No. 17-1407

In the Supreme Court of the United States

SCOTT P. ROEDER, AS NEXT FRIEND OF UNBORN AND PARTIALLY BORN INDIVIDUALS UNDER SENTENCE OF DEATH, PETITIONER

v.

DEREK SCHMIDT, ATTORNEY GENERAL OF THE STATE OF KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR THE REHEARING OF AN ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI

SCOTT P. ROEDER #65192
Proximus Amicus
In Propria Persona
ELLSWORTH CORRECTIONAL FACILITY
P.O. BOX 107
ELLSWORTH, KANSAS 67439

CAPITAL CASE

Question Presented

1. Whether the suggestion of personhood having been established, should unborn and partially born individuals be protected from lethal execution?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, this Court is respectfully petitioned for rehearing of the denial of the petition for a writ of certiorari.

INTERVENING MATTER

The petition for a writ of certiorari was denied on June 11, 2018.

The intervening matter is the opinion in *South Dakota v. Wayfair, Inc., et al.*, 585 U. S. ____ (2018), which was decided by this Court on June 21, 2018.

SUBSTANTIAL OR CONTROLLING EFFECT

The substantial or controlling effect of the decision in *Wayfair* is that the ruling modified the doctrine of *stare decisis* in a manner favorable to rehearing.

REASONS FOR GRANTING REHEARING

In *Roe v. Wade*, 410 U.S. 113 (1973), having reflected on the history of law, the Court reasoned that the rights of persons guaranteed by the Fourteenth Amendment do not apply to the unborn because, "[i]n short, the unborn have never been recognized in the law as persons in the whole sense." *Id*., at 162. The Court has since applied the doctrine of *stare decisis* to let that ruling stand: "[T]he rule of *stare decisis* require[s] that *Roe's* essential holding be retained and reaffirmed...." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 833-834 (1992).

But recently in *Wayfair*, the Court revised the doctrine of *stare decisis* in a manner favorable to states seeking to protect the constitutional rights of the unborn as persons, 585 U. S. ____, slip op. 4:

> *Stare decisis* can no longer support the Court's prohibition of a valid exercise of the States' sovereign power. If it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers, the Court should be vigilant in correcting the error. It is inconsistent with this Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation.

The error of applying *stare decisis* to *Roe* can be seen clearly by analogy. In the United States, women did not gain the right to vote until the Nineteenth Amendment (1920). Up until that time, the Court could have just as easily reasoned that the rights of persons guaranteed by the Fourteenth Amendment do not apply to women because, in short, women have never been recognized in the law as persons in the whole sense. *Cf. Roe*, 410 U.S., at 162. If that had been the case, then thereafter it would have been left to a misguided application of *stare decisis* to allow such a ruling to stand indefinitely.

From this it follows that *Roe's* fundamental proposition of inequality with the unborn is exemplary of "a false constitutional premise of this Court's own creation." *Cf. Wayfair*, *ibid*. Accordingly, given the ruling in *Wayfair*, the doctrine of *stare decisis* should no longer be an impediment to reversing *Roe* in favor of the rights of the unborn as persons.

Neither this Court nor the United States has ever questioned *Roe's* fundamental proposition of inequality with the unborn. *Casey*, 505 U.S., at 913, 932. Having modified the doctrine of *stare decisis* in *Wayfair*, the Court should therefore grant rehearing to question for the first time the fundamental proposition of equality with the unborn.

CONCLUSION

The petition for rehearing should be granted.
Respectfully submitted.

SCOTT P. ROEDER #65192
Proximus Amicus
In Propria Persona
ELLSWORTH CORRECTIONAL FACILITY
P.O. BOX 107
ELLSWORTH, KANSAS 67439

JUNE 2018

CERTIFICATE OF PETITIONER

I, Scott P. Roeder, certify that, in compliance with Supreme Court Rule 44.2, this petition is presented in good faith and not for delay and that its grounds are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

SCOTT P. ROEDER
PETITIONER

No. 17-1407

In the Supreme Court of the United States

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DEREK SCHMIDT, ATTORNEY GENERAL OF THE STATE OF KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR A WRIT OF CERTIORARI

Scott P. Roeder, as next friend of unborn and partially born individuals under sentence of death, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Kansas in this case.

OPINIONS BELOW

The final opinion of the Supreme Court of the State of Kansas, which was issued on its original jurisdiction, appears at Appendix A and is unpublished.

JURISDICTION

The date on which the Supreme Court of the State of Kansas decided this case was December 20, 2017. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in Appendix B to this petition.

.

STATEMENT OF THE CASE

Being in possession of proof of the suggestion of personhood, petitioner filed this case as an original habeas corpus action on November 22, 2017 in the Supreme Court of the State of Kansas as next friend on behalf of unborn and partially born individuals under sentence of death. The case was styled as an "Emergency Habeas Corpus Petition Under K.S.A. 60-1501 for a Stay of Execution of Sentence of Death." The relief sought was a stay of execution on behalf of unborn and partially born individuals under sentence of death, an order prohibiting transfer of the unborn and partially born for execution, and an order appointing counsel *ad litem* for the unborn and partially born.

Aside from noting petitioner's memorandum of points and authorities, the case was dismissed at the initial pleading stages by the Supreme Court of the State of Kansas without comment on December 20, 2018 and without response from the state. See Appendix A.

REASONS FOR GRANTING THE PETITION

Kansas Statutes Annotated 65-6732 provides a legislative declaration that life begins at fertilization, but does not include any proof of the suggestion of personhood on behalf of unborn or partially born individuals. Yet because petitioner is in possession of legal proof of the suggestion of personhood on behalf of unborn and partially born individuals, he urgently appears before this Court as next friend to transmit the same so that their scheduled executions may be stayed immediately.

A. Establishment of the Suggestion of Personhood

This Court has not previously considered abortion to be "the termination of life entitled to Fourteenth Amendment protection." *Roe v. Wade*, 410 U.S. 113, 159 (1973).

But a subtle facet of abortion policy is that the Court in *Roe* quietly denied women the safeguards of *Skinner v. Oklahoma*, 316 U.S. 535 (1942), by way of narrowly defining the meaning of procreation to include only the act of fertilizing, and not the pregnant state itself, *Roe v. Wade*, 410 U.S., at 159:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from … procreation … with which … *Skinner* … [was] concerned.

The same edition of Dorland's Illustrated Medical Dictionary relied upon by the Court in *Roe v. Wade*, 410 U.S., at 159, *viz.* 24th ed. 1965 (hereinafter Dorland's), provides the following definition for the word "procreation": "The entire process of bringing a new individual into the world." Dorland's, at 1223. The same edition also provides the following definition, in relevant part, for the word "pregnancy": "The condition of having a developing embryo or fetus in the body, after union of an ovum and spermatozoon." *Id.*, at 1212.

Importantly, having found pregnancy and procreation to be inherently different, the Court's abandonment of *Skinner* for abortion clearly establishes that *Roe* accepts procreation as being complete once pregnancy begins, *viz.* once fertilization is accomplished. From this it follows that *Roe* considers an abortion to occur *after* procreation is complete, *viz.* after a new individual has been brought into the world.

This subtle observation can be combined with a relatively recent case, *Mohamad v. Palestinian Authority*, 566 U.S. 449, 132 S.Ct. 1702 (2012), to establish the suggestion of personhood on behalf of the unborn.

Despite many religious and philosophical views on the meaning of the word "person," the Court in *Mohamad*, 566 U.S., at 453-456, § II, 132 S.Ct., at 1706-1708, found that the ordinary meaning of the word "individual" refers unmistakably to a "natural person." As a consequence of the decision in *Mohamad*, simply being an "individual" in the ordinary sense creates the standing of a "natural person" in the law.

Despite there being religious and philosophical concepts of the person which are debatable, and

perhaps even more sublime than that of a natural person—such as a spiritual person—it would nonetheless violate the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution to summarily terminate the life of a natural person after procreation is complete. See also Kansas Statutes Annotated 21-6617, which requires procedures to schedule an execution.

Furthermore, it would violate the Establishment Clause of the First Amendment to the United States Constitution to require a consensus on the spiritual person as a prerequisite to legal recognition of the natural person. For example, asking a coroner to find a spiritual soul under a microscope is not possible, but he or she can easily detect an individual.

It goes without saying that the result of procreation is an individual. Having found pregnancy and procreation to be inherently different, *Roe* recognized procreation to be complete once pregnancy begins, *viz.* once fertilization is accomplished. From this it follows that an abortion interrupts pregnancy to terminate the presence of one or more individuals within the mother's body after procreation is complete. By combining this observation with *Mohamad's* unmistakable recognition of the individual as a natural person, the suggestion of personhood is legally established on behalf of the unborn from the time of procreation.

Moreover, since the unborn are persons, it follows that the partially born are persons as well. Accordingly, the suggestion of personhood is legally established on behalf of unborn and partially born individuals from the time of procreation. This is also consistent with Kansas state law, which provides a legislative declaration that life begins at fertilization. See Kansas Statutes Annotated 65-6732.

To summarize and to repeat:

1. The Court in *Roe*, having found pregnancy and procreation to be "inherently different," abandoned *Skinner* for abortion but not for procreation. *Roe v. Wade*, 410 U.S., at 159. From this it follows that *Roe* considers procreation to be complete at the start of pregnancy, that is to say, once fertilization has been accomplished.
2. Since the logical result of procreation is an individual, it follows that an individual is legally present from the time procreation is complete.
3. Since *Roe* considers procreation to be complete at the start of pregnancy, *viz.* once fertilization has been accomplished, it follows that an individual is legally present from the start of pregnancy.
4. The Court in *Mohamad* found that the ordinary meaning of an "individual" is "unmistakably … a natural person." 566 U.S., at 454-455, § II(A),132 S.Ct., at 1706-1707.
5. Combining *Roe* and *Mohamad* leads to the conclusion that an individual, *viz.* a natural person, is legally present from the start of pregnancy.
6. Though there are spiritual concepts of the person, like ensoulment, the basic secular concept is that of a natural person. Though some adhering to spiritual concepts of the person have held off as to declaring when ensoulment occurs, it would violate the separation of church and state guaranteed by the Establishment Clause of the First Amendment to the United States Constitution for governmental authorities to abstain from

recognizing the natural person at the beginning of an individual's natural biological life in deference to such debates. For example, asking a coroner to find a spiritual soul under a microscope is not possible, but he or she can easily detect an individual.

7. By adhering to the secular concept of an individual who is a natural person from the time procreation is complete, that is to say, from the time pregnancy begins, the suggestion of personhood is legally established on behalf of the unborn, while at the same time sidestepping religious and philosophical debates over spiritual persons.

B. Necessity of a Stay of Execution

Having established the suggestion of personhood on behalf of the unborn and partially born, this Court's precedent dictates that a stay of execution of sentence of death must be granted immediately to protect their right to life. See *Roe v. Wade*, 410 U.S., at 156-157 ("If this suggestion of personhood is established … the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment.")

Because it is incumbent upon the states to abide by the Fourteenth Amendment to the United States Constitution, the stay should have been granted by the Supreme Court of the State of Kansas without delay.

Because the Supreme Court of the State of Kansas failed to do so, it is incumbent upon this Court to grant the stay. See Fed. R. Crim. P. Rule 38(a).

C. Relief Requested

The suggestion of personhood having been established, unborn and partially born individuals should be protected from lethal execution. In the interests of securing such protection in a timely and effective manner, specific relief is requested as follows.

The Court is requested to issue appropriate orders to stay the executions of all unborn and partially born individuals within its jurisdiction.

It is further requested that the Court order those having custody not to transfer the unborn or partially born for execution to persons or places outside its jurisdiction.

It is further requested that the Court appoint a guardian *ad litem* on behalf of unborn and partially born individuals under sentence of death, or issue another appropriate order. See 18 U.S.C. § 3006A, 18 U.S.C. § 3599, 28 U.S.C. § 2254(h), 28 U.S.C. § 2255(g), Fed. Rule Civ. Proc. 17(c)(2), U.S. Const. Amends. V, VI, and XIV, and Kansas Statutes Annotated 60-217(c)(2).

It is further requested that the guardian *ad litem* shall not be compromised by dilemmas or inconsistencies, shall be qualified as a death penalty attorney, and shall have no history, public or private, of advocating for or participating in the execution of unborn or partially born individuals.

Even if the Court should deny petitioner's standing as next friend, or if petitioner should die, become incapacitated, or fail to appear, the Court is requested to appoint a guardian *ad litem* to continue the prosecution of this action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SCOTT P. ROEDER #65192
Proximus Amicus
In Propria Persona
ELLSWORTH CORRECTIONAL FACILITY
P.O. BOX 107
ELLSWORTH, KANSAS 67439

MARCH 2018

Order

Supreme Court of Kansas
301 SW 10th Ave.
Topeka, KS 66612
785.296.3229
.....
F L A T F I L E C O P Y
.....
Appellate Case No. 17-118601-S

SCOTT P. ROEDER,
AS NEXT FRIEND OF UNBORN AND PARTIALLY BORN INDIVIDUALS UNDER SENTENCE OF DEATH, PETITIONER,
V.
DEREK SCHMIDT,
ATTORNEY GENERAL OF THE STATE OF KANSAS, RESPONDENT.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

PETITION FOR WRIT OF HABEAS CORPUS
FILED BY SCOTT P. ROEDER.
CONSIDERED BY THE COURT AND DISMISSED.

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES.
NOTED BY THE SUPREME COURT.

Date: December 20, 2017

Douglas T. Shima
Clerk of the Appellate Courts

1. U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S. Const. Amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. U.S. Const. Amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

5. U.S. Const. Amend. VIII provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

6. U.S. Const. Amend. XIV provides:

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

7. K.S.A. 21-6617 provides:

21-6617. Persons convicted of capital murder; proceeding to determine if person shall be sentenced to death; notice; trial judge; jury; imprisonment for life without the possibility of parole. (a) If a defendant is charged with capital murder, the county or district attorney shall file written notice if such attorney intends, upon conviction of the defendant, to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death. In cases where the county or district attorney or a court determines that a conflict exists, such notice may be filed by the attorney general. Such notice shall be filed with the court and served on the defendant or the defendant's attorney not later than seven days after the time of arraignment. If such notice is not filed and served as required by this subsection, the prosecuting attorney may not request such a sentencing proceeding and the defendant, if convicted of capital murder, shall be sentenced to life without the possibility of parole, and no sentence of death shall be imposed hereunder.

(b) Except as provided in K.S.A. 2017 Supp. 21-6618 and 21-6622, and amendments thereto, upon conviction of a defendant of capital murder, the court, upon motion of the prosecuting attorney, shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If any person who served on the trial jury is unable to serve on the jury for the sentencing proceeding, the court shall substitute an alternate juror who has been impaneled for the trial jury. If

there are insufficient alternate jurors to replace trial jurors who are unable to serve at the sentencing proceeding, the trial judge may summon a special jury of 12 persons which shall determine the question of whether a sentence of death shall be imposed. Jury selection procedures, qualifications of jurors and grounds for exemption or challenge of prospective jurors in criminal trials shall be applicable to the selection of such special jury. The jury at the sentencing proceeding may be waived in the manner provided by K.S.A. 22-3403, and amendments thereto, for waiver of a trial jury. If the jury at the sentencing proceeding has been waived or the trial jury has been waived, the sentencing proceeding shall be conducted by the court.

(c) In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 2017 Supp. 21-6624, and amendments thereto, and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible. No testimony by the defendant at the sentencing proceeding shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a

reasonable period of time in which to present oral argument.

(d) At the conclusion of the evidentiary portion of the sentencing proceeding, the court shall provide oral and written instructions to the jury to guide its deliberations.

(e) If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 2017 Supp. 21-6624, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole. The jury, if its verdict is a unanimous recommendation of a sentence of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstances which it found beyond a reasonable doubt. If, after a reasonable time for deliberation, the jury is unable to reach a verdict, the judge shall dismiss the jury and impose a sentence of life without the possibility of parole and shall commit the defendant to the custody of the secretary of corrections. In nonjury cases, the court shall follow the requirements of this subsection in determining the sentence to be imposed.

(f) Notwithstanding the verdict of the jury, the trial court shall review any jury verdict imposing a sentence of death hereunder to ascertain whether the imposition of such sentence is supported by the evidence. If the court determines that the imposition of such a sentence is not supported by the evidence, the court shall modify the sentence and sentence the defendant to life without the possibility of parole, and no sentence of death shall be imposed

hereunder. Whenever the court enters a judgment modifying the sentencing verdict of the jury, the court shall set forth its reasons for so doing in a written memorandum which shall become part of the record.

* * * * *

8. K.S.A. 60-217 provides:

60-217. Parties; capacity.

* * * * *

(c) *Minor or incapacitated person.*

* * * * *

(2) *Without a representative.* A minor or an incapacitated person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem, or issue another appropriate order, to protect a minor or incapacitated person who is unrepresented in an action.

* * * * *

9. K.S.A. 65-6732 provides:

65-6732. Legislative declaration that life begins at fertilization. (a) The legislature hereby finds and declares the following:

(1) The life of each human being begins at fertilization;

(2) unborn children have interests in life, health and well-being that should be protected; and

(3) the parents of unborn children have protectable interests in the life, health and well-being of the unborn children of such parents.

(b) On and after July 1, 2013, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges and immunities available to other persons, citizens and residents of this state, subject only to the constitution of the United States, and decisional interpretations thereof by the United States supreme court and specific provisions to the contrary in the Kansas constitution and the Kansas Statutes Annotated.

(c) As used in this section:

(1) "Fertilization" means the fusion of a human spermatozoon with a human ovum.

(2) "Unborn children" or "unborn child" shall include all unborn children or the offspring of human beings from the moment of fertilization until birth at every stage of biological development.

(d) Nothing in this section shall be construed as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

Address of Petitioner:

Mr. Scott P. Roeder #65192
Ellsworth Correctional Facility
P.O. Box 107
Ellsworth, KS 67439

Address of Custodian:

Mr. Derek Schmidt
Kansas Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612

IN THE SUPREME COURT OF THE STATE OF KANSAS

Scott P. Roeder, As Next Friend of Unborn and Partially Born Individuals under Sentence of Death, *Petitioner,* *vs.* Derek Schmidt, Attorney General of the State of Kansas, *Respondent.*	Case No. _____ EMERGENCY PETITION *****CAPITAL CASE***** Executions Scheduled: Daily K.S.A 60-1501

EMERGENCY HABEAS CORPUS PETITION UNDER K.S.A. 60-1501
FOR A STAY OF EXECUTION OF SENTENCE OF DEATH

EMERGENCY HABEAS CORPUS PETITION UNDER K.S.A. 60-1501
FOR A STAY OF EXECUTION OF SENTENCE OF DEATH

Scott P. Roeder, appearing as next friend, petitions this Court to grant a habeas corpus petition under K.S.A. 60-1501 on its original jurisdiction to stay the lethal execution of all unborn and partially born individuals under sentence of death within its jurisdiction, and which executions are wrongfully scheduled to take place daily or near daily throughout the State of Kansas.

Roeder has filed two civil cases in the last five years, *Roeder v. KDOC*, No. 13-CV-464, in the District Court of Leavenworth County, Kansas, and *Roeder v. State*, No. 17-CV-2373, in the District Court of Sedgwick County, Kansas.

Roeder states that: 1) unborn and partially born individuals are being detained, confined, or restrained of liberty under sentence of death within the State of Kansas, in the custody of the State of Kansas whose custodial representative is Attorney General Derek Schmidt, 120 SW 10th Ave., 2nd Floor, Topeka, Kansas 66612; 2) to the best of his knowledge and belief, the cause or pretense of the restraint is that the unborn and partially born individuals have been denied recognition of their status as natural persons and are scheduled for lethal execution in absence of a formal death warrant; and, 3) the restraint is wrongful because legal proof of their status as natural persons has been established and is hereby transmitted to this Court.

JURISDICTION

1. The filing of this emergency petition is jurisdictional.

This Court's original jurisdiction is invoked under K.S.A. 60-1501.

An individual under sentence of death need not file a formal habeas corpus petition in order to invoke his or her right to counsel and to establish the Court's jurisdiction to enter a stay of execution. *McFarland v. Scott*, 512 U.S. 849 (1994).

Adequate relief is not available in any single one of the district courts because their individual jurisdictions do not cover the whole State of Kansas and the executions at issue are scheduled to take place in multiple district court jurisdictions throughout the State of Kansas. *Krogen v. Collins*, 21 Kan. App. 2d 723, 724, 907 P.2d 909 (1995). Even if adequate district court relief were available, this Court has discretion to exercise its original jurisdiction. *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 405, 197 P.3d 370 (2008).

2. This is a capital case.

In *Holtzman v. Schlesinger*, 414 U.S. 1316, 1316 (1972), the case of bombing in Cambodia by U.S. Defense Department officials was "treated as a capital case" and an application for a stay of execution of sentence of death was granted because denial "would catapult American airmen and Cambodian peasants into a death zone." Even though no formal death warrant had issued, Justice Douglas, in granting the application for a stay of execution of sentence of death, emphasized that "this case, in its stark realities, involves the grim consequences of a capital case" because even though "[n]o one knows who they are … [t]he upshot is that we know that someone is about to die." 414 U.S., at 1317.

Hence, because the upshot is that we know someone is about to die, the lethal execution of unborn and partially born individuals is properly treated as a capital case, even when we do not know who they are. Moreover, because abortion derives its asserted legality from judicial acts and is conducted under the protection of governmental powers, the condemned are under "sentence of death," even in absence of a formal death warrant.

3. Habeas corpus is an appropriate instrument.

An unborn or partially born individual scheduled for execution on any pretense whatsoever is "detained, confined or restrained of liberty" for purposes of a habeas corpus proceeding under K.S.A. 60-1501.

In general, one scheduled for lethal execution under the color of government authorization, whether by the use of drugs, devices, or treatments, by exposure, deprivation, or neglect, by abandonment or disposal, or by any other method of execution, is a "prisoner in custody under sentence" of death for purposes of a habeas corpus proceeding under K.S.A. 60-1507.

To give an example, one being taken to an abortion clinic for lethal execution is a "prisoner in custody under sentence" of death for purposes of a habeas corpus proceeding under K.S.A. 60-1507, wherein the execution is to be performed or assisted by one authorized to do so by the government, such as an abortion doctor.

To give another example, one scheduled for disposal at a fertility clinic after *in vitro* fertilization is a "prisoner in custody under sentence" of death for purposes of a habeas corpus proceeding under K.S.A. 60-1507, wherein the

execution is to be performed or assisted by one authorized to do so by the government, such as a fertility doctor.

To give another example, one scheduled for exposure to lethal drugs obtained at a pharmacy is a "prisoner in custody under sentence" of death for purposes of a habeas corpus proceeding under K.S.A. 60-1507, wherein the execution is to be performed or assisted by one authorized to do so by the government, such as a mother or pharmacist.

To give another example, one facing exposure to a lethal environment created by there being an intrauterine device implanted in the mother's uterus is a "prisoner in custody under sentence" of death for purposes of a habeas corpus proceeding under K.S.A. 60-1507, wherein the execution is to be performed or assisted by one authorized to do so by the government, such as a gynecologist who implanted the device.

In each of these examples, an unborn or partially born individual is "detained, confined or restrained of liberty" for purposes of a habeas corpus proceeding under K.S.A. 60-1501. However, because no formal death warrant has issued, proceedings under K.S.A. 60-1507 appear inadequate, in which case a proceeding under K.S.A. 60-1501 appears most appropriate.

The foregoing examples are non-limiting and therefore do not limit the scope of the relief being sought in this emergency petition.

STANDING

1. Kansas permits "next friend" filings.

Kansas permits next friend filings in habeas corpus proceedings. K.S.A. 60-1501(a). Unborn and partially born individuals under sentence of death include minors who are unrepresented before the Court. Kansas permits a next friend to sue on behalf of an unrepresented minor. K.S.A. 60-217(c)(2).

2. Roeder has next friend standing to prosecute this action.

A next friend typically has no individual standing to prosecute an action on his own behalf, but serves only as a relator before the Court on behalf of a real party of interest. In the present case, the real parties of interest are unborn and partially born individuals under sentence of death.

K.S.A. 65-6732 provides a legislative declaration that life begins at fertilization, but does not include any proof of the suggestion of personhood on behalf of unborn or partially born individuals. Yet because Roeder is now in possession of legal proof of the suggestion of personhood on behalf of unborn and partially born individuals, he urgently appears before this Court as next friend to transmit the same so that their scheduled executions may be stayed immediately.

As the U.S. Supreme Court explains its official policy of ongoing openness to efforts to legally establish the suggestion of personhood, *Roe v. Wade*, 410 U.S. 113, 156-157 (1973):

> The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.

The long awaited proof of personhood, however, is not merely academic in its consequence, but rather it has real consequences for unborn and partially born individuals under sentence of death. Thus, assuming, *arguendo*, that Roeder is in fact capable of establishing the suggestion of personhood on behalf of unborn and partially born individuals, then the proper instrument for doing so is an emergency habeas corpus petition for a stay of execution of sentence of death, since death is irrevocable. Otherwise lives would be lost in the meantime if the suggestion of personhood was to be established by means of a legal instrument of less urgency, such as a memorandum.

"If there is doubt whether due process has been followed in the procedures, the stay is granted, because death is irrevocable." *Holtzman v. Schlesinger*, 414 U.S., at 1319. "Since there is insufficient time to consider the application's merits, and with an execution so irrevocable, it is best to err on the applicant's side." *Grubbs v. Delo*, 506 U.S. 1301, 1301-1302 (1992). Thus, given the irrevocability of each minor's execution, it is evident that an emergency habeas corpus petition for a stay of execution of sentence of death is the proper instrument in which to legally establish the suggestion of personhood on behalf of unborn and partially born individuals.

As the relator of this petition to the Court, Roeder meets both of the prerequisites for next friend standing enumerated in *Whitmore v. Arkansas*, 495 U.S. 149, 161-166 (1990).

First, the real parties, *viz.* unborn and partially born individuals under sentence of death, whose interests Roeder seeks to relate, are unrepresented

minors unable to litigate their own cause due to mental incapacity, lack of access to court, or other similar disability. K.S.A. 60-217(c)(2). Neither unborn nor partially born individuals are ever going to up-and-file a petition on their own, whether for habeas corpus or a stay of execution of sentence of death. It is therefore legally proper that such petitions be presented on their behalf since they cannot appear on their own behalf to prosecute the actions.

Second, Roeder is truly dedicated to the best interests of the individuals on whose behalf he seeks to litigate. He contends that the death penalty is being freakishly and arbitrarily applied in Kansas to execute unborn and partially born individuals in violation of the Eighth Amendment to the United States Constitution. By presenting this emergency petition, he is the best friend they have before the Court at the moment to stay their daily executions. He also has a significant relationship with the real parties of interest: as their benefactor, he has presented this emergency petition on their behalf. As further evidence of his dedication to the best interests of unborn and partially born individuals, the cause of his imprisonment is that he personally defended some of them from their scheduled executions at great risk to himself. See *State v. Roeder*, No. 104,520 (Kan. 2014).

The U.S. Supreme Court has suggested that any would-be advocate who takes exception to recognizing the unborn in the law as persons in the whole sense faces a dilemma which is inconsistent with the suggestion of personhood under the Fourteenth Amendment to the United States Constitution, *Roe v. Wade*, 410 U.S., at 157-158, n. 54:

> When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

Roeder, however, does not espouse such dilemmas or inconsistencies, and wholly rejects them. For example, in the case of procedures for the purpose of saving the life of the mother, Roeder rejects traditional abortions as homicide. Instead, even in such cases, he only accepts non-homicidal procedures. For a discussion of the new technology for performing non-homicidal abortions, see Petitioner's Memorandum of Points and Authorities, as attached, pp. 28-30, Issue 5. Thus, unlike the would-be advocates who have preceded him, Roeder is no hint of an intruder or uninvited meddler styling himself as their next friend.

Roeder therefore satisfies the prerequisites for next friend standing.

3. U.S. Supreme Court precedent has not taken away this Court's jurisdiction over the execution of unborn and partially born individuals.

As the U.S. Supreme Court explains its official policy of ongoing openness to the suggestion of personhood, *Roe v. Wade*, 410 U.S., at 156-157:

> The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.

The Fourteenth Amendment, Section 1, is directed to the states. Consequently, because the U.S. Supreme Court has framed matters in terms of the Fourteenth Amendment, it implies that the states are entitled to make further consideration of the suggestion of personhood. For if the suggestion of personhood is established—which is a possibility the U.S. Supreme Court remains officially open to—the right to life of unborn and partially born individuals would then be immediately guaranteed specifically by the Amendment. For this reason, this Court has jurisdiction to grant a stay of execution upon an establishing of the suggestion of personhood.

The U.S. Supreme Court did make it clear, however, that it will not accept suggestions of personhood which are compromised by dilemmas or inconsistencies, so as to fall short of recognizing the unborn in the law as persons in the whole sense. *Roe v. Wade*, 410 U.S., at 157-158, n. 54, 162. But such is not the case here, for Roeder purports herein to legally and factually establish the suggestion of personhood in the whole sense.

REQUEST FOR GUARDIAN *AD LITEM*

Roeder requests that the Court appoint a guardian *ad litem* on behalf of unborn and partially born individuals under sentence of death, or issue another appropriate order, as is required by statute. K.S.A. 60-217(c)(2) ("The court must appoint a guardian ad litem, or issue another appropriate order, to protect a minor or incapacitated person who is unrepresented in an action.") It is further requested that the guardian *ad litem* shall not be compromised by dilemmas or inconsistencies, shall be a prequalified death penalty attorney,

and shall have no history, public or private, of advocating for or participating in the execution of unborn or partially born individuals.

Even if the Court should deny Roeder's standing as next friend, or if Roeder should die, become incapacitated, or fail to appear, the Court should appoint a guardian *ad litem* to continue the prosecution of this action.

ESTABLISHMENT OF THE SUGGESTION OF PERSONHOOD

The U.S. Supreme Court has not previously considered abortion to be "the termination of life entitled to Fourteenth Amendment protection." *Roe v. Wade*, 410 U.S., at 159.

But a subtle facet of abortion policy is that the U.S. Supreme Court in *Roe* quietly denied women the safeguards of *Skinner v. Oklahoma*, 316 U.S. 535 (1942), by way of narrowly defining the meaning of procreation to include only the act of fertilizing, and not the pregnant state itself, *Roe v. Wade*, 410 U.S., at 159:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from … procreation … with which … *Skinner* … [was] concerned.

The same edition of Dorland's Illustrated Medical Dictionary relied upon by the U.S. Supreme Court in *Roe v. Wade*, 410 U.S., at 159, *viz.* 24th ed. 1965 (hereinafter Dorland's), provides the following definition for the word "procreation": "The entire process of bringing a new individual into the world." Dorland's, at 1223. The same edition also provides the following definition, in

relevant part, for the word "pregnancy": "The condition of having a developing embryo or fetus in the body, after union of an ovum and spermatozoon." *Id.*, at 1212.

Importantly, having found pregnancy and procreation to be inherently different, the U.S. Supreme Court's abandonment of *Skinner* for abortion clearly establishes that *Roe* accepts procreation as being complete once pregnancy begins, *viz.* once fertilization is accomplished. From this it follows that *Roe* considers an abortion to occur *after* procreation is complete, *viz.* after a new individual has been brought into the world.

This subtle observation can be combined with a relatively recent U.S. Supreme Court case, *Mohamad v. Palestinian Authority*, 566 U.S. 449, 132 S.Ct. 1702 (2012), to establish the suggestion of personhood on behalf of the unborn.

Despite many religious and philosophical views on the meaning of the word "person," the U.S. Supreme Court in *Mohamad*, 566 U.S., at 453-456, § II, 132 S.Ct., at 1706-1708, found that the ordinary meaning of the word "individual" refers unmistakably to a "natural person." As a consequence of the decision in *Mohamad*, simply being an "individual" in the ordinary sense creates the standing of a "natural person" in the law.

Despite there being religious and philosophical concepts of the person which are debatable, and perhaps even more sublime than that of a natural person—such as a spiritual person—it would nonetheless violate the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution to summarily terminate the life of a natural person after procreation is complete. See also K.S.A. 21-6617, which requires procedures to schedule an execution.

Furthermore, it would violate the Establishment Clause of the First Amendment to the United States Constitution to require a consensus on the spiritual person as a prerequisite to legal recognition of the natural person. For example, asking a coroner to find a spiritual soul under a microscope is not possible, but he or she can easily detect an individual.

It goes without saying that the result of procreation is an individual. Having found pregnancy and procreation to be inherently different, *Roe* recognized procreation to be complete once pregnancy begins, *viz.* once fertilization is accomplished. From this it follows that an abortion interrupts pregnancy to terminate the presence of one or more individuals within the mother's body after procreation is complete. By combining this observation with *Mohamad's* unmistakable recognition of the individual as a natural person, the suggestion of personhood is legally established on behalf of the unborn from the time of procreation.

Moreover, since the unborn are persons, it follows that the partially born are persons as well. Accordingly, the suggestion of personhood is legally established on behalf of unborn and partially born individuals from the time of procreation. This is also consistent with Kansas state law, which provides a legislative declaration that life begins at fertilization. K.S.A. 65-6732.

To summarize and to repeat:

1. The U.S. Supreme Court in *Roe*, having found pregnancy and procreation to be "inherently different," abandoned *Skinner* for abortion but not for procreation. *Roe v. Wade*, 410 U.S., at 159. From this it follows that *Roe* considers procreation to be complete at the start of pregnancy, that is to say, once fertilization has been accomplished.
2. Since the logical result of procreation is an individual, it follows that an individual is legally present from the time procreation is complete.
3. Since *Roe* considers procreation to be complete at the start of pregnancy, *viz.* once fertilization has been accomplished, it follows that an individual is legally present from the start of pregnancy.
4. The U.S. Supreme Court in *Mohamad* found that the ordinary meaning of an "individual" is "unmistakably … a natural person." 566 U.S., at 454-455, § II(A),132 S.Ct., at 1706-1707.
5. Combining *Roe* and *Mohamad* leads to the conclusion that an individual, *viz.* a natural person, is legally present from the start of pregnancy.
6. Though there are spiritual concepts of the person, like ensoulment, the basic secular concept is that of a natural person. Though some adhering to spiritual concepts of the person have held off as to declaring when ensoulment occurs, it would violate the separation of church and state guaranteed by the Establishment Clause of the First Amendment to the United States Constitution for governmental authorities to abstain from recognizing the natural person at the beginning of an individual's natural biological life in deference to such debates. For example, asking a

coroner to find a spiritual soul under a microscope is not possible, but he or she can easily detect an individual.

7. By adhering to the secular concept of an individual who is a natural person from the time procreation is complete, that is to say, from the time pregnancy begins, the suggestion of personhood is legally established on behalf of the unborn, while at the same time sidestepping religious and philosophical debates over spiritual persons.

REASONS FOR GRANTING THE STAY

Having established the suggestion of personhood on behalf of the unborn and partially born, U.S. Supreme Court precedent dictates that a stay of execution of sentence of death must be granted immediately to protect their right to life. See *Roe v. Wade*, 410 U.S., at 156-157 ("If this suggestion of personhood is established … the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment.")

Because it is incumbent upon the states to abide by the Fourteenth Amendment to the United States Constitution, the stay must be granted by this Court without delay.

SPECIFICS OF THE RELIEF REQUESTED

The Court is requested to issue appropriate orders to stay the executions of all unborn and partially born individuals within its jurisdiction.

It is further requested that the Court order those having custody not to transfer the unborn or partially born for execution to persons or places outside its jurisdiction while these proceedings are pending.

CONCLUSION

The petition should be granted.

Verification

I, Scott P. Roeder, declare (or verify, certify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2017.

Respectfully submitted,

_____

Mr. Scott P. Roeder #65192
Ellsworth Correctional Facility
P.O. Box 107
Ellsworth, KS 67439

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing Emergency Petition was furnished by United States Mail, postage paid, this 21th day of November, 2017, to:

Mr. Derek Schmidt
Kansas Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612

BY: _____

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120 SW 10th Ave., 2nd Floor
Topeka, KS 66612

IN THE SUPREME COURT OF THE STATE OF KANSAS

Scott P. Roeder, As Next Friend of Unborn and Partially Born Individuals under Sentence of Death, *Petitioner,* *vs.* Derek Schmidt, Attorney General of the State of Kansas, *Respondent.*	Case No. _____ Memorandum *****CAPITAL CASE***** Executions Scheduled: Daily

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES

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STATEMENT OF THE CASE

Unborn and/or partially born individuals in the custody of the State of Kansas for purposes of this petition are scheduled for lethal execution, including by medical personnel, on a daily or near daily basis throughout the State of Kansas. Because the condemned have been unlawfully scheduled for execution in absence of the procedures required pursuant to K.S.A. 21-6617 and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, this Court is being moved to issue an immediate stay to halt their executions.

STATEMENT OF ISSUES

Issue 1: Baby Executions in the United States Largely Have the Character of State-Sponsored Honor Killings.

Issue 2: Judicial Consideration of the Legal Aspects of the Unborn Child has been Contrived.

Issue 3: Historically, the United States Supreme Court has been Unanimously Pro-Abatement, but Remains Open to the Suggestion of Personhood.

Issue 4: Judicial Consideration of the Risks of Abortion to Women has been Disingenuous.

Issue 5: There are Constitutional Alternatives to Traditional Abortions Even for the Most Difficult Pregnancies.

ARGUMENT

Issue 1: Baby Executions in the United States Largely Have the Character of State-Sponsored Honor Killings.

Abortion policy in the United States is largely an example of domestic terrorism which takes the form of state-sponsored honor killings. The main object of the policy is to preserve the Nation's reputation by executing the

unborn or partially born babies of troubled or abused women to keep scandals and embarrassments "private." The policy is designed to nudge or force women into compliance for fear that allowing women to be noncompliant will ruin the Nation's reputation as a whole. In the interests of nudging women to choose abortions, young women are denied prenatal and maternity coverage on their parents' employee health insurance. Poor women are threatened that their criminal drug use will be exposed by postpartum drug testing of the baby if they do not have an abortion to hide their drug use. An instruction not to show up pregnant again can be made a probation requirement to nudge women into choosing abortions. Women can be expelled from school or campus housing for being pregnant. In general, forced abortions can be legally performed on a woman under the guise of doing so "on her behalf" or, more generally, as "implied by law" throughout the United States. 18 U.S.C. § 1841(c)(1).

In the interests of pregnancy abatement, the Supreme Court specifically rejected the suggestion of leaving the abortion decision to the woman's sole determination, in favor of an exercise of the abatement authority. See *Roe v. Wade*, 410 U.S. 113, 153-154 (1974) ("The abortion decision … [cannot be left to] … the woman's sole determination … [in view of] … important state interests in regulation," citing the abatement authority of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (forced vaccination), and *Buck v. Bell*, 274 U.S. 200 (1927) (forced sterilization).) The Court even went so far as to abandon the protections of *Skinner v. Oklahoma*, 316 U.S. 535 (1942), so that women can be forced to abort even in arbitrary connection with crime or poverty. *Roe*

v. Wade, 410 U.S., at 159 ("The situation [of the pregnant woman] therefore is inherently different from … procreation … with which … *Skinner* [was] concerned.")

As Justice Marshall recalls *Roe's* withdrawal of *Skinner's* protections, joined notably by *Skinner's* author Justice Douglas, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 100-101 (1973):

> Recently, in *Roe v. Wade*, 410 U.S. 113, 152-154 (1973), the importance of procreation has, indeed, been explained on the basis of its intimate relationship with the constitutional right of privacy which we have recognized. Yet the limited stature thereby accorded any "right" to procreate is evident from the fact that at the same time the Court reaffirmed its initial decision in *Buck v. Bell*. See *Roe v. Wade*, *supra*, at 154.

Here, by "initial decision" is meant that the Court in *Roe* withdrew the protections of *Skinner*, which previously had served to limit the pregnancy abatement authority of *Buck v. Bell*. *Skinner* prohibited forced procedures to control reproduction in arbitrary connection with crime or poverty. But faced with the criminal drug use of the hippie craze, the Court in *Roe* feared that the pregnancy abatement authority would not have enough tooth unless women could be nudged into choosing abortions out of fear that giving birth would expose their drug use during pregnancy. And here Justice Marshall is pointing out that another facet of *Roe's* abandonment of *Skinner* for abortion, germane to the *San Antonio Independent School District* case, is that women can be similarly nudged to abort in connection with their poverty—and that he and Justice Douglas believe that perhaps this would be a better option for the state than providing inferior schools for the poor multitudes.

In 1905, the Supreme Court first established the abatement authority, beginning with forced vaccination in *Jacobson*. In 1927, overwhelmed by the flapper craze, the Court extended the abatement authority to pregnancy abatement, beginning with forced sterilization in *Buck v. Bell*. In 1942, a unanimous Court in *Skinner* modified its initial decision in *Buck v. Bell*, by precluding the pregnancy abatement authority from being exercised in arbitrary connection with crime or poverty. But in 1973, overwhelmed by the hippie craze and its criminal drug use, the Court in *Roe v. Wade*, joined by *Skinner's* frustrated author Justice Douglas, extended the pregnancy abatement authority to include both abortion and sterilization, going so far as to reaffirm its initial decision in *Buck v. Bell* by abandoning *Skinner* so women can be forced to abort in arbitrary connection with crime or poverty. In 1978, frustrated by the cocaine baby epidemic of the disco craze, the Court in *Stump v. Sparkman*, 435 U.S. 349 (1978), guaranteed legal immunity to those authorizing forced procedures, as implied by law, to control reproduction. And, in 1992, frustrated by the crack cocaine baby epidemic of the hip hop/dirty dancing craze, the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992), preserved the abatement authority of *Jacobson* as the ultimate foundation of abortion policy, albeit with three Justices suggesting a tightening of the state's power to pressure women into choosing abortions ("falls short of … plenary"). *Id.*

In exercising asserted state interests in protecting the life of the community from epidemics of irresponsible pregnancies, Kansas is no

exception. A pregnant woman who refuses an abortion deemed appropriate for her can be legally forced to have it by her "legal guardian" under K.S.A. 21-5419(b)(2). Thus, when Kansas urges that having an abortion is a woman's constitutional right, it faces a dilemma.

The same is true elsewhere in the United States: in an effort to balance asserted state interests in pregnancy abatement with those of childbearing, the Supreme Court has given women both a limited right to volunteer for abortions as well as a limited right to refuse abortions. However, the thrust of abortion policy mainly favors abatement.

The abatement, however, does not occur by itself as an automatic consequence of court rulings. Instead, executioners are required to perform the abatement. Faced with a dearth of skilled physicians willing to execute babies, the Supreme Court, in its desperation to ensure widespread pregnancy abatement, created a safe haven for incompetent physicians. It did this by suspending medical regulations so they could stay in practice, albeit by performing abortions. As Justice Douglas concurs with the policy, *Doe v. Bolton*, 410 U.S. 179, 220-212 (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."

Thus, in the context of abortion policy, it is evident that codeword "privacy" does not truly mean a woman's personal right *per se*, but rather an asserted right of society as a whole to be spared public attention for the astonishing number of women who embarrass the Nation by getting pregnant

outside the bounds of accepted social and moral standards. It is these pregnancies, more so than sheer numbers, that the Nation has been desperate to abate, rather than having to face them in the light of day. Hence, in serving the broader interests of abating embarrassing pregnancies, the Supreme Court simply found it too narrow-minded to worry about endangering the lives of women or seriously and permanently injuring their health at the hands of the sorts of washed out physicians who are left alone to perform abortions without medical regulations, lest the law catch their incompetence and remove them from practice. This confirms that the main thrust of abortion policy is honor killings, as the Court never would have allowed women to risk exposure to sub-standard physicians merely in the interests of their own personal privacy.

Thus, abortion policy in the United States is largely an example of domestic terrorism which takes the form of state-sponsored killings to outwardly preserve the social and moralistic honor of the Nation.

There are those who believe that women as a whole will achieve greater liberation in society if their reputations are spared the threat of dishonor by aborting the pregnancies that result from the mishaps which are inevitable when women are allowed out of the house and into the world at large. As a consequence, some see abortion as promoting the social and economic currency of women, even when it means forcing them to have abortions. See *Casey*, 505 U.S., at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.") Thus, some fear that women will be kept

under greater restriction as long as their pregnancies risk dishonoring society. Others fear that less restriction is inevitable in a climate of women's liberation, but that the appearances of social and moral standards need to be preserved nonetheless. Either way, some believe that the asserted benefits to society outweigh the problems of child homicide, forced abortion, and unregulated physicians which are in inherent in abortion policy today.

Moreover, it is precisely because the main object of abortion policy is to maintain the honor of women and society that the Supreme Court has never left the abortion decision to the woman's sole determination. *Roe v. Wade*, 410 U.S., at 153-153, 159. This attitude stems from the Court's view of women and their inability to control themselves sexually. For example, using the person of Carrie Buck as a vehicle for its decision, the Court in *Buck v. Bell* ruled that forced sterilization is permissible for those "afflicted with an hereditary form of insanity or imbecility." 274 U.S., at 200, ¶1. The subtlety removed, the Court means: by "form of insanity," the flapper craze; by "imbecility," the sexual imbecility that accompanied the craze; and, by "hereditary," the fact that the next generation of young women stood eagerly poised to inherit flapper behaviors as if there was nothing wrong with it. Fearing that without a state crackdown on flapper behaviors the Nation would be "swamped with [female sexual] incompetence," *id.*, at 207, the Court scolded the State of Virginia for its "[f]ailure" to apply its forced sterilization laws "outside" the confines of its institutions, meaning to flappers on the loose. *Id.* at 200, ¶ 2. In other words,

Virginia, which had been a haven for flappers, had not done a good job of controlling women, in or out of its institutions.

Fifteen years later, by 1942, the flapper craze was but a distant memory. Having misattributed the craze to a one-time anomaly of female behaviors which the Court thought it had gladly put behind us thanks to the austere measures it instituted in *Buck v. Bell*, a unanimous Court felt confident to place greater restrictions on forced sterilization programs in *Skinner*. But by 1973, faced with a multitude of new crazes, the most notable of which was the hippie craze, the Court in *Roe v. Wade* instituted abortion and withdrew the protections of *Skinner*. Justice Douglas, frustrated by the surprising new outbreak of women's behaviors, joined with the Court in *Roe* and published his concurring opinion under its companion case, *Doe v. Bolton*.

Whereas *Roe* was devoted to the theory of abortion policy, *Doe v. Bolton* was devoted to the implementation of that policy by suspending medical regulations so washed out physicians would have a safe haven to remain in practice as abortion doctors. Justice Douglas divided his concurrence into three parts: parts one and two address the dichotomy of *Roe's* abortion policy and part three addresses *Doe v. Bolton's* implementation of that policy.

In part one, *Doe v. Bolton*, 410 U.S., at 209-215, he explains that aspect of *Roe* which gives the woman some autonomy over the abortion decision, saying that a woman is free to make the "basic" decision, *id.*, at 214, whether to bear an unwanted child. Then in part two, *id.*, at 215-218, he explains that aspect of *Roe* which denies the woman complete autonomy over the abortion

decision. He explains that "[s]uch reasoning [in favor of the woman's autonomy] is, however, only the beginning of the problem" because "[t]he State has interests to protect." 410 U.S., at 215. To emphasize an asserted state interest in overriding the woman's decision to refuse an abortion, so as to protect the life of the community from pregnancy epidemics, he cites the abatement authority of *Jacobson* and *Buck v. Bell*. *Doe v. Bolton*, 410 U.S., at 215. In citing the abatement authority of *Buck v. Bell*, he alters the original epithet by rendering it in the plural: He speaks of women as being (sexual) imbeciles afflicted with hereditary "forms" of insanity or imbecility, given that, by that time, the Court had seen multiple new forms, in addition to the original "form" which was the flapper craze. *Id. Cf. Buck v. Bell*, 274 U.S., at 200, ¶1.

Five years later, by 1978, the natural environs of the hippie craze had given way to the glittering lights of the disco craze, and the Court was pressured to guarantee immunity to those who were authorizing forced abortions. In picking a forced sterilization case as the vehicle for its decision, the Court in *Stump v. Sparkman* observed that although American women are basically able to make the grade intellectually, at least enough to be "promoted each year" in school, nonetheless, the fact remains that, when dealing with older youth and young men, they are still "somewhat retarded" when it comes to their sexuality. 435 U.S., at 351. This epitomizes the Court's attitude behind abortion policy.

It should be emphasized, therefore, that the main trend of pregnancy abatement afforded by the Court's abortion policy has not been to reduce

pregnancy epidemics in the sense of sheer numbers. Rather, the thrust of the policy has been to abate those epidemics of pregnancies which make women, and the Nation, look bad due to the lack of responsibility associated with the pregnancies. Accordingly, the thrust of the Court's abortion policy is to maintain the outward appearances of sexual and reproductive honor on behalf of women and the Nation as a whole. Put another way, abortion policy is meant to make American women, as a whole, look more intelligent, trustworthy, and sexually responsible than they really are.

As a consequence of abortion policy, unborn and partially born individuals are being made the victims of state-sponsored honor killings here in the United States.

Issue 2: Judicial Consideration of the Legal Aspects of the Unborn Child has been Contrived.

Roe v. Wade did not come out of thin air. The Supreme Court had been busy for several years beforehand laying the groundwork for the decision. Of note, in 1969, a retired Justice Clark lobbied hard for legal abortion. Clark, T.C., "Religion, Morality, and Abortion: A Constitutional Appraisal," Loyola University of Los Angeles Law Review, Vol. 2, pp. 1-11, 1969. And, in 1971, the Court tested the waters with *United States v. Vuitch*, 402 U.S. 62 (1971), which was the first case in history heard by the Court on the subject of abortion. The Court tested the waters, partly to see the public's initial reaction as to whether the Nation's highest court might issue a ruling favorable to abortion, but mainly to see whether the Government might suggest that the unborn are persons having constitutional rights which are at stake in an abortion.

Vuitch did not create a stir, and the Government did not suggest that the unborn have constitutional rights. The failure to argue the constitutional rights of the unborn was predictable, of course, since at the time President Nixon, as Commander-in-Chief, was in the practice of nudging women in the military to abort, a practice upheld by the Ninth Circuit. *Struck v. Secretary of Defense*, 460 F.2d 1372 (1972). But the Court, being cautious, wanted to make sure that the opposition to a grace period for child homicide would be limited. With these assurances in hand, the Court, eager to enact widespread pregnancy abatement and having quietly laid the groundwork for mass abortion with its subtle precedent in *Vuitch*, agreed to hear both *Roe v. Wade* and *Doe v. Bolton* the day after the decision in *Vuitch* was announced.

Vuitch was the first of a one-two punch which the Supreme Court delivered to completely knockout the children's rights in *Roe*. As the Court in *Roe* explains the effect of *Vuitch*, *Roe v. Wade*, 410 U.S., at 158-159:

> Indeed, our decision in *United States v. Vuitch*, 402 U.S. 62 (1971), inferentially is to the same effect [persuading us that the word "person," as used in the Fourteenth Amendment, does not include the unborn], for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

Hence, the denial of children's rights in favor of abortion was nothing short of a premeditated effort at the Supreme Court

In *Roe*, as part of the effort to justify sidestepping any formal questioning of the constitutional rights of the unborn as persons, the Court relied on the position taken in a 1939 British trial, *Rex v. Bourne*, 1 K. B. 687 (1939); the

judge in *Rex v. Bourne* interpreted the use of the term "unlawfully" in the Offences Against the Person Act of 1861, 24 & 25 Vict., c. 100, 58-59 ("unlawfully procure the miscarriage of any woman"), to suggest that some abortions were lawful, namely, to save the life of the woman, and interpreted preserving the life of the mother to include a serious and permanent threat to the mother's health. *Roe v. Wade*, 410 U.S., at 136-137.

In the laws of old, however, the definition of murder often included the word "unlawfully" in the statute. For example, as the Tennessee Supreme Court stated its law in 1923, *Morgan v. State*, 148 Tenn. 417, 420 (1923):

> The definition of murder contained in our Code is as follows:
>
> "If any person of sound memory and discretion, unlawfully kill any reasonable creature in being, and under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder." Thompson's-Shannon's Code, § 6438.
>
> This is the same definition given by Lord Coke, Co. 3 Inst. 47, and by Blackstone, 4 Bl. Com. 195, except that in England the act is committed "under the king's peace" and here it is committed "under the peace of the state."

Hence, though some killing may be taken to be lawful by such a statute, or at least not murder, it bears not at all on whether the victim of the killing is in fact a person having constitutional rights.

Yet, as part of its contrivance in *Roe*, the Supreme Court suggests that any exception at all in the abortion statutes implies, *ipso facto*, that the fetus is not a person. *Roe v. Wade*, 410 U.S., at 157-158, n. 54 ("But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception

appear to be out of line with the [Fourteenth] Amendment's command?") But what it really means is simply that an exception has been made by the legislature, whether constitutional or not. To hold otherwise leads to an absurdity, namely, that any exception made to unlawful killing in the statutes means no one has been recognized in the law as a person. Hence, whether a particular exception comports with constitutional standards is a completely different question than whether the fetus is a person or not.

In *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the Court took an approach which was similar to *Roe's* denial of children's rights, by likening African-Americans to evolutionary fetuses, as it were, *id.*, at 407:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

Yet there is a subtle difference between *Roe* and *Dred Scott*: Having denied African-Americans the constitutional rights of a person, the Court in *Dred Scott* chose to leave their fate up to the states, unlike *Roe*, which left the basic decision up to plantation owners, as it were.

Indeed, the Court's *Roe* dissenters have dissented precisely because they would prefer to leave matters up to the states, as did the Court in *Dred Scott*,

even when it comes to late-term abortions. See *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.) ("Although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so."), here italicizing "may" versus "must" in the original to emphasis the suggested role of a state's rights in the matter. Other than when the woman's life is at risk, *Roe v. Wade*, 410 U.S., 173 (Rehnquist, J., dissenting), the Court's *Roe* dissenters would impose restrictions on the states only when the abortions are performed in a manner so gruesome that physicians should be made to find "different and less shocking methods to abort…." *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007).

As far as the children themselves are concerned, the Court has unanimously treated them as "beings … so far inferior, that they ha[ve] no rights which [we are] bound to respect…" *Dred Scott*, 60 U.S., at 407. The Court has never even "questioned" their rights, let alone dissented over their loss of rights. *Casey*, 505 U.S., at 913, 932. See also Issue 3, *infra*.

As to the Fourteenth Amendment, the Court in *Roe* concluded its contrivance for denying the rights of the unborn, saying, 410 U.S., at 162, "In short, the unborn have never been recognized in the law as persons in the whole sense." This is a most ironic conclusion given the fact that the Fourteenth Amendment, Section 1, was specifically designed to enforce the rights of those whose rights had not been recognized in the past, namely, African-Americans. Yet, in *Roe*, the Court used a lack of past recognition as an excuse for denying any recognition at all, as if the Fourteenth Amendment had

no other purpose than to require states to enforce only the *status quo* of rights recognition.

Moreover, prior to the abolition of slavery, according to the three-fifths compromise, slaves were not counted as whole persons under Article 1, Section 2, Clause 3, of the United States Constitution. And even after the Fourteenth Amendment, the separate but equal standard fell short of recognizing African-Americans in the law as persons in the whole sense. Hence, by parallel analysis, it is plainly a contrivance to say that the unborn are precluded from inclusion under the Fourteenth Amendment due to historical failure to recognize them in the law as persons in the "whole" sense. The same is true of their inclusion elsewhere in the Constitution, for example, under the Fourth, Fifth, Sixth, and Eighth Amendments.

It may be noted that though the Fourteenth Amendment expressly gives citizenship to the born, such is not an exclusive measure of U.S. citizenship. *Cf. Boers v. Preston*, 111 U.S. 252, 252 (1884) ("The constitutional grant of original jurisdiction to this Court of all cases affecting consuls, does not prevent Congress from conferring original jurisdiction, in such cases, also, upon the subordinate courts of the Union.") Hence, the Fourteenth Amendment does not prevent Congress from giving citizenship to the unborn, or to others not born in the United States. 8 U.S.C. § 1401.

Moreover, even after the Fourteenth Amendment, some have lived their whole lives in the United States, yet were denied U.S. citizenship in absence of a statutory directive. *Elk v. Wilson*, 112 U.S. 94 (1884). See also the Indian

Citizenship Act of 1924 and 8 U.S.C. § 1401(b). But since having U.S. citizenship is not the sole measure of person status under the Constitution, a lack of U.S. citizenship provides no ground for a challenge to the legal recognition of person status. Indeed, even without U.S. citizenship, the duty to secure the blessings of liberty to the unborn people of the United States, as ourselves and our posterity, is included under the Preamble, which serves as the first guide to the interpretation of the Constitution and what it stands for.

While it is true that, at the time of *Roe v. Wade*, each of the 50 states had defects in their abortion statutes which violated the constitutional rights of the unborn to a greater or lesser extent, nonetheless, at the federal level, President Kennedy, by Executive Order 11098, issued on March 14, 1963, amended paragraph (c) of section 1622.30 of the Selective Service Regulations, as found in Chapter XVI of Title 32 of the Code of Federal Regulations, in a manner that plainly conveys recognition of the unborn in the law as persons in the whole sense. The relevant part reads:

> (c) (1) The term 'child' as used in this section shall include a legitimate or an illegitimate child from the date of its conception, a child legally adopted, a stepchild, a foster child, and a person who is supported in good faith by the registrant in a relationship similar to that of parent and child but shall not include any person 18 years of age or over unless he is physically or mentally handicapped.

From this it follows that a child is legally cognizable as such from the date of his or her conception.

The Court in *Roe*, however, overlooked this evidence of *federal* recognition for the unborn person. Instead, the Court, eager to get on with pregnancy abatement, had focused only on the states when proclaiming, 410

U.S., at 162, "In short, the unborn have never been recognized in the law as persons in the whole sense."

Yet perhaps the greatest blow to the unborn was delivered by the Court in *Roe* in the form of a spurious and specious argument, which was cleverly designed to produce a culture of disagreement over abortion rather than a culture of defense for the unborn, 410 U.S., at 160:

> Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

The spurious aspect of the argument is found in that abortion is not about when life begins, abortion is about how life ended. Simply put, the coroner does not require knowledge of the date or moment of conception in order to make a determination of anyone's homicide, born or unborn; and, no one goes to an abortion clinic to begin a life, but to end it. The specious aspect of the argument is found in that neither a theologian, nor philosopher, nor any arbitrary physician is legally competent to make an official determination of homicide, but rather the coroner.

Persistent absence of a coroner's inquiry into the matter of homicide is most conspicuous evidence of a concerted effort to deny rights to the unborn—evidence which is especially conspicuous in the partial-birth cases of *Stenberg v. Carhart* and *Gonzales v. Carhart*. For if there had ever been any real doubt

that an abortion is homicide, then surely the courts would have called the coroner to make an official determination.

In Kansas, the coroner is the one to provide "competent evidence" to elucidate a cause of death as homicide. K.S.A. 22a-235. Though K.S.A. 21-5419 generally regards abortion as a crime against the "unborn child" as a "person" and "human being," K.S.A. 21-5419(b)(2) means to exempt from the homicide determination abortions performed at the request of the pregnant woman or her legal guardian.

Yet even if a particular coroner happened to possess an opinion favorable to abortion, it is obvious nonetheless that he or she still will not be able to determine, based purely on an examination of a dead fetus, whether an abortion was performed at the request of a pregnant woman, her legal guardian, or for some other reason which is not exempted by statute as a crime against the unborn person. Thus, in relying on K.S.A. 21-5419(b)(2) to exempt certain categories of abortion from the homicide determination, Kansas is relying on the misguided moral or ethical belief that it is permissible to maintain the outward appearances of women's reputations with abortion, while excluding competent evidence from the coroner that such abortions are in fact the legal harm or evil of child homicide.

In *City of Wichita v. Tilson*, 253 Kan. 285, 289-290, 855 P.2d 911 (1993) (*per curiam*), the Kansas Supreme Court held that to assert a necessity defense, "[t]he harm or evil which a defendant ... seeks to prevent must be a legal harm or evil as opposed to a moral or ethical belief of the individual defendant." But

here the shoe is quite clearly on the other foot, for in relying on the judiciary's misguided belief in abortion rather than on the coroner, Kansas has partnered with the Nation's concerted effort to deny rights to the unborn.

Issue 3: Historically, the United States Supreme Court has been Unanimously Pro-Abatement, but Remains Open to the Suggestion of Personhood.

A pervasive myth promoted by the American Press is that the Supreme Court, ever since *Roe v. Wade* was handed down in 1973, has been bitterly divided between pro-choice and pro-life Justices, with the pro-choice Justices favoring a woman's right to choose and the pro-life Justices favoring a child's right to life. Nothing could be further from the truth. On the contrary, since the days of *Vuitch* in 1971, rather than being pro-choice or pro-life, the Supreme Court has always been unanimously pro-abatement.

As to the pro-life stance, no Member of the Court has ever even questioned the children's rights, let alone debated it. As Justice Stevens was pleased to explain this ongoing state of affairs some 20 years after *Roe* was decided, *Casey*, 505 U.S., at 913:

> In short, the unborn have never been recognized in the law as persons in the whole sense. *Id.*, [*Roe v. Wade*, 410 U.S.,] 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 [here referencing the dissenting opinion in *Roe* of Justice Rehnquist]; indeed, no Member of the Court has ever questioned this fundamental proposition.

In other words, though there truly has been dissent in the Court over *Roe*, there has never been any dissent whatsoever when it comes specifically to the

children's loss of rights; indeed, no Member of the Court has ever *questioned* this fundamental proposition.

Justice Blackmun was likewise happy to say in *Casey* some 20 years after he wrote *Roe v. Wade* that the blackout on the children's rights issue had still been maintained, not only by the whole Court, including its new appointments, but also by the Solicitor General appearing before the Court under the Republican Administration. *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.")

Thus, completely contrary to what the Press has misled the public to believe about an exhaustive debate involving pro-life versus pro-choice Justices, the children's rights have never been questioned—let alone debated—at the Supreme Court. There has been no dissent on this issue whatsoever within the Court.

Put another way, the decision to deny unborn children their rights has always been unanimous. But, at the same time, the Court has never followed responsible procedures in arriving at such a decision. Indeed, no Member of the Court has ever even questioned the children's rights, let alone required or observed due process of law on their behalf.

The reason for the Court's lack of dissent over the children's loss of rights is that the Members of the Court unanimously buy into the abatement mantra, albeit with dissenting views on strategy. The *Roe* dissenters would

prefer it if the Court generally ignored both the woman's interests and the child's interests, in favor of letting the states have almost absolute control over the abortion decision in both alternatives, so that the state can force women to abort as readily as to turn around and make them keep their babies instead, depending only on what the state so decides. Simply put, the Court's *Roe* dissenters feel that this is the most appropriate pregnancy abatement strategy.

As three pro-*Roe* Justices explain the abatement strategy held by those in the *Roe*-dissenting minority, *Casey*, 505 U.S., at 859:

> If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example.

Hence, rather than letting the state have complete control over childbearing, *Roe* gave women both a qualified right to volunteer for an abortion and a qualified right to refuse an abortion.

There are several reasons why the Court in *Roe* discontinued the states' rights view that was formerly in effect. The main one is that some states, like Texas, are too proud to legalize a grace period for child homicide. So the only way proud states like Texas can have abortions is if the courts tie everyone's hands and "make" them allow abortions. Another reason is that a vehicle was sought for abandoning *Skinner* to permit forced abortion in connection with criminal drug use; thus, by giving women greater latitude to volunteer for an abortion, the Court in *Roe* was able to disguise that aspect of the ruling which also gave states greater latitude to force women to abort. The end result was

that states like Texas could both allow abortion and force women to abort more readily than ever before.

Thus, when looked at in terms of the Nation as a whole, and the criminal drug use of the times, *Roe* provided what the Members of the Court ultimately believed was the most effective pregnancy abatement strategy. This explains *Roe's* persistence.

Notably, the two dissenters in *Roe*—Justices White and Rehnquist—both concurred with the majority on the merits in *Vuitch*, which had quietly laid the groundwork for *Roe's* denial of the rights of the unborn. *Roe v. Wade*, 410 U.S., at 158-159. Hence, the denial of the children's rights in favor of abortion was nothing short of a unanimous effort at the Supreme Court.

In the counterpoise, as far as the pro-choice view is concerned, even Justice O'Connor, the first woman on the Supreme Court, sided with *Roe's* view that a woman has only a qualified right to refuse an abortion, on the basis of the abatement authority of *Jacobson*. This is because some, including women, fear women's chances for advancement as a whole will be ruined unless certain women are pressured to abort rather than allowing them to expose all women to distrust and dishonor. Thus, as Justice O'Connor writes for her three-Member plurality, *Casey*, 505 U.S., at 857:

> *Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S.

261, 278 (1990); cf., e.g., *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Washington v. Harper*, 494 U.S. 210 (1990); see also, e.g., *Rochin v. California*, 342 U.S. 165 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905).

The specific pages cited from *Jacobson*, *viz.* 197 U.S., at 24-30, speak of the life of the community as something above and beyond the life or will of any individual—man, woman, or child. Thus, when speaking of the "protection of life," here it means, in context, the life of the community. Moreover, in *Jacobson* the Court addressed epidemics, and at the time of *Casey* the Court was faced with the drug-related pregnancy epidemic associated with crack cocaine use. Thus, in context, rather than meaning the life of the woman or child, Justice O'Connor's plurality is saying that "a State's interest in the protection of [the life of the community from pregnancy epidemics] falls short of justifying any plenary override of individual liberty claims." *Casey*, 505 U.S., at 857. Their position may be understood as on the one hand supporting Roe's dichotomy, whereby limits are imposed on both a woman's right to volunteer for an abortion and on her right to refuse an abortion, while at the same time signaling a leaning toward tightening concerning the rampant crack baby forced abortions taking place in that day ("falls short of … plenary"). *Ibid.*

Hence, though the Members of the Court may differ as to their particular strategies of pregnancy abatement, they have unanimously rejected: the question of a child's right to life; the suggestion that the decision to volunteer for an abortion should be left to the woman's sole determination; and, the suggestion that the decision to refuse an abortion should be left to the woman's

sole determination. Accordingly, rather than having Members who are either pro-life or pro-choice, the Supreme Court has always been unanimously pro-abatement on the subject of aborting women's pregnancy problems.

However, even though the Supreme Court has always been unanimously pro-abatement, it is important to note that the Court has remained officially open to the ongoing possibility that the suggestion of personhood will one day be established on behalf of the unborn, thereby putting an end to abortion. As the Court explains its position in *Roe v. Wade*, 410 U.S., at 156-157:

> The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.

Accordingly, it makes sense to review, in a modern light, the suggestion of personhood on behalf of the unborn and partially born.

Issue 4: Judicial Consideration of the Risks of Abortion to Women has been Disingenuous.

Justice Douglas opines that having an early abortion is now safer than giving birth. *Doe v. Bolton*, 410 U.S., at 216-217. He cites studies which found that maternal mortality from abortion was roughly one-third that of giving birth. *Id.*, at 216, n. 5. But he fails to factor in the fact that, at least for some women, abortion presents a compounding risk factor. For example, if the risk of crossing the street is proportional to the distance traveled, and the unit risk is one, then the risk of an abortive crossing made by turning around after making it one-third of the way into the crosswalk will be two-thirds (two times

one-third), which is less than one. But if the woman is determined to cross the street eventually anyway, to get to work, raising a family as it were, then the abortive crossing presents a risk factor which compounds her eventual full crossing. Thus, her overall risk is actually one and two-thirds.

The Supreme Court, as Justice Douglas concurs, does give states the authority to restrict the performance of abortions to "qualified medical personnel," *Doe v. Bolton*, 410 U.S., at 216, meaning, the state can limit the performance to licensed physicians. *Roe v. Wade*, 410 U.S., at 114, ¶ 4. But the safer-for-women mantra is plainly betrayed by the fact that the Court would, at the same time, prohibit states from regulating abortion in any other way during the first trimester, or at any time during pregnancy to save the life of the mother. *Id.*, at 164-166, § XI; *Doe v. Bolton*, 410 U.S., at 220-221. Consequently, the ruling in *Roe* literally means that a washed out physician with no surgical background is free to attempt, for example, the abortion of a late-term ectopic pregnancy to save the life of the mother, without any regulation or scrutiny whatsoever from the state. From this it is evident that the woman's safety has never been more than an ostensible concern.

The Court in *Roe* ventures the argument that the basis for criminal abortion laws in times of old was to protect women from a procedure which was much more likely to result in the woman's death than it is today, in other words, that the chief concern in criminalizing abortion in those days was for the woman's safety and not the life of the child. *Roe v. Wade*, 410 U.S., at 148-150. A more likely interpretation is that the maternal mortality associated with

abortions in those days created more scandal than the practice of abortion was meant to abate. Instead, the preferred method of disposing of scandal, in earlier days, appears to have taken the form of postpartum executions, as opposed to the prenatal and partial-birth executions performed today.

Rather than having the woman's safety in mind, the Court's effort to dispose of scandal with abortion explains why it did away with medical regulations for those practicing abortions. The Court plainly accepted the risks to the woman of an unregulated abortion, even if it means "endangering the life of the woman or seriously and permanently injuring her health…." *Doe v. Bolton*, 410 U.S., 220-221 (Douglas, J., concurring).

Of course, an abortion is not merely risky for the unborn child, it is fatal. But the Court's callousness toward children has extended not only to the unborn, but also to pregnant minors as well. For, when faced with abortionists taking advantage of *Roe's* unregulated setting to abuse pregnant young girls, the Court still rejected any protective regulations on behalf of minors seeking abortions. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). At the time, the Court feared that it would be better to accept the shameful risks of abuse rather than to hinder abortions, lest the Nation be forced to witness an outbreak of embarrassing pregnancies among the younger generation.

It was not until the scandal of abuse became so great that it threatened to jeopardize the entire abatement program that the Court finally allowed states to impose what amounts to a chaperon requirement for minors seeking

abortions, that is to say, a consent requirement with ultimately no "veto" power to actually prevent them from having the abortions. *Bellotti v. Baird*, 443 U.S. 622, *passim* (1979). Otherwise, without allowing states to forewarn the abortionist that someone on the outside is looking out for the girl's interests, the Court feared that the "peculiar vulnerability" of children might leave pregnant minors open to more scandal than one had hoped to abate by the abortion itself. *Id.*, at 622-623, ¶ 1.

That the chief object of abortion policy is to abate scandal rather than to benefit women's health is further evidenced by the fact that abortion providers are widely exempted from mandatory reporting of sexual abuse of a minor. Otherwise, the girl could still have the abortion, but without eliminating the scandal.

Disingenuous regard for the health and safety of pregnant women has come not only from the Supreme Court, but also from the Nation's dominant medical society in the field—the American College of Obstetricians and Gynecologists (ACOG), which is often relied upon by the Court as an authority on women's health care. Much in the same way that the Court in *Roe v. Wade*, when instituting abortion, 410 U.S., 153-154, 159, "reaffirmed its initial decision in *Buck v. Bell*," *San Antonio Independent School District*, 411 U.S., at 101, the ACOG, when reversing itself in favor of abortion-on-demand in 1970, at the same time reaffirmed support for the forced sterilization of women. ACOG, "College Policy on Abortion and Sterilization," ACOG Nurses Bulletin 4 (Fall 1970): 2, PubMed abstract ("In cases of sterilization, a recorded opinion of

a knowledgeable consultant should be obtained, unless the procedure is requested by the patient."); *id.*, ACOG Newsletter 14 (September 1970): 2.

Since that time, the safety of women's health care in the United States, based on objective measures such as maternal mortality, has plummeted to now being dead last in the developed world, not only in relative terms, but with maternal mortality actually increasing. GBD 2015 Maternal Mortality Collaborators, "Global, regional, and national levels of maternal mortality, 1990–2015: a systematic analysis for the Global Burden of Disease Study 2015," Lancet, Vol. 388, pp. 1775-1812, 2016. The plummet has greatly accelerated as the ACOG has increasingly moved to shun physicians from its profession who respect life. ACOG, "ACOG Committee Opinion No. 385 November 2007: the limits of conscientious refusal in reproductive medicine," Obstetrics and Gynecology, Vol. 110, No. 5, pp. 1203-1208, 2007. Thus, as the result of abortion policy, the ACOG has become more of an abortion lobby and less of a competent medical society, a change which has been a great detriment to women's health care.

From this it follows that judicial consideration of the risks of abortion to women has been disingenuous because it neglects the overall harm.

Issue 5: There are Constitutional Alternatives to Traditional Abortions Even for the Most Difficult Pregnancies.

U.S. Patent Application Publication No. 20140221735 A1 (Californniaa), titled "Nondestructive means of ectopic pregnancy management," discloses an alternative abortion technology which, in contrast to traditional abortions, is non-homicidal. In other words, neither the baby nor mother will be the victim

of homicide according to an application of the non-homicidal abortion technology. As the distinction is explained, *id.*, at ¶¶ 488-494:

> [0488] B. Non-Concepticidal Abortion
> [0489] Despite being widely used in medical and legal literature, abortion is not a medical or scientific term; rather, it is an ambiguous euphemism having diverse historical meaning. In the early 20th century, the pregnant woman was often called the abortion and she was said to be the one who was aborted (e.g., "whoever aborts a woman"). In more recent times, performance of a procedure to terminate a pregnancy is called the abortion, and the baby is said to be aborted.
> [0490] Abortion itself is a very general term. For example, a space mission can be aborted; but the abortion should not include the killing of the astronaut onboard the spacecraft.
> [0491] The medical and scientific term for the killing of a conceptus is concepticide (conceptus + -cide); the adjective is concepticidal. This term leaves no ambiguity. For example, some may debate whether killing a conceptus before implantation is an abortion, but either way it is clearly an act of concepticide.
> [0492] As one skilled in the art of forensic medicine will appreciate, such as a medical examiner or coroner, the coroner is not concerned about when life begins; instead, the coroner is concerned about how life ended. Thus, having ruled out natural, accidental, and self-inflicted causes of death, the coroner is left with "homicide" as the only possible determination. In the case of a conceptus, the act of homicide is specifically termed concepticide.
> [0493] With the advent of the present invention comes the prospect of performing an "abortion" of a sort that would not be ruled homicide by the coroner. This is in likeness to aborting a space mission without harming the astronaut. In other words, according to the inventive means of non-destructive ectopic pregnancy management, the cause of any death that may ensue should either be natural or accidental, rather than homicide.
> [0494] From this it will be appreciated by one skilled in the arts of law and medicine that an abortion, even if necessary to save the life of the mother, is never legally or medically permissible, unless it is a non-concepticidal procedure, which means it is performed with such care and skill that any death the conceptus may suffer will be ruled natural or accidental, rather than homicide. Thus the invention teaches a means of non-homicidal abortion.

According to one teaching of the new technology, a baby from a life-threatening ectopic pregnancy is surgically delivered with the birth sac intact;

the baby is transferred to a fluid-filled incubator in which nurturing fluids circulate over the birth sac so the baby can continue to exchange oxygen, nutrients, and wastes as in the mother's body; the baby is placed in a transfer capsule and the capsule is placed in the mother's womb after opening her cervix; the cervix is closed and the baby continues to receive a circulation of fluids via catheter lines which are attached to the capsule and connected to an external circulator via the mother's cervix; the capsule then dissolves to leave the baby predisposed to reimplantation. See '735, at abstract, FIGS. 6, 9-10, 13, 33.

Because traditional abortion has served as a fallback solution to abate difficult pregnancies, fewer people, whether liberal or conservative, have been left feeling a pressing need to develop effective non-concepticidal methods of managing fertility and pregnancy. Thus, by relying on homicidal abortions to abate problems, the judiciary hinders progress. Instead, the judiciary should gladly favor the non-homicidal alternative.

CONCLUSION

The emergency petition should be granted.

Respectfully submitted,

_____

Mr. Scott P. Roeder #65192
Ellsworth Correctional Facility
P.O. Box 107
Ellsworth, KS 67439

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing Memorandum was furnished by United States Mail, postage paid, this 21th day of November, 2017, to:

Mr. Derek Schmidt
Kansas Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612

BY: _____

Mr. Eurica Califorrniaa
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575 Lexington Ave., Ste 8004
New York, NY 10022
(212) 754-4426
amb@juridic.org

Order

Supreme Court of Kansas

301 SW 10th Ave.
Topeka, KS 66612
785.296.3229

***** **FLAT FILE COPY** *****

Appellate Case No. 17-118601-S

SCOTT P. ROEDER,
AS NEXT FRIEND OF UNBORN AND
PARTIALLY BORN INDIVIDUALS UNDER
SENTENCE OF DEATH, PETITIONER,
V.
DEREK SCHMIDT,
ATTORNEY GENERAL OF THE
STATE OF KANSAS, RESPONDENT.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

PETITION FOR WRIT OF HABEAS CORPUS FILED BY SCOTT P. ROEDER.

CONSIDERED BY THE COURT AND DISMISSED.

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES.

NOTED BY THE SUPREME COURT.

Date: December 20, 2017

Douglas T. Shima
Clerk of the Appellate Courts

Address of Petitioner:

Mr. Scott P. Roeder #65192
Ellsworth Correctional Facility
P.O. Box 107
Ellsworth, KS 67439

Address of Custodian:

Mr. Derek Schmidt
Kansas Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612

IN THE SUPREME COURT OF THE STATE OF KANSAS

Scott P. Roeder, As Next Friend of Unborn and Partially Born Individuals under Sentence of Death, *Petitioner,* *vs.* Derek Schmidt, Attorney General of the State of Kansas, *Respondent.*	Case No. _____ EMERGENCY PETITION *****CAPITAL CASE***** Executions Scheduled: Daily K.S.A 60-1501

EMERGENCY HABEAS CORPUS PETITION UNDER K.S.A. 60-1501
FOR A STAY OF EXECUTION OF SENTENCE OF DEATH

S

Address of Petitioner:

Mr. Scott P. Roeder #65192
Ellsworth Correctional Facility
P.O. Box 107
Ellsworth, KS 67439

Address of Custodian:

Mr. Derek Schmidt
Kansas Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612

Noted by the
~~Supreme Court~~
12/20/17

IN THE SUPREME COURT OF THE STATE OF KANSAS

Scott P. Roeder,
As Next Friend of Unborn and
Partially Born Individuals under
Sentence of Death,

Petitioner,

vs.

Derek Schmidt,
Attorney General of the
State of Kansas,

Respondent.

Case No. _____

Memorandum

*****CAPITAL CASE*****

Executions Scheduled: Daily

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES

17-118601-A