what the law is, it's written down. There's been no intervening law passed. Why isn't it clear?

MS. GALEOTO: Your Honor, it's not clear because as the record indicates on Page 11 that the New Amsterdam Supreme Court, while it deemed en banc that a persistent vegetative state and MCS were close enough for the directive to apply, they specifically stated that Mr. Keller -- it was unclear whether or not he was truly competent and whether or not he understood the questions posed to him.

CHIEF JUSTICE ELROD: That's not a question about the law. That's a question about the facts as to his competence which could be resolved in a hearing before the federal district court.

MS. GALEOTO: Your Honor, respectfully if I may disagree, there is no way that the federal district court could, without having from New Amsterdam a statement of what they believe a competent person would be -- which is what the Steven Keller Act which is what is on the Governor's desk right now would clarify. In order to determine competence under the Steven Keller Act the record indicates on Page 17 that indeed a panel of five doctors has to determine whether or not a person is self-aware, whether or not a person has the ability to express a preference.

CHIEF JUSTICE ELROD: But the Steven Keller Act doesn't apply. So they would have to look to an existing precedent, wouldn't they? And I'm sure the state has some existing precedent that the district court could look to and make its best guess or -- whatever that would be under the circumstances.

JUSTICE WAINWRIGHT: And that authority is New Amsterdam Probate Code Section 294.60 if the medical directive doesn't apply; correct?

MS. GALEOTO: Yes, Your Honor. If I may address your question then return to the Chief Justice's question.

The directive does not apply if Mr. Keller is incompetent under 294.06. Under the Probate Code --

JUSTICE DEMOSS: When must he be incompetent? When he signed the directive or now at the time the directive is being considered?

MS. GALEOTO: Justice DeMoss, he would have to be incompetent at the time the directive is being considered.

And to return to your question, Justice Wainwright, and then Chief Justice Elrod's question, the fact is the Probate Code delineates that when Mr. Keller, or anyone, is incompetent, there's a hierarchy of who can make that decision for Mr. Keller. In this case it goes a court-appointed guardian, a spouse, children, and then the parents of that person. In this case on Page 7 of the record Mr. Keller has indicated that if he

is incompetent his wife Michelle can serve as his medical power of attorney.

To return to your question, Chief justice Elrod, regarding the fact that what state law is unclear here because the Steve Keller Act has not yet been signed -- the fact is, Your Honor, that's exactly why my co-counsel's asking this Court to abstain in order to allow the act to either be signed or not be signed so that we're able to have a competency determination from New Amsterdam because --

CHIEF JUSTICE ELROD: We could have a competency determination under existing law today.

MS. GALEOTO: Your Honor, the record is void completely of any competency determination that has been presently made in New Amsterdam, state law.

JUSTICE WAINWRIGHT: But if normally statutes -- at least state statutes when they're passed are effective prospective not retroactively. Even if the Steven Keller Act were signed by the Governor today, it wouldn't apply to this case.

MS. GALEOTO: Well, Your Honor, it would apply to this case if this case was able to be -- if the federal question and the competency determination was able to be brought in state court. And the fact here is that because there is some sort of ambiguity in the law because we do not have in the record any evidence of a current New Amsterdam law that has any

determination as to competence, the proxy statute, Justice Wainwright, that you referred to specifically deals with when a person is incompetent, who may act as their surrogate. And, furthermore, the directive that we have here in this case deals with -- if Mr. Keller is in a coma, a persistent vegetative state, or terminal illness.

We will admit as petitioners that this does not directly apply to a minimally-conscious state, but we're arguing that this Court should not only apply the principles from the directive that state that in all these situation Mr. Keller would not want to be kept alive. But, furthermore, if he was in an incompetent state -- which is unclear whether he is or not -- that his surrogate, his wife the record indicates on Page 7, would be able to make that determination for him.

JUSTICE WAINWRIGHT: Let's assume that you can get past the remand question and how the fact finding can be made and in which court and get past the effective date of the Steven Keller Act. Address specifically the substance of Cruzan and liberty interest.

MS. GALEOTO: Certainly, Your Honor.

Cruzan is exactly the crux of this case here. In Cruzan this Court determined that competent persons and incompetent persons both have liberty interests in choosing whether they want to continue or withdraw life-sustaining treatment. But incompetent persons have to express that liberty

interest through a surrogate or a proxy in order to express their wishes fully. In this case, which was not the case in Cruzan, Mr. Keller has delineated a surrogate that he would have delineate his wish if he was incompetent. And the record indicates on Page 7 that when he became engaged to his wife Michelle he transposed to her his medical power of attorney in the case he was incompetent.

And so here we urge this Court to remember that petitioners are not attempting to withdraw or sustain life-sustaining treatment from Mr. Keller. We're simply asking this Court to honor the liberty interest he's already expressed while he was competent in that if the directives does not apply that his wife Mrs. Keller is able to express that wish on his behalf. Now, if this Court were to find that Mrs. Keller is not able to do that, we would be going against Mr. Keller's wishes that were made when he was competent. And the record --

JUSTICE WAINWRIGHT: What weight do we give the fact that Steve Keller's parents Tyler and Florence are arguing that their son wants to live and they know he would want to live? Yeah, they've been estranged from him for ten years and haven't talked to him in a long time; but should we give any weight to their position in your construct of how we should proceed?

MS. GALEOTO: Well, Your Honor, you would give limited weight to their position because of that Probate Code that you refer to, New Amsterdam 294.06 under Appendix B, because

in that hierarchy of priority if there is no court-appointed guardian, no spouse, no child, then the parents would be able to make a determination. But in this case not only do we have Mr. Keller making a clear determination that if he is incompetent he would like his wife to be his medical power of attorney --

JUSTICE WAINWRIGHT: Sounds like you're arguing we give Tyler and Florence's position, at least as an evidentiary matter, no weight because the wife is available to make the decision and the parents are further down the hierarchy list. So don't even get to the parents' position. Is that what you're arguing?

MS. GALEOTO: Well, Your Honor, we're not necessarily saying that the parents' position has no weight. We're simply saying that Mr. Keller has not expressed that he wants his parents to make that decision for him. And when he was competent, he did express who he wanted to make that decision for him.

CHIEF JUSTICE ELROD: What's the different between saying has no weight or -- sounds like you're saying it has no weight. Why are you fighting that?

MS. GALEOTO: Well, we can say it has no weight. I simply do not want to -- this Court to feel as if we do not want the Kellers -- the parents to have no say. It's simply that --

CHIEF JUSTICE ELROD: Yes, you do. You want us to

rule they have no say. That's what you're seeking, isn't it?

MS. GALEOTO: Of course, Your Honor. We would like Mr. Keller and his wife to be able to uphold their own liberty interests; and, unfortunately, that does not involve the parents. And if the circumstances --

JUSTICE WAINWRIGHT: That's a matter that the legislature decided. We're not going to blame you for that. As you've pointed out the Probate Code has that hierarchy. We just don't get to the parents' position under the Probate Code; right?

MS. GALEOTO: Yes, Your Honor.

CHIEF JUSTICE ELROD: What if we're rethinking Cruzan? Maybe Cruzan isn't such great law. Why should we apply Cruzan? Why do you have a liberty interest under the Constitution to decide to terminate your life support or your life -- nutrition?

MS. GALEOTO: Well, Your Honor, there are two responses to that. Certainly this Court could overturn the line of cases that started with Cruzan including Buxford and Bacca v Quill. It could overturn that -- those line of cases certainly. But the fact is that if -- we would urge this Court not to do so simply because the liberty interest inherent, whether a person is competent or an incompetent person exercising that right through a surrogate, is something that the Constitution does grant through the 14th Amendment as an inherent right as far as due process.

So what we're dealing with here --

CHIEF JUSTICE ELROD: Could you imagine a world where you would have a liberty interest in life but not a liberty interest in the right to die?

MS. GALEOTO: Certainly, Your Honor. That is the world we live in now. This Court has not deemed that we have a right to die. In fact, Buxford specifically says there is no constitutional right to die but a competent person can have the right to refuse medical treatment.

CHIEF JUSTICE ELROD: Is that just a semantic?

MS. GALEOTO: It may be, but that's what the justices in that case chose to delineate.

JUSTICE WAINWRIGHT: So it's our fault? It's a semantic difference?

MS. GALEOTO: Not yours necessary but the court before you.

Therefore, Your Honor, we would urge the Court to reverse the 14th Circuit and hold that Mr. Keller has made a choice regarding his liberty interest.

MS. HUTCHINSON: May it please the Court. My name is Whitney Hutchinson of Team 36, and I along with my co-counsel Matthew Kellam represent the respondents Steven Keller's parents Tyler and Florence Keller.

There are two issues before this Court. I will be addressing the first, asking this Court to affirm the holding of

the 14th Circuit Court of Appeals because abstention is not warranted. And my co-counsel Mr. Kellam in his time before the Court will address that an individual who is self-aware and has the ability to express a preference with respect to life or death has a liberty interest in protecting that choice.

Turning to the first issue. As this Court has repeatedly explained, abstention is to be the exception and not the rule, an exception that applies in only very narrow and extraordinary circumstances. Thus, the 14th Circuit was correct in finding that this case does not warrant abstention because it fails to raise those exceptional circumstances under either the doctrines of abstention addressed below, Thibodeaux and Burford abstention, or additionally under alternative distinct forms of abstention such as Younger or Pelham abstention.

CHIEF JUSTICE ELROD: Can you address Rooker-Feldman abstentions?

MS. HUTCHINSON: Yes, Your Honor. As an additional matter to address the counsels' element argument, that is inapplicable in this case for two reasons: First, Tyler and Florence are not attempting to appeal the ruling of the New Amsterdam Supreme Court by using the federal courts, and that's evident because the fact that a ruling by this Court as to the second constitutional question -- the substantive issue of the appropriate and correct standard of competence will neither affirm nor reverse the New Amsterdam's ruling which was solely

and narrowly limited to their own interpretation of their forma directives and what the persistent vegetative state would encompass. This is dealing with a separate issue of the 14th -- of your due process rights under the 14th Amendment. But additionally this Court recognized in 2005 in the Exxon Mobile decision and additionally in 2006 in Lance vs. Dennis that prior to those decisions the federal circuits had been inappropriately blending abstention and jurisdictional issue with Rooker-Feldman and overusing those. And so this Court expressly limited the scope, said that Rooker-Feldman rarely applies and made it far more akin to res judicata or conclusion which are waived if not raised in the first instance.

JUSTICE WAINWRIGHT: That's an interesting point. In this case the litigation went through probate court, state court of appeals, the state supreme court. After a contrary ruling to Michelle and the hospital's position, they then filed a new action raising many of the same disputes, one might argue, in U.S. district court after the state supreme court had affirmed that the medical directive did govern. Why isn't your first argument res judicata? This is just a second bite at the same apple, that they've had a complete and full opportunity to litigate in the state courts?

MS. HUTCHINSON: If I may answer your question in two parts. Respectfully, Your Honor, no, this case, as you addressed during the petitioners' time before this Court -- the

14th Amendment due process right was not addressed in the courts below. Specifically, though the record is silent, it is reasonable to interpret because this started in the probate court that that is a special court of limited jurisdiction; and the parents were unable to raise this constitutional question there. But additionally even if --

JUSTICE WAINWRIGHT: You're saying that the constitutional questions could not be raised in the New Amsterdam probate court?

MS. HUTCHINSON: If it's a court of limited jurisdiction as opposed to a court of general jurisdiction --

CHIEF JUSTICE ELROD: How do we know that in this record?

MS. HUTCHINSON: We unfortunately do not. It's -- the record is silent as to that.

But if it is a court of general jurisdiction, this issue does not address or overturn the New Amsterdam Supreme Court's ruling in any way. That was solely an interpretation of their form directive with what the persistent vegetative state which is included in that form whether or not --

CHIEF JUSTICE ELROD: Solely an interpretation of the form directive, or does it also make a determination as to whether or not he had attempted to override it? "The evidence presented to the probate court was not proper to conclude that he would "want to continue living."

MS. HUTCHINSON: That was dicta from the New Amsterdam Supreme Court. That was not their primary holding.

CHIEF JUSTICE ELROD: That is not a holding in the case?

MS. HUTCHINSON: That's dicta, Your Honor, of the New Amsterdam Supreme Court. Their primary holding, without determining competency of Steven Keller, was that the directive should apply.

And we're here asking this Court to address a question that was made federal as an issue in the Cruzan holding from 1990.

CHIEF JUSTICE ELROD: If it is a holding in the case, are -- would you be asking us to override that?

MS. HUTCHINSON: If -- I apologize. The second sentence of that?

CHIEF JUSTICE ELROD: If this is a holding that the evidence presented in the probate court was not proper to conclude that Steven would want to continue living -- if that is a holding in the new -- in the state supreme court -- in the New Amsterdam Supreme Court, are you asking us to do something that would override that; and then why wouldn't the appropriate abstention apply?

MS. HUTCHINSON: With respect to -- first with respect to whether or not we would be appealing that under the Rooker-Feldman doctrine -- we don't agree with it; but we're not

appealing it because there was no appropriate finding of competency, whether or not Steven was actually competent prior to invoking the directive. But additionally abstention is not appropriate in this case, as the 14th Circuit correctly noted, because the narrow circumstances that are necessary under each of the distinct doctrines of abstention simply are not present here.

Turning first to the Thibodeaux doctrine, abstention created by this Court in 1959.

JUSTICE WAINWRIGHT: Let's go back to the -- first you agree that the determination by the New Amsterdam Supreme Court -- that there wasn't sufficient evidence to determine that Steven would want to continue living is a factual conclusion?

MS. HUTCHINSON: Certainly, Your Honor.

JUSTICE WAINWRIGHT: Why isn't that necessary to the decision to remand? Once the New Amsterdam Supreme Court decides that the directive was effective and governed, it then had to decide whether, under the directive, Steven wanted to live or die under the terms that he himself signed in the directive. So the New Amsterdam Supreme Court had to decide was he in a position to be -- to make that decision or not. New Amsterdam Supreme Court said there's not enough evidence to get there, sending it back for further facts.

MS. HUTCHINSON: Respectfully, Your Honor --

JUSTICE WAINWRIGHT: Has to be part of their -- for them to remand it they had to make a determination whether

the facts satisfied the terms of the directive.

MS. HUTCHINSON: Certain, Your Honor; but the New Amsterdam Supreme Court under the procedure in record here did not ask for the remand. That was by the 14th Circuit as noted on Page 19 of the record. It was not the New Amsterdam Supreme Court that asked for a remand here.

So here -- now that we're determining the appropriate standard of competency which my co-counsel will address in much further detail we're asking this Court to delve into that issue because this is a base constitutional issue that will affect citizens across our nation which is why abstention is not appropriate.

Under Thibodeaux which addresses when a state -- or federal district court would be addressing an unclear question of state law that is intimately entwined with the state's governance prerogative such as it found when it applied to Thibodeaux abstention and Kaiser Steel Corporation vs. Southwest Ranch. This is distinguishable from that case because, first, this is not an unclear question of state law that is intimately entwined with its government prerogative unlike the water rights in Kaiser. Here the Court addresses that New Mexico is a very arid state so the regulation of their water necessitated Thibodeaux abstention. Here -- this is something a constitutional liberty interest and the ability to exercise it that will affect citizens across our entire nation and, thus, is

not as intimately entwined as the waters rights for New Mexico.

But additionally Thibodeaux abstention judicial should only apply to diversity cases. Procedurally this arises under federal question jurisdiction. Thus, the 14th Circuit was correct in holding that Thibodeaux abstention is unwarranted in this case.

Turning to Burford abstention which was created --

CHIEF JUSTICE ELROD: Why would this apply across the nation? This is -- has to apply within the context of the various states' rules and procedures and evidentiary standards. There's not going to be a one-size-fits-all determination that we can make in this case.

MS. HUTCHINSON: Certainly not, Your Honor. This would not be depriving the states their ability to determine their procedural and evidentiary standards. This is what the Court in Cruzan in 1990 addressed, that an individual who's competent has the ability to exercise their liberty interests noting that this is a constitutional issue. Here we're urging this Court under the second issue presented to adopt a standard of competency that will set a constitutional floor.

CHIEF JUSTICE ELROD: Well, maybe Scalia had it right.

MS. HUTCHINSON: Well, Scalia did note in his concurrence of Cruzan that individual end-of-life decisions are very personal and intimate. And so this -- the standard which my

co-counsel will address in much further detail will allow for those individual decisions to best be effectuated especially given diagnosis of the minimally-conscious state.

CHIEF JUSTICE ELROD: Having the federal courts involved lets the individual's decisions best be effectuated? That's exactly opposite of what Justice Scalia said, isn't it?

MS. HUTCHINSON: Here it will allow for the individual's decisions to be best effectuated because it sets forth a standard that an individual who is self-aware and has the ability to express a preference, that they can then change their decisions as a competent individual and exercise their liberty interest. But --

JUSTICE DEMOSS: Counsel, what evidence did you offer that would show there is a medical distinction between the condition that -- what's his name? Frank?

JUSTICE WAINWRIGHT: Steven.

JUSTICE DEMOSS: Steven was in after his injury was something different from what he specified in his directive as the conditions that would be applicable?

MS. HUTCHINSON: Well, with -- respectfully, Your Honor, whether or not the directive applies -- the arguments under that -- that the petitioner forward are premature at this point. First we must determine if Steven is competent or not. Then on remand to the eastern district of New Amsterdam there would have to be fact finding to determine if he's competent. If

he is, he is allowed to control -- exercise his liberty interest. If he's not, then --

JUSTICE DEMOSS: He's permitted to do that in spite of the fact of what he said previously in his directive?

MS. HUTCHINSON: Certainly, Your Honor, because an individual who is competent may change a directive that he put fourth when fully competent any day up to the day they die. They're not bound by that. And they have the ability to change their mind because these are things that can be changed if an individual signs a directive prior to being married or having children. That decision can be changed, and that's very intimate and personal as Justice Scalia noted.

And so here Burford abstention would not be appropriate because Burford abstention is something that applies only in narrow circumstances where there is a regulatory scheme present that addresses an issue of special state concern; second, that there's an administrative scheme that's very detailed and complex; and, third, the federal court in exercising its jurisdiction would be forced to immerse itself in the technicalities of that state's scheme. Here there is no state law regulation necessarily issue with respect to the proper standard of competency.

JUSTICE WAINWRIGHT: What are the limits --

JUSTICE DEMOSS: Are there any federal standard on that?

MS. HUTCHINSON: In response to your question, Your Honor, the federal standard at this point -- no. Which is what we're urging this Court to adopt under the second issue; that an individual, as the 14th Circuit held, who's self-aware and has the ability to express a preference -- that they are competent to control their medical treatment with respect to end-of-life decisions.

JUSTICE WAINWRIGHT: Although he nodded his head in answering each of questions and most of them were not yes or no questions -- questions calling for a yes or no answer.

MS. HUTCHINSON: Which is why there certainly needs to be more fact finding under the eastern -- in the eastern district under the standard of competence that this Court sets forth.

JUSTICE WAINWRIGHT: Why was there not an adequate and Constitutionally-sufficient opportunity to produce those facts in the state court proceeding? I'm concerned about the limits of your argument. Again, the parties went through the state court apparatus, the state court judiciary, and then started anew in a federal district court. Can they do that any time there's a constitutional claim in any type of case and can any person do that, think of a new constitutional claim or one that existed previously but they didn't -- decided not to bring up until they filed a new suit over the same dispute in federal court after they've lost in the state court?

MS. HUTCHINSON: Not necessarily, Your Honor. It does depend on the procedure within the individual state whether or not the state court that they began in is a court of limited jurisdiction or general jurisdiction. But additionally under --

JUSTICE WAINWRIGHT: Isn't that their choice? Couldn't they have decided to file in a court of general jurisdiction rather than in a court of limited jurisdiction -- certainly to bring the constitutional claim if it is, in fact, true that they can't bring that in the probate court? They could have brought that in the court of general jurisdiction. They weren't forced to go to the probate court.

MS. HUTCHINSON: While they were not forced, Your Honor, the probate court -- as opposing counsel acknowledged they are courts that are specially equipped and uniquely equipped to address these issues. So it was appropriate for them to start in the probate court.

JUSTICE WAINWRIGHT: So if we follow your rationale then we have a -- authorities have a roadmap for getting two bites at the apple?

MS. HUTCHINSON: Not necessarily.

JUSTICE WAINWRIGHT: Devil's advocate: I've filed my case in a court of limited jurisdiction; took it all the way to the supreme court in that state; and, aha, I have a constitutional question. Now going to file in the district court and get a second opportunity --

MS. HUTCHINSON: Certainly not, Your --

JUSTICE WINSLADE: It sounds like the Shiavos all over again.

MS. HUTCHINSON: This is different than the Shiavos and the reason is it's because this Court has limited the Rooker-Feldman doctrine. It is much more akin to res judicata or claim preclusion arguing -- I apologize. I see that my time has expired. May I respond to both of your justices questions?

CHIEF JUSTICE ELROD: You may respond to Justice Winslade's question.

MS. HUTCHINSON: Thank you.

Here this is -- here for the Rooker-Feldman doctrine to apply as the Court has noticed it (inaudible) preclusion. If the petitioners felt that Tyler and Florence were attempting to take a second bite at the apple, that they should have originally raised this claim, they should have brought forth the Rooker-Feldman doctrine in the eastern district of New Amsterdam which they failed to do; thus, that argument has been waived.

We respectfully request that this Court affirm the holding of the 14th Circuit because abstention is not appropriate. Thank you.

MR. KELLAM: May it please the Court. My name is Matthew Kellam of Team 36; and I, too, represent the respondents in this matter Tyler and Florence Keller.

Turning to the second issue, Your Honor --

JUSTICE DEMOSS: Answer a couple of questions. Did your clients -- were they parties in the probate proceeding?

MR. KELLAM: Yes, Your Honor.

JUSTICE DEMOSS: And in what --

MR. KELLAM: Your Honor, they were plaintiffs in the state probate court proceeding.

JUSTICE DEMOSS: The --

MR. KELLAM: The parents.

JUSTICE DEMOSS: The parents were they were plaintiffs in the state probate proceeding?

MR. KELLAM: Yes, Your Honor.

JUSTICE DEMOSS: And they were also plaintiffs in the federal district court proceedings?

MR. KELLAM: Correct, Your Honor.

JUSTICE DEMOSS: So the prior discussion about whether or not this is two bites at the same apple seems pretty relevant to me. How -- why do they get another bite in federal court?

MR. KELLAM: Respectfully, Your Honor, there's not a second bite of the apple here because the federal constitutional liberty interests were not at issue and could not have been raised at a state level.

JUSTICE DEMOSS: Would they have been raised -- they could have been an issue; right?

MR. KELLAM: No, Your Honor. The only issue that was adjudicated at the state supreme court level was the application of a directive. Whereas here the sole issue before this Court is which is the correct standard of competency for minimally-conscious patients under the 14th Amendment of the United States Constitution.

Therefore, the respondents urge this Court to affirm the decision of the 14th Circuit because it has crafted a correct test, a test that is appropriate for two reasons: First, the 14th Circuit's standard correctly identifies the decided differences between patients in a persistent vegetative and minimally-conscious state --

JUSTICE WAINWRIGHT: Is that a legal determination or factual determination?

MR. KELLAM: That is more of a medical conclusion, Your Honor, as far as --

JUSTICE DEMOSS: Testimony in this record?

MR. KELLAM: No, certainly not, Your Honor. However, the 14th Circuit's standard is appropriate because it acknowledges the fact that because we have a brand new type of patient in our nation, that this Court needs to look into this issue further to effectuate the liberty interests of these patients because --

JUSTICE WAINWRIGHT: Counsel, let me take you back. Medical conclusion was not one of my options. Is that a

factual determination or legal conclusion; and if it -- if it's one or the other, does it help or hurt you?

MR. KELLAM: It would be the former, Your Honor. It's more of a factual conclusion. However, it is worthy to note that courts have honored that factual determination as well.

And it affects our argument because this Court in Cruzan vs. Missouri Department of Health in 1990 found that competent individuals have the ability to exercise the liberty interest and implied that incompetent individuals have the liberty interest but are unable to exercise it. But in 1990 the minimally-conscious state had not yet been diagnosed in the medical community. Now for about ten years we do know that minimally-conscious patients do exist in our nation. And so if this Court affirms the decision of the 14th Circuit, it will officially endorse a test that will protect the autonomy and liberty interest of this new category of patients therefore setting a constitutional floor for competency.

JUSTICE DEMOSS: Did the state court -- state supreme court have testimony before it as to the similarity between these two stages of consciousness?

MR. KELLAM: Your Honor, the record does not indicate if there was testimony; but the supreme court of New Amsterdam certainly did hold that these two states of consciousness, persistent vegetative and minimally conscious, were similar enough so that the directive should apply.

JUSTICE DEMOSS: As I understood it they were saying where -- in the directive where they used the word vegetative status we're going to say that's substantially the same as the minimally conscience; is that correct?

MR. KELLAM: Yes, Your Honor. That's --

JUSTICE DEMOSS: Now, on what evidence in the record do they have to make that conclusion?

MR. KELLAM: Your Honor, it is not clear in the record how they made that determination. But --

JUSTICE WAINWRIGHT: I would hope there was some facts, testimony -- hopefully expert testimony that was brought forth in the probate court -- the trial court.

MR. KELLAM: Yes. And, Your Honors, quite respectfully -- with due respect to your concerns the application of the directive is not an issue that is before this Court. The sole issue before this Court is which standard of competence is correct, and here's why: The application of the directive and New Amsterdam's proxy law and any arguments pertaining to them are premature because a directive will only apply if an individual is incompetent. A competent individual --

JUSTICE DEMOSS: Repeat that. If the individual is incompetent?

MR. KELLAM: Correct, Your Honor. Because if the patient is competent, a directive does not apply because competent patients have the ability to make end-of-life decisions

on a daily basis.

JUSTICE DEMOSS: You're talking about the timing difference between when he makes the directive and when it becomes necessary to apply the directive.

MR. KELLAM: Yes. And the directive would not apply, Your Honor, unless Steven was held to be incompetent. And quite importantly --

CHIEF JUSTICE ELROD: Was he incompetent at the time that the decision is needing to be made; right?

MR. KELLAM: Correct, Your Honor.

CHIEF JUSTICE ELROD: But what do we do, then, with the implied holding of the state supreme court that the evidence presented to the probate court was not proper to conclude that Steven would want to continue living? That could be an implied holding as to his competence at the time he was answering these questions. And we assume that New Amsterdam Supreme Court is like our very fine Texas Supreme Court and wouldn't just be opining on this factual issue or on the similarity between the two medical conditions without some record from the probate court.

MR. KELLAM: Your Honor, it seems that the New Amsterdam Supreme Court could have made a determination of Steven's competence but it elected not to do so because, again, there was not a remand for further factual (inaudible) competency standard. The Court instead chose to interpret the directive

which is --

CHIEF JUSTICE ELROD: Well, it did the directive because it found that there was no valid contrary statement by Steven that would override the directive.

MR. KELLAM: Correct, Your Honor.

CHIEF JUSTICE ELROD: And therefore, you can assume that impliedly either he was incompetent or they found he it was inclusive.

MR. KELLAM: Your Honor -- and the latter would be more appropriate. At the state probate court level Judge Lo did hold that Steven was competent enough to make end-of-life decisions; however, the New Amsterdam Supreme Court reversed that holding. Also additionally the 14th Circuit did not find enough evidence on the record to hold that Steven was incompetent.

CHIEF JUSTICE ELROD: Does it -- if it's inclusive as to what his intention was, then why doesn't the directive apply? They had an opportunity to get good evidence -- the best evidence they can get in front of the probate court as to his current intentions or his intentions at the time of the probate hearing and they went forward with the video and that's what they had. So that's all the Court can decide on.

MR. KELLAM: Respectfully, Your Honor, there has yet to be a determination of Steven's competence. So if this Court affirms the 14th Circuit, the eastern district of New Amsterdam can have a further effectual finding and determine

finally if Steven is competent or not.

CHIEF JUSTICE ELROD: The evidence wasn't good enough. So -- whether he's competent now -- how is that --

MR. KELLAM: Your Honor, there's --

CHIEF JUSTICE ELROD: The evidence that would support it has not been good enough according to the state Supreme Court.

MR. KELLAM: But, Your Honor, the essential focus here is on the 14th Circuit; and the 14th Circuit held that especially the video was inclusive as to whether Steven was competent or not. So if this Court affirms the decision of the 14th Circuit, it will endorse the correct test for the federal district court to apply. Then we can determine whether Steven was competent or not which is a critical question --

CHIEF JUSTICE ELROD: What? Are we going to watch the video ourselves -- I mean, and say, "We agree with the supreme court" or "we agree with the 14th Court" on what the video shows? Is that how we're going to decide this case?

MR. KELLAM: Absolutely not, Your Honor. This Court need not delve into factual finding. All this Court needs to do is affirm the 14th Circuit because the 14th Circuit endorses a test that focuses on the ability to be aware of one's surroundings and the ability to express a preference.

JUSTICE WAINWRIGHT: Counsel, my gut says that more facts -- experts -- legitimate experts opining on this

matter, a fact finder at a trial court making a determination about minimally conscious versus persistent vegetative -- the 14th Court of Appeals referred to competency, the Probate Code says incapacitated or developmentally disabled, there's some different language in his medical directive. I'm not sure how all these terms overlap. My gut says more judicial review and fact finding and evidence would be a good thing. I'm not sure you -- I don't know if you can get there, however, having gone through the entirety of the state judiciary and then start anew here.

MR. KELLAM: Your Honor --

JUSTICE WAINWRIGHT: Especially if the only facts in the record are the videotape where Steven Keller nodded to every question even the ones that required an answer other than yes or no. And I guess the medical directive. Are those the only two pieces of fact in the record?

MR. KELLAM: No, Your Honor. On Page 6 of the record Steven actually smiled when his wife Michelle and his son Steven, Jr., walked into his hospital room which is a critical point because it shows that Steven not only is aware of himself and his surroundings, not only that he can communicate but that he can actually show an expression of love. And that's why the 14th Circuit standard is appropriate because Steven may very well be competent.

JUSTICE WINSLADE: Isn't the fact that the court

recognized the directive imply that they felt that he was not competent because it was inconclusive?

MR. KELLAM: Your Honor, the directive, again, would only be applicable to this case if Steven was held to be incompetent; and, therefore, before the directive or the proxy law under New Amsterdam would apply, Steven would have to be held by the federal district court to be incompetent.

JUSTICE WINSLADE: Don't doctors determine competency under the advanced directive laws not judges?

MR. KELLAM: Under the advanced directive, Your Honor, yes; however, courts can conclude whether a patient is competent or not. And doctors do assist in that matter but --

JUSTICE DEMOSS: Is there any medical expert testimony as to whether he was competent or incompetent?

MR. KELLAM: Not particularly, Your Honor. But the doctors --

JUSTICE DEMOSS: Why wasn't there?

MR. KELLAM: Because the doctors have concluded on Page 6 of the record that Steven is in a minimally-conscious state. But, again, in order to determine if Steven is competent or not -- or not, this Court first needs to determine which tests the federal district court should apply to make that determination.

JUSTICE WINSLADE: Why didn't the petitioners argue -- you were the plaintiffs. Why didn't you produce some

evidence that he was competent rather than show a video that was ambiguous?

MR. KELLAM: Well, Your Honor, admittedly the video is ambiguous and the respondents, plaintiffs in the federal district court, did try and prove that Steven is competent and the record does show that Steven may be competent even though the video is somewhat inconclusive. Again, Steven, has shown the ability to communicate. He has responded to questions and he did show an expression of love; and that's why the 14th Circuit standard is appropriate because it holds if a patient can be aware of his or her surroundings or the patient can express a preference with respect to life or death decisions, then that patient may be competent. And --

JUSTICE WAINWRIGHT: Would -- the 14th Court said that a person that is able to express a preference can make this life or death determination?

MR. KELLAM: Yes.

JUSTICE WAINWRIGHT: Is that too little, though? Does it need to be an informed preference? If you ask the person as in Steven's case a question that he nods his head and that's ambiguous, is that expression of preference and is that sufficient under the standard as you understand it?

MR. KELLAM: No, Your Honor, that would be insufficient. Under this standard doctors would have to be convinced that the patient would actually be expressing a

preference.

JUSTICE WAINWRIGHT: Then the videotape is not helpful at all?

MR. KELLAM: Correct.

CHIEF JUSTICE ELROD: Well then there's nothing before us. If we were to find him competent today (inaudible) there's still nothing in the record to show that he's expressed a preference.

MR. KELLAM: No, Your Honor. That would certainly have to be determined on a remand --

CHIEF JUSTICE ELROD: Why should there be another opportunity? With due respect, I understand it's a life-and-death matter; but why should there be another opportunity to show that?

MR. KELLAM: Well, there has not yet been the opportunity in the federal district court to determine whether Steven was competent or not. The law that is in flux at this point to which standard the federal district court will apply.

And, Your Honor, your concerns touch on if this Court reverses the 14th Circuit, the ability to understand test will be the test that will be adopted. But the American Journal of Psychiatry has attacked that test because of its impractical nature. After all, the ability to understand is an unobservable mental process; and doctors would have a next to impossible time determining if a minimally-conscious patient was competent or

incompetent because it is truly difficult to understand if a patient really understands.

JUSTICE WAINWRIGHT: Well then let's assume -- let's assume that we allow the remand to go forth to the trial court for fact findings. The standard (inaudible) is impossible to determine.

MR. KELLAM: If this Court reverses the 14th Circuit, then it would endorse the ability to understand test which is incorrect, Your Honor. However, if this Court affirms the 14th Circuit, it will adopt the expressed a preference test which focuses on two elements.

JUSTICE WAINWRIGHT: I'm not sure how to express a preference and an ability to understand are different because you agreed a few minutes ago has to be an informed decision not just a reflex in expressing a preference.

MR. KELLAM: Your Honor, the distinction would be --

JUSTICE WAINWRIGHT: If doctors can't tell if they understand, would doctors be able to tell if they're expressing a knowing and intentional preference?

MR. KELLAM: Your Honor, the distinction there are doctors would have an easier time determining the competent patient's wishes if they are able to -- I see my time is up. May I briefly answer your question and then conclude?

CHIEF JUSTICE ELROD: Yes.

MR. KELLAM: Thank you.

Doctors under the expressive preference test would be able to view observable, objective acts where the ability to understand test would hinge on a subjective unobservable mental process.

Respectfully, Your Honors, for these reasons we ask the Court to affirm the decision of the 14th Circuit in both issues. Thank you.

CHIEF JUSTICE ELROD: Rebuttal?

MR. DOUPE: Yes, Your Honor.

CHIEF JUSTICE ELROD: You may proceed.

MR. DOUPE: May it please the Court. Your Honor, in rebuttal I would like to raise two points raised --

CHIEF JUSTICE ELROD: I have a question for you first. Is what we're talking about here removing the feeding tube? Is that the treatment that you're talking about, and does that constitute treatment or does that just constitute nutrition and is that -- is that the same thing for purposes of this argument?

MR. DOUPE: Yes, Your Honor. The continuation of life-sustaining treatment would constitute treatment under Cruzan.

CHIEF JUSTICE ELROD: But is life sustaining -- is feeding life-sustaining treatment?

MR. DOUPE: Yes, Your Honor, it is life

sustaining --

CHIEF JUSTICE ELROD: It is under the directive but is it under the state law?

MR. DOUPE: It's ambiguous whether it would be under the state law, Your Honor. It's not entirely clear from the state law which is precisely why Burford abstention would apply because if there is an ambiguity in the statute and this Court is not capable at this present time without further clarification of the statute --

CHIEF JUSTICE ELROD: So that's the only medical treatment that the -- other than maybe being turned over and exercised or whatever he's undergoing? He's not going to be on any machines or anything? It is feeding tube we're talking about?

MR. DOUPE: Yes, Your Honor. It's feeding tube.

JUSTICE WAINWRIGHT: Counsel, the -- cut entirely to the chase. We're talking about a life here. Shouldn't we be sure? What is the broad-scheme-of-things problem with additional fact finding?

MR. DOUPE: Your Honor, we have no objection to additional fact finding; however, there is a problem with the forum in the sense that the federal district court would have to reach a competence determination before essentially assessing whether there is a liberty interest at stake here.

And as I noted previously the Rooker-Feldman

doctrine would essentially bar the current application of liberty interest in this particular case. So it would give the respondents two bites at the apple.

CHIEF JUSTICE ELROD: So you're waiving Rooker-Feldman?

MR. DOUPE: No, Your Honor, we have not had the opportunity to raise Rooker-Feldman in the probate court because at the time there was no liberty interest question raised.

CHIEF JUSTICE ELROD: In the federal district court you did not raise Rooker-Feldman, did you?

MR. DOUPE: No, Your Honor, we did not raise Rooker-Feldman.

CHIEF JUSTICE ELROD: Then have you waived it?

MR. DOUPE: No, Your Honor, we have not raised Rooker-Feldman because at that present moment there was not a determination based on the competence question.

It is for these reasons, Your Honors, that we ask that the Court reverse the 14th Circuit. Thank you.

THE BAILIFF: The honorable Court is now adjourned. We ask that counsel and spectators exit the courtroom so that the justices may deliberate. Thank you.