No. 20-654

In The

Supreme Court of the United States

ANTHONY JOHN RIPA,

Petitioner,

v.

STONY BROOK UNIVERSITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR REHEARING

ANTHONY JOHN RIPA
Pro Se
The Octagon, Suite 402
888 Main Street
New York, NY 10044
Telephone: (646) 300-2843

Petitioner

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PETITION FOR REHEARING

Pursuant to Rule 44.2, petitioner Anthony John Ripa respectfully petitions this court for an order (1) granting rehearing, (2) vacating the Court's January 11, 2021 order denying certiorari, and (3) redisposing of this case by granting the petition for a writ of certiorari, vacating the judgment, and remanding to the Second Circuit for further consideration in light of *Bostock v. Clayton County*, 590 U.S. ___ (2020).

REASONS FOR GRANTING THE PETITION

Introduction

The main argument is twofold. The first part is why, if you were to hear this case, you would vacate the lower court's judgment. The second part is why you must hear this case. The justification of the first part incidentally includes the Equal Protection Clause, but need not have. The justification of the second part relies on the Equal Protection Clause. I contend that you must apply the Equal Protection Clause for the second part, irrespective of the first part.

The third part is why, at a bare minimum, you must not silently deny this petition for rehearing.

I. Why, if you were to hear this case, you would vacate the lower court's judgment

A. Post-*Bostock*

The petition for a writ of certiorari included many reasons why this case, if heard on the merits, must result in this Court vacating the judgment of the Second Circuit. The petition cited numerous reasons, including the broad protections recognized in *Bostock v. Clayton County*, 590 U.S. ___ (2020). *Bostock* was decided after the Second Circuit's opinion, leaving the Second Circuit's opinion out of date.

The Majority in *Bostock* held:

> "Title VII's prohibition of sex discrimination in employment . . . is written in starkly broad terms. It has repeatedly produced unexpected applications . . . Congress's key drafting choices . . . virtually guaranteed that unexpected applications would emerge over time."

Alito Dissenting:

> "Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning."

The Majority responding to Alito:

> "Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to

> do as we think best. But that's an invitation no court should ever take up."

In *Bostock*, the Majority spoke in "starkly broad terms." The Minority foresaw the new swath of litigants that would be invited. The Majority responded that such policy considerations were extra-judicial, leaving the way open for this case.

B. Pre-*Bostock*

As it stands, we do not actually require the strong guarantees in *Bostock* to decide this case.

Pervasive derogatory jokes have already (on multiple occasions) been decided to pass the "severe or pervasive" test. In my case, the derogatory jokes are found on posters. Derogatory jokes on posters are necessarily pervasive because that communication medium makes the derogatory jokes constant, continuous, and unending.

Excluded Participation is so widely held to be actionable, that dismissing it amounts to judicial malpractice.

II. Why you must hear this case

A. Introduction

The Judiciary Act of 1925 gave rise to Supreme Court Rule 10. "Review on a writ of certiorari is not a matter of right, but of judicial discretion," leading the Court of 1950 to hold in *Maryland v. Baltimore Radio*

Show, that "denial carries with it no implication whatever regarding the Court's views on the merits of a case."

Supreme Court Rule 10 means, for two meritorious petitioners, one writ may be granted, while the other is denied. This plainly violates the Equal Protection Clause of the Fourteenth Amendment.

A chain is only as strong as its weakest link. The discretion to pick and choose which meritorious petitioner receives justice guarantees violating the Equal Protection Clause of the Fourteenth Amendment.

B. Constitution

i. Facial Challenge

Supreme Court Rule 10 is a facial violation of the Equal Protection Clause of the Fourteenth Amendment.

Supreme Court Rule 10 states:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion."

Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) stated:

> "If the Court is to do its work it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive, apart from the fact as already indicated that different reasons not infrequently move different

> members of the Court in concluding that a particular case at a particular time makes review undesirable."

This is just the sort of "naked policy appeal" that *Bostock* warns us against:

> "the last line of defense for all failing statutory interpretation arguments: naked policy appeals."

Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) further stated:

> "this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review."

This Court cannot at the same time, claim the right to decline meritorious cases, and adhere to the Equal Protection Clause of the Fourteenth Amendment.

If you read two meritorious petitions, and grant one but deny the other, then you necessarily violate the Equal Protection Clause of the Fourteenth Amendment.

ii. As-Applied Challenge

a. The Equal Protection Clause Incidental

In part II(B)i Facial Challenge, I referenced two hypothetical meritorious petitioners. In part I, I cited

Bostock as an actual (as opposed to hypothetical) meritorious petitioner. In the petition for a writ of certiorari, I provided an overwhelming amount of evidence that my case was meritorious, including that my case falls within the "starkly broad terms" of *Bostock*. However, my petition for a writ of certiorari was denied, while Bostock's was not.

This is no longer hypothetical. Your application of Supreme Court Rule 10 has in fact violated the Equal Protection Clause of the Fourteenth Amendment, to my disadvantage.

You had two meritorious petitioners (Bostock & Ripa). You granted one petition. You denied the other. You violated the Equal Protection Clause of the Fourteenth Amendment.

Intentional

At least one Supreme Court Justice already believes at least one other Supreme Court Justice to be disingenuous (*Bostock*: Alito dissenting):

> "The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but . . . that would not explain today's decision. Many Justices of this Court, both past and present, have not espoused or practiced a

> method of statutory interpretation that is limited to the analysis of statutory text."

The reasoning that was applied in the *Bostock* decision cannot be determinative, if when present in other cases it is ignored. Supreme Court Rule 10 encourages Justices to apply reason partially, without fear that those same Justices will be forced to apply their words consistently to future litigants.

This is not unlike the sinner who after learning of repentance is then emboldened to sin more because they can always repent later.

The Supreme Court intentionally gives justice to its favored petitioners, withholds it from others, and washes its hands with Supreme Court Rule 10.

This is as wrong in the Court's case as it was in the sinner's case.

As applied, Supreme Court Rule 10 is unconstitutional, because it violates the Equal Protection Clause of the Fourteenth Amendment.

b. The Due Process Clause

The Due Process argument is like the Equal Protection argument. If you give process to some, then others are now Due Process. You afforded Bostock the process of a hearing; I am now due that same process.

C. Policy

i. Good policy is for policymakers

Bostock (2020):

> "the last line of defense for all failing statutory interpretation arguments: naked policy appeals."

Bostock (2020) makes it clear that this last line of defense is no defense at all:

> "Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up."

Bostock (2020) makes it perfectly clear that:

> "people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."

ii. Supreme Court Rule 10 is not even Good Policy

Maryland v. Baltimore (1950) stated:

> "If the Court is to do its work it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive, apart from the fact as already indicated that different reasons not infrequently move different members of the Court in concluding that a

> particular case at a particular time makes review undesirable."

Assume that you have good reason to not hear a case. However, rather than write a reason you prefer that the court (as in *Maryland v. Baltimore*) "discharge its indispensable duties," as you imagine them. So, you add another page to the one hundred or so that you have written for *Bostock* (2020). You give excruciating detail about your reasoning in *Bostock* (2020). You give no detail about the denial of a similarly situated case. This is diminishing returns. By giving slightly less to *Bostock*, and slightly more elsewhere, you produce far more clarity for potential litigants to know the likely strength of their case. Whereas, with silent denial you open the floodgates to a deluge of petitioners, who could have had some idea as to the ultimate strength of their case, but do not because of your silence. You save a small amount of time in the short run, by paying a large amount of time in the long run. It is a bad investment of both your time, and those that you serve. In sum, Supreme Court Rule 10 is penny wise and pound foolish, because an ounce of prevention, is worth a pound of cure.

Assume that you have no good reason to not hear a case. Then you should hear that case. If you cannot find the time there are options. You could give a two word reason: "No time." Your honesty clarifies law. Alternatively, you could find the time, as previously mentioned, by not overgiving in some cases. Or by moving man-hours to new hires, or automation. Giving justice

to only a select few is not impartial, therefore not Good Policy.

Assume that you have a bad reason to not hear a case. Then you should hear that case. However, Supreme Court Rule 10 allows you to not hear it. Furthermore, *Maryland v. Baltimore* (1950) gives you cover to hide your bad reason. Supreme Court Rule 10 combined with *Maryland v. Baltimore* (1950) is a moral hazard that incentivizes corruption. If by some miracle that corruption has failed to manifest in any of the million or so petitions to the Court thus far, it is only a matter of time, because the incentives are wrong. What can go wrong, will go wrong. As Justice Brandeis promoted "sunlight is the best disinfectant." If the incentives are set up correctly then problems can be preempted. Currently, the incentives are not set up correctly; Supreme Court Rule 10 is not Good Policy.

Bad consequences mean bad policy. The Constitution protects rights. You reserve the right to not protect the constitutional rights of others (or even explain yourself for not doing so). The Constitution then becomes nothing more than a parchment guarantee.

In sum, Supreme Court Rule 10 is not Good Policy.

D. Constitution & Policy

The Equal Protection Clause of the Fourteenth Amendment demands that no meritorious petitioner go unheard, if any other is heard. Nor can any be judged without reason, while others are not. As

applied, Supreme Court Rule 10 deprived me of Equal Protection, and now requires remedy (rehearing).

Policy considerations and the Constitution are in alignment. They jointly demand hearing this case.

Though had they not aligned, unconstitutional supersedes policy considerations.

III. Why you must respond to this petition

A. Introduction

You may agree with part (if not all) of the foregoing argument. Nevertheless, you may prefer to avoid some perceived cost of it. Furthermore, it may occur to you that you may avoid this cost, by simply relying on the as of yet not struck down Supreme Court Rule 10, to silently deny this Petition for Rehearing.

B. Constitution

i. If you assume Supreme Court Rule 10 is unconstitutional

You are bound first and foremost by the Constitution, not by any devolved rule which is at odds with the Constitution. If you assume Supreme Court Rule 10 is incompatible with the Constitution (it is), then you cannot use it against me, to silently deny this Petition for Rehearing.

ii. If you assume Supreme Court Rule 10 is constitutional

This is not sound, as I have already demonstrated this assumption to be false, in part II(B).

Though one fatal flaw suffices, I will now demonstrate a second fatal flaw.

Silently denying this petition for rehearing may be formally valid. However, this would constitute the informal fallacy of "Begging the Question", a type of circular reasoning. I claim (furthermore actually demonstrate) Supreme Court Rule 10 is unreliable. You respond (with one word: "Denied") under the assumption that Supreme Court Rule 10 is reliable. This is fallacious. You cannot assume that which is at issue.

C. Policy

i. Good Policy

Consider these case studies. NASA is relatively competent. However, rather than being overconfident they use checklists. This process of checklists has entered into medicine, where it saves lives. Still doctors resist having to checklist their work; they do not want to be checked up on or questioned. They prefer to be assumed to be perfectly reliable, even though they are not. When poled they vote against being required to have a checklist. However, when doctors are poled about whether they want their own doctor to have a checklist then they vote that they do. Like others, you

may not want a checklist, but you would demand it for anyone whose decisions you are subject to.

On Monday October 12, 2020, Justice Amy Coney Barrett testified under oath:

> "Even though I would not like the result, would I understand that the decision was fairly reasoned and grounded in the law? That is the standard I set for myself in every case, and it is the standard I will follow as long as I am a judge on any court."

Justice Barrett testified under oath "That is the standard I set for myself in every case." I demand that you keep your oath and follow your standard.

Justice Barrett testified under oath "it is the standard I will follow as long as I am a judge on any court." I demand that you keep your oath and follow your standard.

The entire Court would do well to follow Justice Barrett's standard.

It is not the case that "I understand that the decision was fairly reasoned and grounded in the law." To the contrary, I am confident that it is not the case "that the decision was fairly reasoned and grounded in the law."

I demand that you make it possible that "I understand that the decision was fairly reasoned and grounded in the law."

Rather than privately tumbling through a thicket of unshareable hidden reasons before finally delivering

a one word result: "Denied", you should improve the process with reliable, methodical, habitual, and transparent reasoning.

ii. Bad Policy

As mentioned in II(B)ii(a), at least one Supreme Court Justice already believes at least one other Supreme Court Justice to be disingenuous. This disingenuousness was only uncovered because the reason was written down.

What can go wrong will go wrong: at NASA, in medicine, and law. People will give disingenuous reasons (*Bostock*: Alito dissenting). If allowed to give no reason at all, then those reasons will not even rise to the level of disingenuous, they will just be bad reasons. With no accountability, there will be no remedy for bad reasoning. Justice Brandeis promoted "sunlight is the best disinfectant." It is all the more important, that the most final of decisions be above board, instead of under the table.

When judges can rule without reason, they will rule without reason.

D. Constitution & Policy

Policy considerations and the Constitution are in alignment. They jointly demand not silently denying this petition for rehearing.

Though had they not aligned, unconstitutional supersedes policy considerations.

CONCLUSION

For the foregoing reasons, this Court should (1) grant rehearing of the order denying the petition for writ of certiorari (2) vacate the Court's January 11, 2021, order denying certiorari, and (3) grant the petition for a writ of certiorari, vacate the judgment and remand to the Second Circuit for further consideration in light of *Bostock v. Clayton County*, 590 U.S. ___ (2020).

Respectfully submitted,

ANTHONY JOHN RIPA
Pro Se
The Octagon, Suite 402
888 Main Street
New York, NY 10044
Telephone: (646) 300-2843

Petitioner

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this Petition for Rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.

ANTHONY JOHN RIPA
Pro Se
The Octagon, Suite 402
888 Main Street
New York, NY 10044
Telephone: (646) 300-2843

Petitioner