No. 04-1653

In The
Supreme Court of the United States

Jacquelyn Finney

Petitioner,

v.

Thomas P. Nugent et al.

Respondents.

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR REHEARING ON BEHALF OF THE PETITIONER JACQUELYN FINNEY

To the Honorable Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Petitioner, Jacquelyn Finney, hereby prays for a 60-day extension of time to file a Petition for Rehearing regarding this Court's denial of her petition for a writ of certiorari issued in this case on October 3, 2005. The 25-day period provided by this Court's Rule 44 for filing a Petition for Rehearing will expire on Thursday, October 27, 2005. Rule 44.1 provides that the Court or a Justice may extend the time for the filing of a Petition for Rehearing, and Rule 30.3 directs that an application for such an extension be made to an individual Justice. The October 3rd decision arises out of a matter before the U.S.

Court of Appeals for the Ninth Circuit. Hence, this Application is made to Justice O'Connor in her capacity as the Circuit Justice for the Ninth Circuit. Rule 22.3.

After due consideration, Petitioner Jacquelyn Finney believes that a Petition for Rehearing is appropriate in this case. It will be presented in good faith and not for any purposes of delay. There is no prejudice to Respondents. California Rule of Court 989.3 (CRC 989.3) has evaded review for a decade, but for petitioner's challenge.

Solely due to the misapplication of the Rooker-Feldman doctrine, CRC 989.3 remains immune from petitioner's constitutional challenge for compliance with the Fourteenth Amendment and the Americans with Disabilities Act, Title II. Immunizing CRC 989.3 causes California judges, administrators and court entities to be immune from suit by petitioner for constitutional injuries under color of that state law.

> "[I]t has never been suggested that state court action is immunized from the operations of those [Fourteenth Amendment] provisions simply because the act is that of the judicial branch of state government." *Shelley v. Kraemer*, 334 U. S. 1 (1948).

The practical result of this Court's refusal to grant this petition is to give legal sanction to an unconstitutional burden on the fundamental constitutional right of petitioner and six million disabled Californians to access the state's courts.

Petitioner seeks an extension of time for filing such a Petition for five primary reasons:

I. <u>Petitioner is Totally Disabled from Polio and is Proceeding Pro Se</u>

Petitioner is totally disabled from polio and intractable pain. She is a non-attorney, proceeding pro se, assisted only by her husband, who is also her caregiver. She has complied with every time deadline, as required by the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure and the Rules of the Supreme Court.

She has never requested an extension of time either to accommodate her severe disabilities or to level the playing field with respondents, the California court system and its judges, who are attorneys supported by the resources of the State of California. Petitioner's strict compliance with the myriad of complex court rules has been accomplished, while suffering unconscionable emotional distress and physical pain.

This Court has denied petitioner access to the federal courts for any remedy.

> "Surely a requirement that a [disabled person] run a gauntlet of [disability discrimination and retaliation] in return for the [fundamental right to access the courts] can be as demeaning and disconcerting as the harshest of racial epithets… [Petitioner's] allegations in this case - which include not only pervasive harassment but also [fraudulent] conduct of the most serious nature - are plainly sufficient to state a claim for 'hostile environment' [disability discrimination]." *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986).

This Court is not required to accommodate petitioner's "special needs" and does not advertise that it offers accommodations for the special needs of disabled citizens. However, petitioner requests that this Court grant her application for extension of time in recognition of the spirit of the Americans with Disabilities Act, *Tennessee v. Lane,* and the Congressional Accountability Act of 1995.

The U.S. House of Representatives Committee on the Judiciary's website advertises that the Committee "strives to accommodate/meet the needs of those who require special assistance." (Attachment No.1). In that petitioner's request is modest and reasonable, it is appropriate that this Court exercise its discretion to accommodate her special needs.

It would appear inconsistent and inexplicable for this Court to ignore petitioner's special needs, when the U.S. Congress strives to accommodate disabled persons' special needs for access.

II. This Court Has Inconsistently and Selectively Applied *Exxon Mobil v. Saudi Basic Industries* and *Tennessee v. Lane*

This Court has subjected petitioner to disparate treatment by granting petitions for writs of certiorari in two cases in light of *Exxon Mobil v. Saudi Basic Industries Corp.*, 544 U.S.__ (2005), while denying petitioner's petition. *Exxon Mobil's* stringent limitations on the application of the Rooker-Feldman doctrine demand that the judgment of the court below be vacated.

On Monday, October 3, 2005, this Court granted a petition for a writ of certiorari in *Sophocleus v. Alabama Department of Transportation* (04-1113). The judgment was vacated and the case remanded to the Eleventh Circuit for further consideration in light of *Exxon Mobil v. Saudi Basic Industries Corp.* Chief Justice Roberts took no part in the consideration or disposition of this petition.

Inexplicably, on Monday, October 3, 2005 this Court, also without the participation of Chief Justice Roberts, selectively and inconsistently refused to apply *Exxon Mobil's* stringent limitations on the Rooker-Feldman doctrine to the undisputed facts of petitioner's case. The Rooker-Feldman doctrine does not prohibit a facial constitutional challenge to a state law. In addition, this Court's affirmation of *Popovich v. Cuyahoga County Court*, 539 U.S. 941 (2003) as decided in *Tennessee v. Lane*, 124 U.S. 1978 (2004) confirms petitioner's argument that the Rooker-Feldman doctrine does not deprive the federal courts of jurisdiction to remedy disability discrimination by judges in state court proceedings.

On Tuesday, October 11, 2005, this Court, with the participation of Chief Justice Roberts, also granted a petition for a writ of certiorari in *Stacy v. Hermitage* (05-199).

The judgment was vacated and the case was remanded to the Third Circuit for further consideration in light of *Exxon Mobil.*

This Court's pattern of the selective and inconsistent application of its *Exxon Mobil* precedent creates the strong appearance of concerted bias against petitioner and the protected group of disabled persons. She has presented undisputed evidence of judicial misconduct and fraud on the court that nullifies disabled persons' fundamental constitutional right to access the California courts as guaranteed by ADA, Title II. This Court refused to apply its precedents to petitioner's undisputed facts, denying her any remedy.

Absent the jurisdiction of federal courts to enforce petitioner's fundamental constitutional right to challenge California Rule of Court 989.3 for compliance with the requirements of the Fourteenth Amendment and ADA, Title II and to sue California judges, administrators and court entities for disability discrimination and retaliation under color of state law, *Tennessee v. Lane* and ADA Title II are unenforceable.

This Court prejudiced petitioner by denying her petition without Chief Justice Roberts' participation. This Court also prejudiced six million disabled Californians and all disabled Americans, who are at risk of sanctions, discrimination and retaliation by judges under color of state law, which cannot be challenged due to this Court's inexplicable pattern of the inconsistent and selective application of its precedents in *Exxon Mobil v. Saudi Basic Industries* and *Tennessee v. Lane.*

Especially disturbing is the fact that the five Justices, who expressed their horror at state courts' perverse history of disability discrimination in *Tennessee v. Lane,* and who also expressed their support for broad jurisdiction by the federal courts in *Exxon*

Mobil v. Saudi Basic Industries, have denied any remedy to petitioner. She has been grievously harmed by state judges under color of a state law that was originally proposed, affirmed and promoted by a federal judge in conspiracy with state judges.

This Court has sanctioned a state law that purges the California courts of disabled Americans, which is repugnant to the Constitution. In *Tennessee v. Lane,* this Court assured disabled Americans that their fundamental Constitutional right to access state courts cannot be abridged by state laws, policies, customs and practices. This Court's precedents have guaranteed to African-Americans, women, homosexuals and other groups that their fundamental constitutional right to be free of discrimination cannot be abridged by state laws, policies, and practices.

This Court's denial of any remedy to petitioner has the practical effect of declaring to disabled Americans that they are inferior to all other human beings and are undeserving of the enforcement of their fundamental constitutional right to access the courts as guaranteed by ADA, Title II.

This Court's dereliction of its duty to enforce *Tennessee v. Lane,* and *Exxon Mobil* has exacerbated the tension and conflict between the Judiciary and the Congress. This Court's denial is in conflict with Congressional support of petitioner's fundamental constitutional right to access the courts. On July 28, 2005, the *Congressional Record* reported that Speaker Hastert had referred a petition by Jacquelyn Finney in support of the fundamental constitutional right to access the courts as guaranteed by the Americans with Disabilities Act, Title II to the U.S. House of Representatives Committee on the Judiciary (Page H7567).

III. Decisions Produced by Judicial Misconduct and Fraud on the Court Are in Essence Not Decisions at All and Never Become Final

California Rule of Court 989.3 was originally proposed, affirmed and promoted by Ninth Circuit District Judge Dickran Tevrizian. This undisputed fact, on its face, has improperly influenced the disposition of petitioner's case.

The pattern of multiple, serious, egregious legal errors involving the denial of federal jurisdiction to remedy the violation of petitioner's fundamental constitutional right to access the courts as a disabled person, in tandem with a federal judge's proposal and affirmation of the state law that caused petitioner's constitutional injuries, provides undeniable evidence of judicial misconduct and fraud on the court that has irreparably harmed petitioner.

It is inexplicable and prejudicial that this Court has denied certiorari, as the disposition of petitioner's case by the court below was improperly influenced.

> "[T]ampering with the administration of justice in this manner involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." *Levander v. Prober*, 180 F.3d 1114, 1119 (9th Cir. 1999).
>
> "We have the inherent power to vacate the judgment… fashion an appropriate remedy." *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *Hazel-Atlas v. Hartford*, 322 U.S. 238 (1944).
>
> "A single instance of serious, egregious legal error, particularly one involving the denial to individuals of their basic or fundamental rights, may amount to judicial misconduct." (Jeffrey M. Shaman, Judicial Ethics, 2 Geo J. Legal Ethics 1, 9 1988)…

Judge Tevrizian has conspired with California judges and other individuals to commit a fraud on the court, which is:

> "a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case…" *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d 180, 195 (8th Cir. 1976)… A decision produced by fraud on the court is not in essence a decision at all, and never becomes final." *Kenner v. C.I.R.*, 387 F.3d 689 (1968).

This conspiracy violates disabled persons' fundamental constitutional right to access the California courts under color of state law in violation of the Fourteenth Amendment and Americans with Disabilities Act, Title II. It is the duty of this Court to consistently and nonselectively apply its precedents to permit federal courts the jurisdiction to decide the merits of this case.

IV. This Court's Failure to Enforce *Tennessee v. Lane* Denies Disabled Americans Protection from HMO Coercion to Commit Suicide Under Duress

On October 5, 2005, this Court heard oral arguments in *Gonzales v. Oregon* (04-623). This Court's decision will determine the fate of physician-assisted suicide and the metastasis of that practice to other states.

Petitioner's HMO, Kaiser Permanente, has actively solicited its physicians in Oregon to participate in physician-assisted suicide. Kaiser Permanente may be involuntarily terminating the lives of mentally incompetent, disabled patients under duress. (Attachment No. 2) When petitioner and other disabled patients cannot speak freely with their doctors and are denied necessary medical care, their vulnerability to involuntary physician-assisted suicide increases.

Petitioner is totally disabled from polio and intractable pain. Kaiser Permanente has progressively denied her primary and specialist medical care absent her refusal to agree to prior restraint on her speech in her physician-patient relationships. In August 2005, Kaiser denied petitioner access to OB-GYN care due to her refusal to agree to additional prior restraint on her speech regarding the enforcement of her ADA Title III rights and protections.

HMO coercion has resulted in the denial of medical care to petitioner and by extension to the entire class of disabled patients. Absent patients' ability to access the

courts, HMOs' prior restraint on speech and denial of medical care unconscionably creates a hostile environment that increases patients' vulnerability to unendurable coercion to involuntarily consent to physician-assisted suicide. Should, for example, petitioner and other disabled patients be denied sufficient pain control, they will be at grave risk of succumbing to pressure to involuntarily terminate their lives.

Petitioner, as a disabled HMO patient, cannot access the courts due to a pretextual jurisdictional barrier, preventing her opposition to *de facto* eugenics policies and practices that were condemned by *Tennessee v. Lane*. Jurisdictional barriers that prevent the disabled from demanding their right to ethical treatment by their physicians are antithetical to this Court's rejection of the right to physician-assisted suicide.

> "[P]rotecting those who are not truly competent or facing imminent death or whose decisions to hasten death would not be truly voluntary are are sufficiently weighty to justify a prohibition against assisted suicide…" O'Connor, J. concurring, *Washington v. Glucksberg*, 521 U.S. 702 (1997)

This Court's willful blindness to the fact that its precedents in *Exxon Mobil v. Saudi Basic Industries, Tennessee v. Lane* and *Washington v. Glucksberg* are inextricably intertwined ignores their combined effects on the lives of ordinary Americans. The collective effect of these precedents on petitioner denies federal courts the jurisdiction to enforce her fundamental constitutional right as a disabled person to access state courts to remedy unconscionable denial of medical care that increases her vulnerability to coercion to commit suicide under duress.

V. The Constitutionality of *Tennessee v. Lane*, As-Applied to State Prisons, Is Inextricably Intertwined with Enforcement of Disabled Americans' Fundamental Constitutional Right to Access State Courts

This Court granted certiorari in the consolidated cases of *Goodman v. Georgia*

(04-1236) and *U.S. v. Georgia* (04-1203), scheduled for oral argument on November 9, 2005. Should this Court extend the constitutionality of the ADA Title II to state prisons, its abstract declaration of a fundamental constitutional right to disabled prisoners will be as vulnerable to tricks designed to evade its enforcement as is *Tennessee v. Lane*.

Petitioner is entitled to the same constitutional guarantee of equal protection and due process that this Court does provide and may further extend to prisoners pursuant to ADA Title II.

Request

In order to fully assimilate all these developments and present the strongest and most responsible grounds for rehearing, and based upon the entire record in this matter, Jacquelyn Finney respectfully requests that her time for filing a Petition for Rehearing be extended to and include Thursday, December 1, 2005.

Respectfully submitted,

Jacquelyn Finney, Pro Se
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Attachments: No. 1. "Special Needs" U.S. House of Representatives – Committee on the Judiciary website, October 13, 2005.

No. 2. "Doctors of Death – Kaiser Solicits Its Doctors to Kill," by Wesley J. Smith, National Review, August 19, 2002.

October 14, 2005

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In The Supreme Court of the United States

Jacquelyn Finney

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Thomas P. Nugent, et al.

Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that he has, on this 14th day of October, 2005 caused a copy of the foregoing Application for Extension of Time to File a Petition for Rehearing on Behalf of the Petitioner Jacquelyn Finney was shipped by FedEx (Airbill No. 8116 0458 4063), prepaid to Arlene Prater, (Law Offices of Best Best & Krieger LLP, 655 West Broadway, 15th Floor, San Diego, California 92101-3301. Tele. No. 619/525-1300) counsel for the Respondents herein and further certifies that all parties required to be served have been served.

_____

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Committee Schedule
Legislation & Oversight
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Print Shop
Related Links
Contact Judiciary
Minority Website
Special Needs

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Special Needs

Section 210 of the Congressional Accountability Act of 1995, applies the rights and protections covered under the Americans with Disabilities Act of 1990 to the United States Congress. Accordingly, the Committee on Judiciary strives to accommodate/meet the needs of those requiring special assistance. The Commitee's main hearing room located in 2141 Rayburn House Office Buidling is equipped with assisted listening devices for those in need.

Should you need special accommodation, please contact the Committee on Judiciary in advance of the scheduled event at 202-225-3951.

Thank you.

Doctors of Death: Kaiser Solicits Its Doctors to Kill

By: Wesley J. Smith
National Review Online
August 19, 2002

Original article

When liberals ask me why they should oppose physician-assisted suicide (PAS), I always reply, "I can summarize a big reason in just three letters: HMO."

That always raises an eyebrow. Liberals hate HMOs.

Then I ask, "Do you know how much it costs for the drugs used in an assisted suicide?" They usually shake their heads, no. Answering my own question, I say, "About forty bucks," adding, "Since HMOs make money by cutting costs, and it could cost $40,000 (or more) to provide suicidal patients with proper care so that they don't want assisted suicide, the economic force of gravity is obvious." More often than not, my liberal interlocutor will say, "Gee, I never thought about that before," and agree that the HMO factor is a very serious problem confronting the assisted-suicide movement.

Most people haven't yet made the money connection between assisted suicide and the increasing strains on health-care budgets. That may be because reporters, who are usually eager to expose potential financial conflicts of interest in other public-policy issues, tend to be blind to the economic stakes involved in the assisted-suicide controversy. They prefer to see it as a matter of "choice," or of "compassion," or of modernism-versus-religion. Yet, the realization that assisted suicide will, in the end, be largely about money, is becoming increasingly difficult to ignore.

Take Oregon, where assisted suicide is legal. While the assisted-suicide law does not compel any doctor or HMO to participate in the self-destruction of patients, only Catholic HMOs have said no. Indeed, Kaiser/ Permanente Northwest's doctors are known to have written lethal prescriptions under the Oregon law.

But now, Kaiser isn't merely permitting doctors to assist in patient suicides, it is actively soliciting its doctors to participate in the deadly practice. As revealed by the anti-assisted-suicide medical group Physicians for Compassionate Care, a Kaiser executive recently e-mailed a memo to more than 800 Kaiser doctors soliciting PAS-doctor volunteers.

The memo reveals that to the apparent chagrin of Kaiser, to their credit, few plan doctors are willing to participate in the killing of their own patients. Hence, the executive urges any Kaiser doctor willing to "act as Attending Physician under the [assisted suicide] law for YOUR patients" and doctors "willing to act as

"Attending Physician under the law for members who ARE NOT your patients" to contact "Marcia L. Liberson or Robert H. Richardson, MD, KPNW Ethics Services." (Emphasis in the memo.) Since "attending physicians" write the lethal prescriptions under the Oregon law, Kaiser is apparently willing to permit its doctors to write lethal prescriptions for patients they have not treated.

For opponents of assisted suicide who are closely following events in Oregon, Robert Richardson is already notorious as the HMO administrator who green-lighted the assisted suicide of Kate Cheney. Cheney, as reported by the Oregonian, was a terminal cancer patient who was probably suffering from dementia when she asked for a lethal prescription, raising serious and significant questions about her mental competence. Rather than prescribe lethal drugs, her doctor referred her to a psychiatrist who reported that "she does not seem to be explicitly pushing for this." He also determined that she did not have the "very high capacity required to weigh options about assisted suicide." Accordingly, the psychiatrist nixed the lethal prescription.

Advocates of legalized assisted suicide might, at this point, smile happily and say that this is the way the law is supposed to operate: a vulnerable and perhaps incompetent woman's life had been protected. But proving that "protective guidelines" don't really protect, that wasn't the end of Cheney's story. Her daughter insisted that Kaiser permit another psychiatric opinion. Kaiser agreed to the request.

This time, the consultation was a clinical psychologist rather than an M.D. psychiatrist. Like the first report, the psychologist found that Cheney had significant memory problems. For example, she could not recall when she had been diagnosed with terminal cancer. The psychologist also worried that Cheney decision to die "may be influenced by her family's wishes." Still, despite these reservations, the psychologist determined that Cheney was competent to commit suicide.

The final decision to approve the assisted suicide was made by Richardson. Despite two mental-health professionals significant concerns about Cheney's mental state and the potential that familial pressure was involved in her decision, after he interviewed Cheney, Richardson approved the writing of a lethal prescription.

It is worth noting that Cheney did not take the poison pills right away. Her assisted suicide took place only after she was sent to a nursing home for a week. Tellingly, she took the pills on the very day of her return home. No doctor was present. Nor was her mental status assessed at that time. That is because under the Oregon law, once the prescription is written, death doctors need have no more to do with the suicidal patient.

When the Cheney case became public, Richardson angrily claimed that his decision had nothing to do with money. And, to be fair, there is no doubt that if the relatively few people reported as committing assisted suicide so far in Oregon is correct, Kaiser and other participating HMOs have not yet saved a great deal of money by agreeing to facilitate the assisted suicides of their terminally ill members. But if the reluctance of good doctors such as those currently refusing to participate in-patient self-killing at Kaiser is ever overcome, the financial facts could change. Indeed, if assisted suicide ever became nationalized and a routine "medical treatment," significant money could be saved — and hence made — by the HMO industry from the hastened deaths of their patients.

This is the view of none other than assisted-suicide guru, Derek Humphry, cofounder of the Hemlock Society and a heavy lifter in support of the Oregon law. Humphry now claims that money is the "unspoken argument" in favor of legalizing assisted suicide. Specifically, in his most recent book Freedom to Die, co-

authored with Mary Clement, the authors write that "the hastened demise of people with only a short time to left would free resources for others," an amount they predict could run into the "hundreds of billions of dollars." Moreover, the authors claim that "economic necessity" is the ultimate force driving the assisted-suicide movement, to the point that it "is the main answer to the question [about legalizing PAS], 'Why Now?'"

Logic is certainly on their side. With the advent of managed care, profits in health care increasingly come from cutting costs. With assisted suicides costing such little money, what "treatment" could be more cost effective than assisted suicide? And since it is a well-known human failing that our values often follow our pocketbooks, ignoring the significant financial stakes involved in the assisted-suicide debate is to overlook a crucial part of the story.

— Wesley J. Smith is an attorney for the International Task Force on Euthanasia and Assisted Suicide and a senior fellow at the Discovery Institute. He is the coauthor of Power Over Pain: How To Get The Pain Control You Need. ≤≤

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