CAPITAL CASE

No. 22-7048

IN THE SUPREME COURT OF THE UNITED STATES

Scott P. Roeder, Individually and as Next Friend of Unborn and Partially Born Individuals under Sentence of Death,
Petitioner,
v.
Paul Snyder[1], Warden, Winfield Correctional Facility,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

Scott P. Roeder #65192
Pro Se and as Next Friend
Winfield Correctional Facility[2]
1806 Pinecrest Circle
Winfield, KS 67156-5500

Petitioner

May 2023

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[1] On or about April 20, 2023, petitioner Scott P. Roeder was transferred out of the custody of Dan Schnurr, Warden, Hutchinson Correctional Facility, and into the custody of Paul Snyder, Warden, Winfield Correctional Facility, and which successor custodian has been substituted as a party. See Supreme Court Rule 36.
[2] Please note petitioner's new mailing address.

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Petitioner Scott P. Roeder respectfully petitions for rehearing of this Court's Order of April 17, 2023 denying the petition for a writ of certiorari.

SUMMARY OF ARGUMENTS

Petitioner suggests that rehearing is appropriate on the basis of two intervening cases that constitute matters within the meaning of Supreme Court Rule 44.2: *West Virginia v. B.P.J.*, 598 ____ (2023) (Appl. No. 22A800), and *Danco Laboratories, LLC v. Alliance for Hippocratic Medicine*, 598 ____ (2023) (Appl. No. 22A901).

Regarding *West Virginia v. B.P.J.*, petitioner argues that the dissenting opinion of Justice Alito, joined by Justice Thomas, raises important questions about the circumstances under which a litigant whose claim of urgency is belied by its own conduct may still be entitled to relief. Petitioner contends that this dissent creates a reasonable basis for granting rehearing and remanding the case to the United States Court of Appeals for the Tenth Circuit for further consideration.

Regarding *Danco Laboratories, LLC v. Alliance for Hippocratic Medicine*, petitioner argues that this case raises fundamental questions about the rights of the unborn and the Court's policy of discriminating against their Fourteenth Amendment rights. Petitioner contends that the piecemeal approach offered by cases like *Danco* is insufficient to fully address the rights of the unborn to equal justice under law, whereas rehearing presents a clear opportunity achieve this goal in one fell swoop.

Additionally, petitioner requests that the Court investigate the Clerk's unexplained redaction of the appendix to his petition for certiorari filed March 13, 2023, as it may also constitute grounds for rehearing.

REASONS FOR GRANTING REHEARING

Petitioner suggests that rehearing is appropriate on the basis of the following intervening matters under Rule 44.2.

1. ***West Virginia v. B.P.J.***

The Tenth Circuit considered petitioner's claim that "his appellate counsel was ineffective in pursuing a necessity defense and a voluntary manslaughter jury instruction on the basis of imminence. . . ." Petition for Certiorari, App. A2. The Tenth Circuit denied a certificate of appealability on the basis that "the Kansas Supreme Court decided against Mr. Roeder's imminence arguments and held the facts showed Mr. Roeder did not hold an honest belief that any harm he sought to prevent was imminent." Petition for Certiorari, App. A7-8(#2).

In this regard, the Kansas Supreme Court found on direct appeal, *State v. Roeder*, 300 Kan. 901, 918 (2014):

> Moreover, Roeder testified that he first determined that it would be necessary to kill Dr. Tiller in about 1993, that he formulated the plan to kill the doctor at his church in 2002, and that he attended the doctor's church in 2008 with the intent to kill the doctor before he actually effected his plan in May 2009. That timeline belies the notion that Roeder sincerely believed that the harm to be prevented was imminent; one does not wait over a decade to prevent an imminent harm.

In other words, the Tenth Circuit agreed with the Kansas Supreme Court that because petitioner's claim of urgency is belied by his own conduct he is not entitled to relief in the form of necessity related defenses.

However, in the intervening case under Rule 44.2 of *West Virginia v. B.P.J.*, the dissenting opinion of Justice Alito, joined by Justice Thomas, debated whether (*2) "a litigant whose claim of urgency is belied by its own conduct" can nonetheless be "entitled to relief" based on the "circumstances" of the case. In other words, the dissent posits that, depending on the circumstances, a litigant whose claim of urgency is belied by its own conduct is not necessarily disentitled to relief thereby.

In view of this dissent, petitioner's claim clearly meets the standard for a certificate of appealability, namely, that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 & n. 4 (1983).

See also petition for certiorari, esp. pp. 35-37(#2).

See also Appellant's Combined Opening Brief and Application for a Certificate of Appealability (10th Cir. Dkt. No. 10946882) at 12-15, section 4.4 (Fourth Issue); esp. *id.* at 13 ("Yet fairminded jurists can unanimously agree that [courts below] are befuddled in their sense of reality for an obvious reason: Sam [a child in question] was not *conceived* 'over a decade' before

petitioner shot and killed his would-be executioner. [Citations to the record on appeal omitted.] If not for petitioner, Sam would be dead.")

Accordingly, the Court should grant rehearing to vacate the judgment below and to remand the case to the Tenth Circuit for further consideration in light of *West Virginia v. B.P.J.*

2. Danco Laboratories, LLC v. Alliance for Hippocratic Medicine

The Court's interpretation of Fourteenth Amendment applicability is conditional rather than unconditional, as it requires applicable persons to have been recognized *elsewhere* in the law as "persons in the whole sense," according to *Roe v. Wade*, 410 U.S. 113, 162 (1973). For African-Americans, that "elsewhere" is found in the Thirteenth Amendment. For women, it is likely found in the Nineteenth Amendment. Either way, the Court's present interpretation means that the Fourteenth Amendment itself does not provide the recognition necessary for equal justice under law.

The Court's thinking suggests that if the Thirteenth Amendment had abolished abortion instead of slavery, the unborn would be protected by the Fourteenth Amendment, but ironically not African-Americans. This follows because African-Americans could not have met the standard of recognition as "persons in the whole sense" prior to the Thirteenth Amendment, due to the three-fifths compromise. See U.S. Const., Art. I, Sec. 2, Cl. 3. Under this compromise, African-Americans were counted as three-fifths of a person for

congressional representation purposes, which is less than "whole" and thus contrary to the Court's present standard for recognizing applicable person status under the Fourteenth Amendment.

The Court assures that this historical opinion of African-Americans was once regarded as something "which no one thought of disputing. . . ." *Dred Scott v. Sandford*, 19 How. 393, 407 (1857). In like fashion, no Member of the Court has disputed the Court's analogous opinion of the unborn. As Justice Stevens succinctly reflects on the absence of any dispute within the Court's ranks concerning *Roe's* opinion of the unborn, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 913 (1992):

> In short, the unborn have never been recognized in the law as persons in the whole sense. *Id.*, at 162. Accordingly, an abortion is not "the termination of life entitled to Fourteenth Amendment protection." *Id.*, at 159. From this holding, there was no dissent, see *id.*, at 173; indeed, no Member of the Court has ever questioned this fundamental proposition.

Nor was this an isolated opinion. Indeed, as *Roe's* author Justice Blackmun similarly reflects in *Casey*, 505 U.S. at 932, "No Member of this Court—nor for that matter, the Solicitor General, Tr. of Oral Arg. 42—has ever questioned our holding in *Roe* that an abortion is not 'the termination of life entitled to Fourteenth Amendment protection.' 410 U.S., at 159."

Recently, in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, 142 S.Ct. 2228 (2022), the Court once again declined to question this fundamental proposition of inequality, positing that the Constitution does not require it to adopt a "theory of life." 142 S.Ct. at 2261. Yet the Fourteenth

Amendment does not require the Court to adopt a theory of life any more than a theory of evolution.

As the petition for certiorari explains, pp. 13-15(#C), the Court's policy of discriminating against the Fourteenth Amendment rights of the unborn finds it roots in *United States v. Vuitch*, 402 U.S. 62 (1971). Unfortunately, the Court's persistent unanimity in refusing to so much as even question this policy has doubly disadvantaged petitioner's cause. For as the petition for certiorari explains, p. 5 (Statement of the Case), "All-in-all, the petition invites a look into two matters which the Court, in the past, has been unwilling to deal with: equality with the unborn and the need to completely revamp postconviction habeas corpus."

Indeed, as explained by U.S. Attorney General nominee John Ashcroft at his Senate confirmation hearing, even the Solicitor General is expected to be mindful of his or her "currency" in view of what "[t]he Supreme Court has signaled very clearly it doesn't want to deal with" or is "unwilling" to deal with; to do otherwise is "a losing proposition" that devalues one's ability "to succeed on other issues" over the course of one's career.[3] In other words, even for the top-ranked attorney practicing before the Court, the expected role ranges somewhere between an *amicus curiae* and a flunky.

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[3] American Presidency Project: George W. Bush: Attorney General Nominee John Ashcroft's Senate Confirmation Hearing (Day Two). https://www.presidency.ucsb.edu/documents/attorney-general-nominee-john-ashcrofts-senate-confirmation-hearing-day-two#ixzz1ndfiUqfX (accessed 04/22/2023)

In turn, Mr. Ashcroft did the most convenient thing imaginable for the Court in the partial-birth execution case of *Gonzales v. Carhart*, 550 U.S. 124 (2007). Rather than having the federal medical examiner testify to the fact of child homicide—which is the obvious legal thing to do—Mr. Ashcroft allowed the Court to dodge the rights of the unborn by confining himself to the gruesomeness of the act. In the Court's view, in a traditional abortion the doctor places a blanket over the pregnant woman's belly and then, using the magic word "choice," sends the stork back to the cabbage patch. Partial-birth abortion threatens this view in a gruesome way, by letting the baby's legs, feet, or toes stick out from under the stork-blanket. Mr. Ashcroft's only plea, then, was to just keep it all under the blanket.

The more recent trend in reproductive make-believe is to replace the stork-blanket with stork-pills: Give the pregnant woman special "medicine" and the baby goes back to the cabbage patch. Of course, as with the outcome reached in *Gonzales v. Carhart*, the baby dies either way. But the motivating difference is found in the mentality of make-believe.

Rather than putting away its make-believe and taking responsibility for the unborn, the Court continues to take a piecemeal approach to striking an ever-changing balance between permitting their execution and blanketing their executions with a copacetic mentality. The Court is reminded that the executions are federal, whether in passing out stork-blankets to women directly, as did *Roe*, or in passing them out to elected representatives to pass

out to women, as does *Dobbs*. For, either way, the ultimate source of the warrant to execute is federal.

Of course, part of the make-believe mentality is to omit testimony from the coroner so as to dodge the fact of child homicide. But, as the petition for certiorari explains, pp. 33-35(#1), there was no dodging it in petitioner's case. Consequently, for reasons explained by Mr. Ashcroft's testimony, the petition faced a "losing proposition" from the start and was denied.

Ironically, the Court now finds itself entrenched in the intervening case under Rule 44.2 of *Danco Laboratories, LLC v. Alliance for Hippocratic Medicine*. Though initially limited to an application for stay, essentially what the controversy is asking the courts to decide is whether the mentality of using stork-pills to execute babies (*viz.*, Danco's abortion drug) is somehow copacetic enough to provide an exception to *Dobbs*.

As explained in the petition for certiorari, pp. 6-10(#A), neither this Court nor the profession of obstetrics and gynecology has ever proposed legal abortion without also expressing a willingness to accept harmful compromises to women's health, including in tandem with forced sterilization and forced abortion. Nowhere is this compromise more evident than in the words of Justice Douglas, *Doe v. Bolton*, 410 U.S. 179, 220-221 (1973):

> In short, I agree with the Court that endangering the life of the woman or seriously and permanently injuring her health are standards too narrow for the right of privacy that is at stake.

Hence, in view of the sordid history of our medical and legal professions, it is unreasonable to assume that the U.S. Food and Drug Administration (FDA) approved Danco's abortion drug without willingness to accept the sorts of compromises that could harm women's health.

Rehearing will not only answer the piecemeal questions of *Danco* and future cases like it in one fell swoop, but it will also fully serve the rights of the unborn to equal justice under law.

3. Clerk's Redaction of Petitioner's Appendix

Petitioner has been alerted by his outside legal paperwork assistant that the Clerk of this Court has redacted the appendix to his petition for certiorari filed March 13, 2023, as evidenced by the redacted copy available on the Court's website. Given that each of the appendix sections is material to an understanding of the questions presented by the petition, if any of the copies circulated to the Court are found to have been redacted, petitioner respectfully submits that this, in and of itself, would be grounds for rehearing. Petitioner believes that the unexplained redaction of the appendix is not permitted by the Rules of this Court and violates the constitutional rights of due process and public proceedings. See Rule 14.1(i).

Specifically, the Clerk deleted Appendices D through W; substituted PACER copies for Appendices A through C without adding the appendix page numbers referenced by petitioner; and, added a PACER copy of the judgment of the United States District Court for the District of Kansas.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

Scott P. Roeder

Scott P. Roeder #65192
Pro Se and as Next Friend
Winfield Correctional Facility
1806 Pinecrest Circle
Winfield, KS 67156-5500

Petitioner

CERTIFICATE OF PETITIONER

Pursuant to Supreme Court Rule 44.2, I, Scott P. Roeder, hereby certify that the petition for rehearing is restricted to the grounds specified in Rule 44.2. I further certify that the petition for rehearing is presented in good faith and not for delay.

Scott P. Roeder

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Respondent.

CERTIFICATE OF MAILING

I, Eurica Californiaa, declare that on this date, May 12, 2023, that I have mailed to the Clerk of the United States Supreme Court the enclosed PROOF OF SERVICE and PETITION FOR REHEARING by depositing an envelope containing the above documents in the United States mail with first-class postage prepaid and properly addressed to the Clerk as follows:

Clerk, U.S. Supreme Court
1 First Street, N.E.
Washington, DC 20543-0001
Tel: (202) 479-3011

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 12, 2023.

By: E. Cd

Mr. Eurica Californiaa
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PROOF OF SERVICE

I, Eurica Californiaa, declare that on this date, May 12, 2023, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR REHEARING on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 12, 2023.

By: E. Cal

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