IN THE

Supreme Court of the United States

No. 70-18

JANE ROE, *et al.*, *Appellants*,

v.

HENRY WADE, *Appellee*.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF AMICUS CURIAE OF THE ATTORNEYS GENERAL OF ARIZONA, CONNECTICUT, KENTUCKY, NEBRASKA AND UTAH

GARY K. NELSON
Attorney General of the State of Arizona
State Capitol
Phoenix, Arizona 85007

ROBERT K. KILLIAN
Attorney General of the State of Connecticut
Trinity Street
Hartford, Connecticut 06105

ED W. HANCOCK
Attorney General of the Commonwealth of Kentucky
State Capitol
Frankfort, Kentucky 40601

CLARENCE A. H. MEYER
Attorney General of the State of Nebraska
Department of Justice
Lincoln, Nebraska 68509

VERNON B. ROMNEY
Attorney General of the State of Utah
State Capitol
Salt Lake City, Utah 84114

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INTEREST OF THE AMICI CURIAE

The *amici* in this brief are the attorneys general of five states in which the statutes governing the performance of abortions are similar to the statute of the State of Texas; and which statutes have also been challenged before three-judge federal courts on constitutional grounds. It is the considered opinion of these *amici,* for reasons more fully explored in this brief, that this matter should be remanded to the United States District Court for the Northern District of Texas, affirming the denial of injunctive relief and vacating the declaratory judgment as to the constitutionality of the Texas abortion statute.

BRIEF

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QUESTION PRESENTED

This case raises an issue of jurisdiction. The jurisdictional question is whether the three-judge federal panel below ought to have refrained from granting declaratory relief in this matter.

SUMMARY OF ARGUMENT

The three-judge federal court below ought to have refrained from granting declaratory relief in this case.

ARGUMENT

DECLARATORY RELIEF WAS IMPROPERLY GRANTED IN THIS MATTER

In this case, the original request for the convention of a three-judge federal court was based on the allegation that certain rights guaranteed by the Constitution of the United States were

infringed upon by the existence of a state statute proscribing the performance of abortions except in certain limited situations. It is submitted that such an allegation, *per se,* deserves careful scrutiny.

In the first place, none of the original plaintiffs had been threatened with criminal prosecution under the challenged statute, no harassment had occurred, and the possibility of prosecution had never even been intimated. It is one thing to call upon the federal judiciary when *enforcement* of a state statute is alleged to interfere with one's alleged constitutionally-protected rights; it is quite another to turn to the federal judiciary with the complaint that the mere *existence* of a state statute interferes with such alleged rights. To call upon the federal judiciary in the latter situation is to seek an advisory opinion.

In the second place, this Court need not be reminded that the mere allegation of interference with one's federal rights does not, of itself, warrant the entrance of the federal judiciary into the arena. This Court has limited the interference of the federal courts to certain specific areas. It is respectfully submitted that the court below ought to have refrained from exercising jurisdiction and, further, that the authority for the entrance of that court into this matter was--and remains--non-existent. For these reasons, these *amici* urge that the case should be remanded to the court below with an order vacating the declaratory judgment which it originally granted.

The doctrine of federal abstention was perhaps most precisely enunciated by Mr. Justice Frankfurter in his careful opinion in *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941). In that case, speaking of three-judge federal panels, he said that: "(F)ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. . . ." (at 500). When discussing the possible "friction with state policies" in the area of criminal law, Justice Frankfurter cited *Fenner v. Boykin,* 271 U.S. 240 (1926) and *Spielman Motor Co. v. Dodge,* 295 U.S. 89 (1935). He noted that these and other cases,

> " ... reflect a doctrine of abstention appropriate to our federal system whereby the federal courts 'exercising a wise discretion' restrain their authority because of 'a scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." 312 U.S. at 501.

Fenner v. Boykin, supra, involved a challenge to the constitutionality of a Georgia statute which proscribed various dealings in certain commodities and also proscribed the maintenance of an office where such transactions could be facilitated. Appellants, citizens of another state (which, it is submitted, is of no consequence herein) established such an office and were threatened with arrest and prosecution. They challenged the validity of the Georgia statute upon the ground that it interfered with the free flow of commerce among the States and was thus violative of the federal constitution. This Court affirmed the dismissal below with the observation that *Ex Parte Young,* 209 U.S. 123 (1908) and other cases,

> " ... have established the doctrine that when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done." 271 U.S. at 243-244.

This Court made the further observation, which is especially telling herein:

> "The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of

> federal questions. An intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court." *Ibid.* at 244.

Amici submit that this last-quoted portion of the decision is worthy of emphasis. To say that the condition would be "intolerable" is to engage in understatement if, even without the least intimation of a possible prosecution and even without the violation necessary to a prosecution, individuals are to be allowed to contest selected portions of the criminal codes of the various States in original Federal court proceedings.

The other case cited by Mr. Justice Frankfurter when discussing the possibility of "friction with State policies" in the area of criminal law is *Spielman Motor Co. v. Dodge, supra.* That case involved a challenge, before a three-judge federal panel, to a New York statute which sanctioned criminal penalties for its violation. The challenge was based on the contention that the statute in question violated the New York Constitution as being an "improper delegation of legislative power" and the Constitution of the United States as "effectuating a deprivation of liberty and property without due process of law. . . ." Therein, Mr. Chief Justice Hughes, speaking for the Court, held that the conditions which would allow the proper interference of a three-judge federal panel in the administration of a State's criminal code, were as follows:

> "We have said that it must appear that 'the danger of irreparable loss is both great and immediate;' otherwise, the accused should first set up his defense in the State court, even though the validity of a Statute is challenged. There is ample opportunity for ultimate review by this Court of federal questions." 295 U.S. at 95-96, citing *Fenner v. Boykin, supra,* at 242-244.

Douglas v. City of Jeannette, 319 U.S. 157 (1943), involved the convention of a three-judge federal court in which certain members of a religious sect sought to restrain the enforcement of a municipal ordinance on the ground that, as applied to them, it

abridged "the guarantees of freedom of speech, press and religion of the First Amendment made applicable to the states by the Fourteenth" (at 159). Jurisdiction therein was alleged to rest on the Constitution and laws of the United States, including the Civil Rights Act of 1871. The right of federal district courts to jurisdiction in actions brought under the Civil Rights Act had previously been established. *Hague v. C.I.O.*, 307 U.S. 496 (1939). However, Chief Justice Stone, speaking for the Court in *Jeannette,* noted that in spite of the authority of the federal district court--and in spite, also, of the certain unconstitutionality of the ordinance–the plaintiffs were entitled to the relief they sought "only if they establish a cause of action in equity," 319 U.S. at 162. He further stated that:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts." *Ibid.*

The Chief Justice observed that imminent prosecution, even under a statute or ordinance allegedly violative of the federal Constitution, did not warrant the interference of the federal courts and said that:

> "Where the threatened prosecution is by State officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate' (citing cases)," 319 U.S. at 163-164.

Amici acknowledge the propriety and, often, the necessity of federal court intervention when prosecution, or threatened prosecution, show an immediate danger of irreparable damage to the accused. However, the decisions of this Court, in our reading of them, establish that where prosecution or the threat of

prosecution is absent then, *a fortiori,* the danger of irreparable damage is absent and the intervention of the federal judiciary is unwarranted in such a situation in the administration of state criminal laws.

In *Dombrowski v. Pfister,* 380 U.S. 479 (1965), the convention of the three-judge panel below had been based on the allegation that certain Louisiana statutes were violative of the First and Fourteenth Amendment guarantees securing freedom of expression; and also that the officers charged with enforcement of these laws had engaged in the bad faith harassment of the plaintiffs.

In that case Mr. Justice Brennan, speaking for the Court, noted that:

> "In *Ex Parte Young*, 209 U.S. 123, the fountainhead of federal injunctions against state prosecutions, the Court characterized the power and its proper exercise in broad terms: it would be justified where state officers '. . .threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act violating the Federal Constitution. . . .' 209 U.S. at 156. Since that decision, however, considerations of federalism have tempered the exercise of equitable power for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." 380 U.S. at 483-484.

Mr. Justice Brennan, citing *Douglas v. City of Jeannette, supra,* at 164, further observed that the abstention of federal equity courts is warranted where the defendant is not " 'threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith,' " *Ibid.* at 485.

The decision in *Dombrowski* did, of course, narrow the grounds for federal abstention. In that case, however, this Court based this limitation upon the facts that the prosecution–or threatened prosecution–would constitute an undue interference with First and Fourteenth Amendment rights guaranteeing

freedom of expression; and also on the fact that the record presented a sorry display of harassment on the part of the State officers. The decision in *Dombrowski* is readily distinguishable from the case at bar. The main thrust of the the challenge to the Texas abortion statute below was in no real way related to the freedom of expression; and no harassment, prosecution or threat of prosecution was alleged. What was alleged was a *fear* of prosecution should the plaintiffs below engage in actions violative of the Texas criminal law. No where, in the cases decided by this Court, can justification be found for the interference of federal courts of equity in such a situation.

In a recent series of cases, *Younger v. Harris,* 401 U.S. 37 (1971), *Boyle v. Landry,* 401 U.S. 77 (1971),*Samuels v. Mackell,* 401 U.S. 66 (1971), and companion cases, this Court discussed in great detail the grounds for interference by the federal judiciary in the administration of state criminal laws. The actual facts in *Younger* are, of course, different from those in the case at bar in that injunctive relief was sought from a three-judge federal court *after* the plaintiff therein had been indicted in a state criminal proceeding. This Court held that the grant of such injunctive relief was improper. What is most applicable to the instant case challenging the Texas abortion statute, however, is that *Harris*–in his suit seeking federal injunctive relief–was joined by three other individuals. Two of these, "Jim Dan and Diane Hirsch intervened as plaintiffs in the suit, claiming that the prosecution of Harris would inhibit them as members of the Progressive Labor Party, from peacefully advocating the program of their party. . . ." *Younger v. Harris, supra,* at 39. A third individual, "Farrell Broslawsky, an instructor in history at the Los Angeles Valley College, also intervened claiming that the prosecution of Harris made him uncertain as to whether he could teach about the doctrines of Karl Marx or read from the Communist Manifesto as part of his classwork." *Ibid.* at 39-40. As to these three individuals Mr. Justice Black, in speaking for this Court, said:

> "Whatever right Harris, who is being prosecuted under the state syndicalism law may have, Dan, Hirsch and Broslawsky cannot share it with him. If these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had

> found this allegation to be true--either on the admission of the State's district attorney or on any other evidence--then a genuine controversy might be said to exist. But here appellees Dan, Hirsch and Broslawsky do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible. They claim the right to bring this suit solely because, in the language of their complaint, they 'feel inhibited.' We do not think that this allegation, even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution. A federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases." *Ibid.* at 42.

It is submitted that the situation of Intervenor Hallford in the case at bar is similar to that of Harris; while the situation of the original plaintiffs is similar to that of those who joined with Harris in his federal suit. The fact that injunctive relief is sought from a federal court before or after the initiation of criminal proceedings will make little difference if such courts are willing to grant such relief on anything approaching a regular basis. It is submitted that it would subvert the entire thrust of the federal abstention doctrine if individuals, desiring to engage in certain actions which are proscribed by a state criminal statute, are free--even in the absence of any harassment, threat of prosecution or true infringement upon First Amendment guarantees of freedom of expression--to engage the federal courts in an attempt to have every statute which allegedly interferes with their federal rights by its very existence declared unconstitutional.

In speaking of the right of Harris himself to federal injunctive relief, Justice Black noted that it was incorrect to assume that the *Dombrowski* decision made such relief available "without regard to any showing of bad faith or harrassment, whenever a state statute is found 'on its face' to be vague or overly broad, in violation of the First Amendment." *Ibid.* at 50. Neither

harassment nor bad faith prosecution was ever established in the case at bar; nor would the record permit such a finding.

Boyle v. Landry, supra, involved two sets of plaintiffs in an action seeking declaratory and injunctive relief against the enforcement of certain Illinois statutes and ordinances of the City of Chicago. In obviously speaking of those plaintiffs against whom no criminal prosecutions had been instituted Mr. Justice Black, in speaking for the Court, said:

> "It is obvious that the allegations of the complaint in this case fall far short of showing any irreparable injury from threats or actual prosecutions under the intimidation statute or from any other conduct by state or city officials. Not a single one of the citizens who brought this action had ever been prosecuted, charged or even arrested under the particular intimidation statute which the court below held unconstitutional. All the charges of the complaint deal broadly and generally with all the state statutes and city ordinances that the appellees originally challenged. In fact, the complaint contains no mention of any specific threat by any officer or official of Chicago, Cook Country or the State of Illinois to arrest or prosecute any one or more of the plaintiffs under that statute either one time or many times. . . .the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future." *Ibid.* at 81.

CONCLUSION

Amici submit that, absent of showing of harassment or bad faith prosecution and absent a showing of true infringement upon the freedom of expression, the grant of anticipatory relief *via* declaratory judgments or injunctions against state criminal statutes on the allegation that the mere existence of the statute supposedly infringes upon federal constitutional rights, runs counter to the concept of "Our Federalism" discussed by Justice Black in *Younger v. Harris, supra,* at 44-47. This Court's granting

of the right of the plaintiffs below to bring an action such as this could not help but encourage undue interference with the administration of the criminal codes of all the states by the local federal courts.

Therefore, these *amici* request, that this matter be remanded to the United State District Court for the Northern District of Texas affirming the denial of injunctive relief and vacating the declaratory judgment granted below.

Respectfully submitted,

GARY K. NELSON
Attorney General of the State of Arizona
State Capitol
Phoenix, Arizona 85007

ROBERT K. KILLIAN
Attorney General of the State of Connecticut
Trinity Street
Hartford, Connecticut 06105

ED W. HANCOCK
Attorney General of the Commonwealth of Kentucky
State Capitol
Frankfort, Kentucky 40601

CLARENCE A. H. MEYER
Attorney General of the State of Nebraska
Department of Justice
Lincoln, Nebraska 68509

VERNON B. ROMNEY
Attorney General of the State of Utah
State Capitol
Salt Lake City, Utah 84114

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