

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1970

No. 70-18

JANE ROE, JOHN DOE, AND MARY DOE, *Appellants*,  
JAMES HUBERT HALLFORD, M.D., *Appellant-Intervenor*

v.

HENRY WADE, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS

---

---

REPLY TO JURISDICTIONAL STATEMENT

---

---

CRAWFORD C. MARTIN  
Attorney General of Texas

NOLA WHITE  
First Assistant Attorney General

ALFRED WALKER  
Executive Assistant Attorney General

HENRY WADE  
Criminal District Attorney  
Dallas, County, Texas

ROBERT C. FLOWERS  
Assistant Attorney General

JAY FLOYD  
Assistant Attorney General

JOHN B. TOLLE  
Assistant District Attorney  
Dallas County Courthouse  
Dallas, Texas 75202

*Attorneys for Appellee*  
Box 12548  
Austin, Texas 78711

## **SUBJECT INDEX**

	Page
INDEX TO AUTHORITIES-----	ii
JUDGMENT AND OPINION BELOW-----	2
JURISDICTION -----	2
STATE STATUTES INVOLVED-----	2
QUESTIONS PRESENTED -----	2
STATEMENT AND PROCEEDINGS BELOW	2
ARGUMENT:	
I. Appellants' Appeal Should Be Dismissed--	4
A. Injunctive Relief as to Appellant Jane Roe -----	4
B. Injunctive Relief as to Appellant James Hubert Hallford -----	5
C. Pendency of Appeal in Fifth Circuit---	6
II. Consideration of All Constitutional Issues-	6
CONCLUSION AND PRAYER-----	7

## INDEX TO AUTHORITIES

### CASES

	Page
Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970)-----	5-6
Brockington v. Rhodes, —— U.S. ——, 90 S.Ct. 206, 24 L.Ed.2d 209 (1969)-----	5
Brooks v. Briley, 274 F.Supp. 538 (M.D.Tenn. 1967), affirmed, 391 U.S. 361, 88 S.Ct. 1671, 20 L.Ed.2d 647-----	6
Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968)-----	6
Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)-----	5
Florida Lime and Avocado Growers, Inc., v. Jacobsen, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960)-----	7
Goldstein v. Cox, —— U.S. ——, 90 S.Ct. 671, 24 L.Ed.2d 663 (1970)-----	6
Gray v. State, 178 S.W. 337 (Tex.Crim. 1915)-----	5

## INDEX TO AUTHORITIES—Continued

### CASES—Continued

	Page
Gunn v. University Committee to End the War in Viet Nam, — U.S. —, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970)-----	6
Ex parte Levitt, 302 U.S. 633, 58 U.S. 1, 82 L.Ed. 493 (1937)-----	5
Massachusetts v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923)-----	5
Mercer v. Theriot, 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964)-----	7
Mitchell v. Donovan, — U.S. —, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970)-----	6
Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955)-----	7
Shaw v. State, 165 S.W. 930 (Tex.Crim. 1914)-----	5
Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951)-----	6
Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1939)-----	7

## INDEX TO AUTHORITIES—Continued

### TEXAS STATUTES

	Page
Article 1191, Vernon's Annotated Penal Code of the State of Texas-----	1
Article 1192, Vernon's Annotated Penal Code of the State of Texas-----	1
Article 1193, Vernon's Annotated Penal Code of the State of Texas-----	1
Article 1194, Vernon's Annotated Penal Code of the State of Texas-----	1
Article 1196, Vernon's Annotated Penal Code of the State of Texas-----	1, 2

### UNITED STATES CODE

28 U.S.C., Section 1253-----	2
28 U.S.C., Section 2283-----	6

In The  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1970

\_\_\_\_\_  
NO. \_\_\_\_  
\_\_\_\_\_

JANE ROE, JOHN DOE, AND MARY DOE,  
*Appellants*  
JAMES HUBERT HALLFORD, M.D.,  
*Appellant-Intervenor*  
vs.

HENRY WADE,  
*Appellee*

\_\_\_\_\_  
ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF TEXAS

\_\_\_\_\_  
**REPLY TO JURISDICTIONAL STATEMENT**  
\_\_\_\_\_

Appellee Henry Wade and the State of Texas respectfully move the Court to dismiss Appellants' appeal herein or, in the alternative, to affirm that portion of the judgment denying Appellants injunctive relief. In the further alternative, Appellees move the Court, if the Court assumes jurisdiction of this cause, to consider all constitutional issues raised below including the question of the constitutionality of Articles 1191, 1192, 1193, 1194 and 1196, Vernon's Annotated Penal Code of the State of Texas, hereinafter referred to as the Texas Abortion Laws.

## **JUDGMENT AND OPINION BELOW**

The Judgment of the United States District Court for the Northern District of Texas is included in the Appendix to the Jurisdictional Statement of Appellants at pages 4a-6a, and the Opinion is at pages 7a-20a.

## **JURISDICTION**

Appellants seek to invoke the jurisdiction of this Court under 28 U.S.C., Section 1253.

## **STATE STATUTES INVOLVED**

Appellants correctly specify the Texas statutes under consideration in their Jurisdictional Statement at pages 4-5; however, they have listed them out of numerical order in that they have listed Article 1196 first.

## **QUESTIONS PRESENTED**

A. Whether Appellants are entitled to injunctive relief against the enforcement of the Texas Abortion Laws?

B. Whether the Texas Abortion Laws infringe upon rights guaranteed to women by the Ninth Amendment to the United States Constitution?

C. Whether the Texas Abortion Laws are void because of unconstitutional overbreadth?

D. Whether abstention is warranted as to Appellants' request for injunctive relief against the enforcement of the Texas Abortion Laws?

## **STATEMENT AND PROCEEDINGS BELOW**

Appellants have extracted allegations of fact contained in their Complaints to supplement their statement of the nature of the case before the Court. Briefly,

the proceedings were instituted in the United States District Court for the Northern District of Texas, Dallas Division, as a request for a declaratory judgment that the Texas Abortion Laws are unconstitutionally overbroad and vague, and for injunctive relief against their enforcement. Appellant Jane Roe represented herself to be an unmarried pregnant woman. Appellants John and Mary Doe simultaneously filed suit as a married couple seeking the same relief although Mary Doe did not contend she was pregnant. Appellant James Hubert Hallford intervened as a physician and is presently, as well as at the time of filing his intervention suit, under indictment for violation of the Texas Abortion Laws. The named defendant was Appellee Henry Wade, Criminal District Attorney of Dallas County, Texas. The State of Texas sought and obtained leave of the Court to respond to the Appellants' Complaints.

After oral submission, the United States District Court, sitting as a three-judge court, rendered its decision and entered its judgment, which are included in the Appendix to the Jurisdictional Statement at pages 4a-20a.

Thereafter, in chronological order, the following instruments were filed in this Court and in the United States Court of Appeals for the Fifth Circuit, to-wit:

1. Appellees herein gave Notice of Appeal to the Fifth Circuit—appended herein as Appendix A.
2. Appellants herein, Jane Roe and James Hubert Hallford, gave Notice of Appeal to the Fifth Circuit—appended herein as Appendix B and Appendix C (these Notices are referred to as Notice of *Protective* Appeal in the Appendix



to the Jurisdictional Statement at pages 21a-24a).

3. Appellee herein, the State of Texas, gave Notice of Appeal to this Court—appended herein as Appendix D.
4. Appellants herein gave Notice of Appeal to this Court—appended to the Jurisdictional Statement at pages 1a-3a.
5. Appellants herein filed their Motion to Hold Appeal in Abeyance in the Fifth Circuit—appended herein as Appendix E.
6. Appellee herein, Henry Wade, filed Appellant's Motion in Opposition to Motion to Hold Appeal in Abeyance in the Fifth Circuit—appended herein as Appendix F.

## ARGUMENT

### I.

#### Appellants' Appeal Should Be Dismissed

##### A. *Injunctive Relief as to Appellant Jane Roe.*

The United States District Court found that Appellants John and Mary Doe failed to show standing, but that Appellant Jane Roe had standing to bring this lawsuit (Appendix to Jurisdictional Statement at page 5a). Appellant Jane Roe filed her complaint in the District Court on March 3, 1970, and it has now been some eight months since the filing of same. The query is whether there is a justiciable controversy entitling such Appellant to injunctive relief in that the issue sought to be adjudicated has been rendered moot by subsequent developments, i.e., termination of her pregnancy? No justiciable controversy is presented to a federal court

when the parties seek adjudication of moot questions. *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Accord, *Brockington v. Rhodes*, — U.S. —, 90 S.Ct. 206, 24 L.Ed.2d 209 (1969).

A requirement that must be established before a three-judge Federal court can entertain an action on its merits (and grant injunctive relief) is that the party challenging a statute as invalid must show that he (she) has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement. *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); *Ex parte Levitt*, 302 U.S. 633, 58 U.S. 1, 82 L.Ed. 493 (1937). It can only be logically assumed that Appellant Jane Roe is not in need of an abortion at this time to terminate her pregnancy. Further, Appellant Roe could not be prosecuted in the Texas courts for submission to an abortion, nor could any woman. *Gray v. State*, 178 S.W. 337 (Tex. Crim. 1915); *Shaw v. State*, 165 S.W. 930 (Tex.Crim. 1914).

This Court may properly conclude that, as to Appellant Jane Roe, no justiciable controversy is presented to invoke the jurisdiction of a federal court that would go to this Court's jurisdiction to review the District Court's denial of injunctive relief as to such Appellant. Accord, *Flask v. Cohen*, *supra*.

*B. Injunctive Relief as to Appellant James Hubert Hallford.*

Appellant Hallford's action is, in effect, an action to enjoin or stay proceedings in the State court where he is under indictments for violating the Texas Abortion Laws. In such instances, this Court has required or sanctioned federal forbearance. *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive En-*

*gineers*, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970); *Cameron v. Johnson*, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968); *Brooks v. Briley*, 274 F.Supp. 538 (M.D.Tenn. 1967), affirmed, 391 U.S. 361, 88 S.Ct. 1671, 20 L.Ed.2d 647.

Historically there has been great reluctance by federal courts to interfere in the operations of a State court. See, e.g., *Stefanelli v. Minard*, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951). This principle has been codified in 28 U.S.C., Section 2283. None of the statutes which Appellants rely upon as conferring jurisdiction upon this court expressly authorize an injunction to stay proceedings in a state court.

#### C. *Pendency of Appeal in Fifth Circuit.*

Since the filing of its Notice of Appeal to this Court (Appendix D), Appellees herein have determined that the only forum available to them for appeal from the judgment below is to the Fifth Circuit. *Gunn v. University Committee to End the War in Viet Nam*, — U.S. —, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970); *Goldstein v. Cox*, — U.S. —, 90 S.Ct. 671, 24 L.Ed.2d 663 (1970); *Mitchell v. Donovan*, — U.S. —, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970). Appellants herein will not be prejudiced by determination of this appeal by the Fifth Circuit.

## II.

### Consideration of All Constitutional Issues

In the event this Court should assume jurisdiction of this appeal, Appellees respectfully request this Court to consider all constitutional issues presented below. This Court has previously held that, upon review of a final judgment, it considers all the substantial federal questions determined in the earlier stages of the

litigation. *Mercer v. Theriot*, 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964). Accord, *Florida Lime and Avocado Growers, Inc., v. Jacobsen*, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960); *Reece v. Georgia*, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955); *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1939).

### CONCLUSION AND PRAYER

Appellees submit that Appellants have not shown they are entitled to injunctive relief and move the Court to dismiss Appellants' appeal herein or, in the alternative, to affirm that portion of the judgment of the United States District Court denying injunctive relief to Appellants.

In the further alternative, Appellees move the Court, if the Court assumes jurisdiction of this cause, to consider all constitutional issues raised in the District Court.

Respectfully submitted,

CRAWFORD C. MARTIN  
Attorney General of Texas

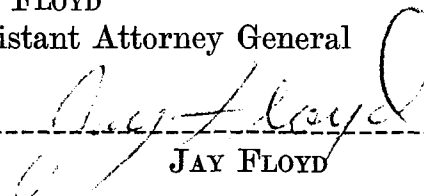
NOLA WHITE  
First Assistant Attorney General

ALFRED WALKER  
Executive Assistant Attorney General

ROBERT C. FLOWERS  
Assistant Attorney General

JAY FLOYD  
Assistant Attorney General

By

  
JAY FLOYD