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

JURISDICTIONAL STATEMENT

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INDEX

PAGE

TABLE OF AUTHORITIES

PAGE

Cases:

PAGE

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JURISDICTIONAL STATEMENT

Appellants bring this direct appeal from a judgment entered June 17, 1970, by a statutory three-judge United States District Court for the Northern District of Texas. The judgment appealed from granted these Appellants (Plaintiffs below) a declaration that the Texas anti-abortion statutes were unconstitutional on their face, by reason of overbreadth affecting fundamental individual rights, and that provisions in the statute suffered from unconstitutional uncertainty. However, the judgment denied a permanent injunction which had been sought as necessary in aid of the District Court's jurisdiction to enjoin future enforcement of the statute declared invalid. Appellants submit this

Statement to show that this is a direct appeal over which this Court has jurisdiction, and that the appeal presents important and substantial federal questions which merit plenary review.

Citation to Opinions Below

The June 17, 1970, opinion of the statutory three-judge United States District Court for the Northern District of Texas is not yet reported. The text of the decision is set out in the Appendix, *infra,* at 7a.

Jurisdiction

(i) On March 3, 1970, Appellant Jane Roe filed her original complaint,[1] basing jurisdiction on 28 U.S.C. §1343(3) (1964 ed.), and complementary remedial statutes, 28 U.S.C. §2201 (1964 ed.); 42 U.S.C. §1983 (1964 ed.). On the same day Appellants John and Mary Doe filed a complaint predicating federal jurisdiction on the same statutes. On March 23, 1970, the District Court granted leave for Appellant James H. Hallford, M.D., to intervene as a party-plaintiff, on the basis of a complaint alleging a class action and the same jurisdictional grounds set out above. Subsequently, on April 22, 1970, Appellant Jane Roe amended her complaint to sue "on behalf of herself and all others similarly situated" (App. at 8a n. 1). Appellants John and Mary Doe also amended their complaints to assert a class action (*Id.*). All Appellants, from their respective positions as married couples, pregnant single women, and practicing physicians asked that the Texas anti-abortion stat-

[1] The Complaint and all other documents referred to in this Jurisdictional Statement are part of the record on appeal.

utes[2] be declared unconstitutional on their face, and for an injunction against future enforcement of the statutes. A statutory three-judge United States District Court was requested and convened pursuant to 28 U.S.C. §§2281, 2284 (1964 ed.).

(ii) The final judgment of the statutory three-judge District Court, granting Appellants' request for a declaratory judgment, but denying any injunctive relief, was entered on June 17, 1970 (App. at 4a). On Monday, August 17, 1970, all Appellants filed with the United States District Court for the Northern District of Texas notices of appeal to this Court (App. at 1a), pursuant to 28 U.S.C. §2101(b) (1964 ed.), and SUP. CT. RULES 11, 34 (July 1, 1970 ed.), 398 U.S. 1015, 1021, 1045 (1970). A protective appeal to the United States Court of Appeals for the Fifth Circuit was noticed on July 23, 1970, by Appellant Hallford (App. at 23a), and on July 24, 1970, by Appellant Jane Roe (App. at 21a).

(iii) Jurisdiction of this Court to review by direct appeal the three-judge District Court's final judgment denying a permanent injunction is conferred by 28 U.S.C. §1253 (1964 ed.).

(iv) Cases which sustain the jurisdiction of this Court are: *Evans* v. *Cornman,* 398 U.S. 419, 420 (1970); *Goldberg* v. *Kelly,* 397 U.S. 254, 261 (1970); *Carter* v. *Jury Comm'n of Greene County,* 396 U.S. 320, 328 (1970); *Moore* v. *Ogilvie,* 394 U.S. 814, 815-16 (1969); *Williams* v. *Rhodes,* 393 U.S. 23, 26-28 (1968); *Dinis* v. *Volpe,* 389 U.S. 570 (1968) (per curiam); *Hale* v. *Bimco Trading Co.,* 306 U.S. 375, 376-78 (1939).

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[2] The statutes, set out verbatim, *infra,* at 4-5, are 2A TEXAS PENAL CODE arts. 1191-1194, 1196, at 429-36 (1961).

Statutes Involved

2A TEXAS PENAL CODE art. 1196, at 436 (1961):

> "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

2A TEXAS PENAL CODE art. 1191, at 429 (1961):

> "If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."

2A TEXAS PENAL CODE art. 1192, at 433 (1961):

> "Whoever furnishes the means for procuring an abortion knowing the purpose intended is an accomplice."

2A TEXAS PENAL CODE art. 1193, at 434 (1961):

> "If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars."

2A TEXAS PENAL CODE art. 1194, at 435 (1961):

> "If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

Questions Presented

I. Whether the Three-Judge Court Should Have Enjoined Future Enforcement of the Texas Anti-Abortion Laws, Which the Court Had Declared Unconstitutional, Where an Injunction was Necessary in Aid of the Court's Jurisdiction, Proper to Effectuate the Declaratory Judgment, and Needed to Prevent Irreparable Injury to Important Federal Rights of the Class of Pregnant Women Who Are or Will be Seeking Abortions, and the Class of Physicians Who are Forced to Reject such Women as Patients Because of a Reasonable Fear of Prosecution.

II. Whether a Married Couple, and Others Similarly Situated, Have Standing to Challenge the Texas Anti-Abortion Laws, Where Said Laws Have a Present and Destructive Effect on their Marital Relations, They are Unable to Utilize Fully Effective Contraceptive Methods, Pregnancy Would Seriously Harm the Woman's Health, and Such a Couple Could Not Obtain Judicial Relief in Sufficient Time After Pregnancy to Prevent Irreparable Injury.

Statement of the Case

Appellants brought three actions on behalf of three variously situated classes of Plaintiffs.

John and Mary Doe, a childless married couple, sued on behalf of themselves and all others similarly situated. Mary Doe has a neural-chemical disorder which renders pregnancy a threat to her physical and mental health, although not to her survival. Her physician has so advised her, and has also advised against using oral contraceptives. The alternate means of contraception used by John and Mary Doe is subject to a significant risk of failure. In such event, Mary Doe would like to, but legally could not, obtain a therapeutic abortion in a suitable medical facility in Texas. The probability of contraceptive falure in the class represented by Mary Doe is unquestionably high, when the size of the class is considered. Also, the limitations of judicial relief for a pregnant woman seeking an abortion are well known.[3] For Mary Doe and others in her position, a pre-

[3] The period between pregnancy detection, which normally occurs after the fourth week, and the safest time for a therapeutic abortion, before the twelfth week, leaves little time for judicial deliberation. With the notable exception of the Seventh Circuit, courts have declined to render a decision on behalf of a pregnant woman in the limited time available. In the present case, the first complaint was filed March 3, 1970, and followed after fifteen full weeks by a decision on the merits, June 17, 1970. *Compare Doe* v. *Randall,* 314 F. Supp. 32 (D. Minn. 1970) (nearly five weeks between decision and complaint); *Doe* v. *Lefkowitz,* 69 Civ. 4423 (S.D.N.Y. Dec. 12, 1969) (per curiam) (preliminary injunction denied until all factual materials developed by deposition); and *California* v. *Belous,* 71 Cal. 2d ——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (argument March 3, 1969; decision September 5, 1969); with *Doe* v. *Scott,* No. 18382 (7th Cir. Mar. 30, 1970) (per curiam), *rev'g* 310 F. Supp. 688 (N.D. Ill. Mar. 27, 1970) (order entered in three days where pregnancy caused by rape).

pregnancy ruling on the validity of the Texas anti-abortion laws was the only ruling that could grant her the relief she would be seeking. Any other decision would simply be too late to prevent irreparable injury. Accordingly, John and Mary Doe brought an action for declaratory and injunctive relief against the present effect of the Texas statutes on their marital relations, and the inevitable future effect the statutes would have, in the certain event that a member of the class would become pregnant and not qualify for a legal abortion in Texas.

Jane Roe, an unmarried pregnant woman, also brought an action of the same nature, on her own behalf and for all others similiarly situated. Jane Roe had been unable to obtain a legal abortion in a medical facility in Texas, because her survival was not threatened by continued pregnancy, and no hospital would perform the abortion, in light of the Texas anti-abortion statutes.[4] Jane Roe was financially unable to journey to another jurisdiction with less restrictive laws on abortion, and accordingly had no recourse other than continuing an unwanted pregnancy, or risking her life and health at the hands of a non-medical criminal abortionist.

James H. Hallford, M.D., intervened as a Plaintiff, representing himself and other licensed Texas physicians similarly situated. Dr. Hallford's interest was twofold. As a

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[4] While Texas does not punish the woman who persuades a physician to abort her, the anti-abortion statutes impose a felony sanction of up to five years for the physician. 2A TEXAS PENAL CODE art. 1191, at 429 (1961). Moreover, the physician risks cancellation of his license to practice. 12B TEXAS CIV. STAT. art. 4505, at 541 (1966); *id.* art. 4506, at 132 (Supp. 1969-70). Also, the hospital can lose its operating license for permitting an illegal abortion within its facilities. 12B TEXAS CIV. STAT. art. 4437f, §9, at 216 (1966).

physician, he is requested by patients, on a regular and recurring basis, to arrange for medically induced abortions in hospitals or other appropriate clinical facilities. This he cannot do, for several reasons. The Texas anti-abortion statutes are unclear in their potential application to the situations in which patients request abortions. Consequently, both physician and hospital must exercise special caution to avoid prosecution. Also, the potential sweep of the statutes is so drastic that the only clear case of legal abortion is one in which the patient is near to certain death. These cases are rare; hence the typical patient's case will be legally uncertain, or of certain illegality. To avoid the realistic possibility of severe penal and administrative sanctions, the physician must turn away the typical patient. Since the conscientious physician knows full well that such a patient may seek out an incompetent non-medical abortionist, thereby endangering her life or health, he will continually be forced by the statute to breach his professional duty of care to the patient.[5] To rectify this invasion of the physician-patient relationship, Dr. Hallford brought this action to enjoin future enforcement of the Texas anti-abortion statutes, against himself, or against any other physician similarly situated.

Dr. Hallford's second interest in bringing the action was to seek relief against two indictments outstanding against

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[5] If prior cases on abortion prosecutions in Texas are a reliable index, patients who are turned away by physicians have recourse only to an assortment of quacks. *See, e.g., Fletcher* v. *State,* 362 S.W.2d 845 (Tex. Ct. Crim. App. 1962) (non-physician using crude techniques in "cottage on the river"; hysterectomy necessary to prevent girl's death); *Catching* v. *State,* 364 S.W.2d 691 (Tex. Ct. Crim. App. 1962) (non-physician; police found "tool box containing several catheters, a knitting needle, and other items").

him on abortion charges.[6] Under Texas law, a physician charged with abortion is presumed guilty, if the State is able to establish the fact of the abortion. The physician, in such a case, must admit complicity in the act, waive his privilege against self-incrimination, and defend on the basis that the abortion was "procured or attempted by medical advice for the purpose of saving the life of the [woman]." 2A TEXAS PENAL CODE art. 1196, at 436 (1961). Decisions such as *Veevers* v. *State,* 354 S.W.2d 161 (Tex. Ct. Crim. App. 1962), hold that the Article 1196 exception is an affirmative defense, which the physician must raise and prove. In numerous respects, this settled state-law practice deprives a physician of essential constitutional rights. Moreover, state practice invades the privacy of physician and patient by exposing intimate and confidential associations to the public glare of a criminal trial. In addition, the possibility of conviction carries with it the revocation of the physician's license before appeal. These elements of state practice render defense to criminal abortion charges a wholly inadequate means of vindicating the physician's constitutional rights. Accordingly, Dr. Hallford brought the present action as a Plaintiff-Intervenor in the main actions filed by Jane Roe, John Doe, and Mary Doe. The cases were consolidated, and argued together.

Essentially, the federal questions raised by each individual Plaintiff were raised by all. The complaints charged that the Texas anti-abortion statutes deprived physicians and patients of rights protected by the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments, as construed by this Court in decisions such as *Griswold* v. *Connecticut,*

[6] *State* v. *Hallford,* Nos. C-69-2524-H & C-69-5307-IH (Tex. Crim. Ct., Dallas County).

381 U.S. 479 (1965).[7] Defendants interposed objections to the standing of each Plaintiff, the propriety of adjudication versus abstention, the ripeness of the dispute for present decision, and the propriety of injunctive relief.

A statutory three-judge court, convened in response to Plaintiffs' request for injunctive relief from the Texas anti-abortion statutes, granted a declaratory judgment that the statutes were unconstitutionally vague and overbroad.

After dealing with the jurisdictional questions of standing,[8] ripeness,[9] and abstention,[10] raised by the Defendants, the three-judge court stated:

> "[T]he Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children" (App. at 12a).

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[7] In the brief on the merits, Appellants will more fully elaborate this complex substantive constitutional point. For purposes of this Statement, however, it is sufficient to note that *Griswold* has been applied in the abortion context by numerous state and federal courts. *See* cases cited in notes 31-37, *infra,* and accompanying text.

[8] Jane Roe, the pregnant Plaintiff, and Dr. Hallford, had standing because they "occupy positions *vis-à-vis* the Texas Abortion Laws sufficient to differentiate them from the general public." App. at 9a. Also, on the authority of *Griswold,* Dr. Hallford had standing to raise the "rights of his patients, single women and married couples, as well as rights of his own." App. at 9a n. 3. John and Mary Doe, however, were held to lack standing. App. at 5a.

[9] The district court was "satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a 'case of actual controversy' . . . ." App. at 10a.

[10] *Zwickler* v. *Koota,* 389 U.S. 241, 248-49 (1967), was sufficient authority to preclude abstention. App. at 11a.

Reliance was placed on decisions by this Court establishing "[r]elative sanctuaries for such 'fundamental' interests [as] the family,[11] the marital couple,[12] and the individual." [13] Further precedent was found in similar decisions by other federal and state courts,[14] as well as a major treatment of *Griswold* in the abortion setting by Retired Justice Tom C. Clark, *see* Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal,* 2 LOYOLA UNIV. (L.A.) L. REV. 1 (1969).

Not only were the statutes overbroad, and not justified by a narrowly drawn compelling State interest, but the language of the statutes was unconstitutionally vague. Although a physician might lawfully perform an abortion "for the purpose of saving the life of the [pregnant woman]," [15] the circumstances giving rise to such necessity were far from clear. The district court detailed a few of the more apparent ambiguities:

> "How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertain-

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[11] *See Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923); *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), all cited by the district court. App. at 13a.

[12] *See Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

[13] *See Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *Stanley* v. *Georgia,* 394 U.S. 557 (1969).

[14] *See, e.g., McCann* v. *Babbitz,* 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal docketed,* 38 U.S.L.W. 3524 (U.S. June 20, 1970) (No. 297, Oct. 1970 Term); *United States* v. *Vuitch,* 305 F. Supp. 1032 (D.D.C. 1969), *ques. of juris. postponed to merits,* 397 U.S. 1061, *further juris. questions propounded,* 399 U.S. 923 (1970); *California* v. *Belous,* 71 Cal. 2d ——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970).

[15] 2A TEXAS PENAL CODE art. 1196, at 436 (1961).

> ably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered." App. at 17a.

After finding the Texas anti-abortion statutes unconstitutional on two grounds, the district court considered the propriety of injunctive relief. Acting on the assumption that *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965) controlled, the court refused to enjoin any present or future enforcement of the statutes. Appellants have brought this appeal to review the denial of injunctive relief.

The Questions Are Substantial

The present appeal presents important and unresolved federal questions which have not been but should be determined by this Court. A district court's refusal to enjoin present and future enforcement of a statute declared facially unconstitutional raises important issues for the vindication by federal courts of rights guaranteed by the Constitution. Decisions by this Court have not in recent years clarified the propriety of federal injunctive relief against state criminal statutes outside the pristine speech area of the First Amendment. A decision by this Court is needed, particularly where, as here, the injunction was sought by some Appellants who were total strangers to any pending prosecutions, and by one Appellant for whom defense of state court prosecution would be a wholly inadequate means of vindicating his federally protected rights.

In addition, the substantive issues in the case, which will surely be raised for further review by Appellee, are novel issues of profound national import, affecting the lives of many thousands of American citizens each year. Further, the same issues are presented in four appeals already docketed,[16] a variety of conflicting decisions in the lower courts,[17] and a host of pending actions in federal and state lower courts.[18]

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[16] (1) *United States* v. *Vuitch,* No. 84, arises under a differently worded felony abortion statute, however, and poses numerous alternate grounds for affirmance other than the central questions presented here, of overbreadth and vagueness.

(2) *McCann* v. *Babbitz,* No. 297, was decided at the federal district court level on grounds virtually the same as those below in the present case. It appears in *McCann,* however, that the appeal was taken by the State solely from the granting of a declaratory judgment for Dr. Babbitz. No appeal was taken from the denial of an injunction, as 28 U.S.C. §1253 (1964 ed.), would seem to require, and as this Court twice held last Term, *Mitchell* v. *Donovan,* 398 U.S. 427 (1970) (per curiam), *vacating* 300 F. Supp. 1145 (D. Minn. 1969), with directions to enter a fresh judgment of dismissal, to enable appellants to appeal to the Eighth Circuit; *Rockefeller* v. *Catholic Medical Center,* 397 U.S. 820 (1970) (per curiam).

(3) *Hodgson* v. *Randall,* No. 728, is an appeal from a three-judge federal court decision refusing to enjoin state court prosecution of a physician who sought federal relief before performing a hospital therapeutic abortion for German measles indications, and long before the state indictment.

(4) *Hodgson* v. *Minnesota,* No. 729, involves the same subject matter as No. 728, and is an appeal from the Supreme Court of Minnesota's denial of a writ of prohibition to a state trial court which had upheld the constitutionality of an abortion statute, where unconstitutionality was the only defense to the charges.

[17] *See* cases cited in notes 31-37, *infra,* and accompanying text.

[18] *See* cases cited in note 38, *infra.*

Introduction

In the remainder of this Jurisdictional Statement, Appellants will show that the questions presented are substantial, and merit plenary review by the full Court. Because of the novelty and complexity of the issues, and the limited function of a Jurisdictional Statement, this showing will not undertake to develop all arguments in depth.

I.

The Three-Judge Court Should Have Enjoined Future Enforcement of the Texas Anti-Abortion Laws, Which the Court Had Declared Unconstitutional, Because an Injunction Was Necessary in Aid of the Court's Jurisdiction, Proper to Effectuate the Declaratory Judgment, and Needed to Prevent Irreparable Injury to Important Federal Rights of the Class of Pregnant Women Who Are or Will Be Seeking Abortions, and the Class of Physicians Who Are Forced to Reject Such Women as Patients Out of a Reasonable Fear of Prosecution.

A. The Subject Matter of the Merits Involves Important and Substantial Federal Constitutional Questions:

On the merits, Appellants argued successfully that decisions by this Court, construing the First, Fourth, Ninth, and Fourteenth Amendments supported a claim that the Texas anti-abortion statutes swept too broadly and thereby invaded rights protected by the Constitution (App. at 5a, 6a, 12a-16a).[19] Moreover, the statutes in question were held

[19] In particular, Appellants relied upon the reasoning of *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), where this Court invalidated a state law prohibiting use of contraceptive devices, because

to be so vague and indefinite as to violate the Fourteenth Amendment due process guarantee of reasonably specific legislation (App. at 5a, 6a, 16a-18a). That guarantee is particularly significant where, as here, important personal rights are at stake, and an impermissibly vague statute operates to inhibit a wide range of constitutionally protected conduct.[20]

Ultimately, the substantive question presented is whether a State may enact a felony statute to punish a physician, a woman, and her husband, with five years in state prison, where the couple requests, and the physician performs, a therapeutic surgical procedure to abort a pregnancy which the couple did not want, but were unable to prevent.[21] Under *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), it is clear that a husband and wife[22] are constitutionally priv-

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the law swept too broadly and invaded "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." 381 U.S. at 485.

[20] The most reliable estimates hold that fewer than 10,000 hospital therapeutic abortions are performed yearly, in states where there has been no abortion law reform. *See* Tietze, *Therapeutic Abortions in the United States,* 101 AM. J. OBST. & GYNEC. 784, 787 (1968). These constitute a minute proportion of all unwanted pregnancies which face American couples each year. Those excluded from hospitals have two alternatives: continuation of unwanted pregnancy, or extra-hospital, probably illegal, induced abortion.

[21] The woman is not an accomplice under Texas law, but other participants, including her husband, are fully liable. *See Willingham* v. *State,* 33 Tex. Crim. 98, 25 S.W. 424 (1894) (woman neither principal nor accomplice).

[22] *Griswold* was silent on the more significant problem of access by unmarried persons to contraceptives. A result of non-access, and failure, is the birth of over 100,000 illegitimate children yearly to girls age nineteen or younger. *See* U.S. BUREAU OF THE CENSUS: *Statistical Abstract of the United States: 1969,* Table 59, at 50 (90th ed. 1969).

Outside of the state judiciary in Massachusetts, authorities have uniformly held the *Griswold* rationale applicable to litigants who

ileged to control the size and spacing of their family by contraception. The failure of contraception, however, is commonplace.[23] Authoritative estimates are that between 750,000 and 1,000,000 births each year are unwanted.[24] These are in addition to the 200,000 to 1,000,000 unwanted pregnancies which are estimated to end in abortions induced outside of the clinical setting.[25] Taken together, some

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had not entered into the marriage contract. *Compare Baird* v. *Eisenstadt*, —— F.2d ——, No. 7578 (1st Cir. July 6, 1970) (invalidating Massachusetts statute which outlawed distribution of contraceptives to the unmarried), *Mindel* v. *United States Civil Service Comm'n*, 312 F. Supp. 485 (N.D. Calif. 1970) (reinstating postal clerk who had been dismissed for cohabitation without benefit of marriage), *and* the present case, *Roe* v. *Wade*, —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam) (Texas anti-abortion statutes "deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."), *with Sturgis* v. *Attorney General*, 260 N.E.2d 687, 690 (Mass. 1970) (directly contrary to federal decision in *Baird*).

[23] If a married couple is to have private control over numbers and spacing of children, induced abortion is absolutely necessary as a backstop to contraceptive failure. For compilation of contraceptive failure rates according to method used, see P. EHRLICH & A. EHRLICH, POPULATION RESOURCES ENVIRONMENT 218-19 & Table 9-1 (1970); N. EASTMAN & L. HELLMAN, WILLIAMS OBSTETRICS 1068-75 (13th ed. 1966); Hardin, *History and Future of Birth Control*, 10 PERSPECTIVES IN BIOLOGY & MED. 1, 7-13 (1966); Tietze, *Clinical Effectiveness of Contraceptive Methods*, 78 AM. J. OBST. & GYNEC. 650 (1959).

[24] The most recent scholarly examination of unwanted birth magnitudes will appear in a forthcoming issue of SCIENCE. A summary of these findings by Dr. Charles F. Westoff of Princeton University's Office of Population Research, analyzing the 1965 National Fertility Study, appeared in the N.Y. Times, Oct. 29, 1969, at 25, col. 3.

[25] Secret induced abortions are inherently incapable of quantification. Nonetheless, one can be certain that the number is very high. For estimates, see Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3-6 (H. Rosen ed. 1967); M. CALDERONE (ed.), ABORTION IN THE UNITED STATES 180 (1958); P. GEBHARD *et al.*, PREGNANCY, BIRTH AND ABORTION 136-37 (1958); F. TAUSSIG, ABORTION:

950,000 to 2,000,000 unwanted births plus non-clinical abortions occur yearly. Accordingly, one must conclude that restrictive anti-abortion statutes, such as the Texas law in question here, drastically affect the conduct of literally millions of American citizens.

The national significance of the issues in this case can also be inferred from increased activity within the medical profession, and in the legislatures. On June 25, 1970, the House of Delegates of the American Medical Association voted to permit licensed physicians to perform abortions in hospitals, with the sole additional qualification that two other physicians be consulted.[26] Physicians were cautioned, however, not to violate existing state statutes, forty-seven of which are far more restrictive.[27] Three states in 1970—New York, Alaska, and Hawaii—removed, for the most part, any criminal penalties which might previously have been imposed upon physicians for performing abortions in appropriate medical facilities.[28] From 1967 to 1970, twelve states had adopted therapeutic abortion statutes similar to that of the MODEL PENAL CODE's 1962 Proposed Official

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SPONTANEOUS AND INDUCED 25 (1936); Regine, *A Study of Pregnancy Wastage,* 13 MILBANK MEM. FUND QUART. No. 4, at 347-65 (1935).

[26] *See* N.Y. Times, June 26, 1970, at 1, col. 1. The statement has not yet been published in an official A.M.A. document. A recent issue of the J.A.M.A. noted that only 26 physicians had resigned from the body because of new policy. 213 J.A.M.A. 1242 (Aug. 24, 1970).

[27] For analysis of abortion laws in the United States prior to the most recent changes, see Lucas, *Laws of the United States,* in 1 ABORTION IN A CHANGING WORLD 127 (R. Hall ed. 1970); George, *Current Abortion Laws: Proposals and Movements for Reform,* 17 W. RES. L. REV. 371 (1966).

[28] *See, e.g.,* N.Y. PENAL LAW §125.05(3), at 79 (McKinney Supp. 1970-71).

Draft.[29] More recently, on August 4, the Commissioners on Uniform State Laws issued a Second Tentative Draft of a UNIFORM ABORTION ACT. The Act sanctioned abortions by licensed physicians "within 24 weeks after the commencement of the pregnancy; or if after 24 weeks . . . " under the circumstances set out in the MODEL PENAL CODE proposal.

These developments bear witness to the importance of the issues presented here.

While policy-making and legislative bodies have debated the issue of abortion, courts, confined to the constitutional framework, have been asked to resolve the questions of individual privacy and legislative power which are presented here. Although the questions framed in this case have not been decided[30] by this Court, numerous federal

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[29] *See* MODEL PENAL CODE §230.3(2) (Proposed Official Draft, 1962). The states are Arkansas, California, Colorado, Delaware, Georgia, Kansas, New Mexico, North Carolina, Oregon, South Carolina, and Virginia.

[30] On at least eight occasions this Court has declined to review state court decisions which involved restrictive anti-abortion laws. The eight denials are: *Mucie* v. *Missouri,* 398 U.S. 938 (June 1, 1970), *denying cert. to* 448 S.W.2d 879 (Mo. 1970) (manslaughter abortion conviction where patient died); *California* v. *Belous,* 397 U.S. 915 (Feb. 24, 1970), *denying cert. to* 71 Cal. 2d ——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (statute repealed after prosecution commenced); *Molinaro* v. *New Jersey,* 396 U.S. 365 (Jan. 19, 1970) (per curiam), *dismissing appeal from* 54 N.J. 246, 254 A.2d 792 (1969) (defendant jumped bail after appeal filed); *Knight* v. *Louisiana Bd. of Medical Examiners,* 395 U.S. 933 (June 2, 1969), *denying cert. to* 252 La. 889, 214 So.2d 716 (1968) (per curiam) (federal questions not properly raised and preserved); *Morin* v. *Garra,* 395 U.S. 935 (June 2, 1969), *denying cert. to* 53 N.J. 82 (1968) (per curiam) (same); *Moretti* v. *New Jersey,* 393 U.S. 952 (Nov. 18, 1968), *denying cert. to* 52 N.J. 182, 244 A.2d 499 (1968) (conspiracy conviction; abortion to have been performed by barber); *Fulton* v. *Illinois,* 390 U.S. 953 (Mar. 4, 1968), *denying*

and state decisions attest to the substantiality of the federal questions. Moreover, the sometimes sharp divisions in the courts below illustrate further the need for a decision at this level. In showing that the Court has jurisdiction, and that the questions are substantial, Appellants will outline the divisions among lower courts.

In September, 1969, the Supreme Court of California became the first appellate court to recognize the constitutional stature of a "fundamental right of the woman to choose whether to bear children . . . ." [31] The *Belous* court found this right implicit in this Court's "repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." [32]

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cert. to 84 Ill. App.2d 280, 228 N.E.2d 203 (1967); *Carter* v. *Florida,* 376 U.S. 648 (Mar. 30, 1964), *dismissing appeal from* 150 So.2d 787 (Fla. 1963).

[31] *California* v. *Belous,* 71 Cal. 2d ——, ——, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), *cert. denied,* 397 U.S. 915 (1970). *Belous,* a state court appeal of a conspiracy conviction of a physician, involved a statute worded almost identically to that in the present case.

One year earlier, a California trial court had ruled that the Eighth and Fourteenth Amendments prohibited license revocation proceedings against physicians who had performed hospital approved abortions on patients exposed in early pregnancy to German measles. The opinion of the trial court, however, simply enumerated those Amendments among various conclusions of law, without supporting the conclusions with any attempt at reasoned analysis. Nonetheless, the result, and the factual similarities between that and the present case, are of interest. *See Shively* v. *Board of Medical Examiners,* No. 590333 (Calif. Super. Ct., San Fran. County Sept. 24, 1968) (not reported), *on remand from* 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1968) (granting physicians' motions for discovery, without reference to merits).

[32] 71 Cal. 2d at ——, 458 P.2d at 199, 80 Cal. Rptr. at 359, *citing, e.g., Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Loving* v. *Virginia,* 388 U.S. 1, 12 (1967); *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535, 536 (1942).

More recently, three different decisions by statutory three-judge federal courts have invalidated restrictions on access to medical abortion in Wisconsin and Georgia, as well as in the present case from Texas. The first, *McCann* v. *Babbitz*,[33] recognized in that jurisdiction a woman's

> "basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened." 310 F. Supp. at 302.

McCann grew out of the prosecution of a physician, but the three-judge court had no difficulty holding that a physician has standing to assert the rights of pregnant patients.[34]

The second recent federal decision is the present case, *Roe* v. *Wade*,[35] declaring the Texas anti-abortion statutes unconstitutional on the similar ground that

> "they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."

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[33] 310 F. Supp. 293 (E.D. Wis. 1970) (per curiam), *appeal docketed*, 38 U.S.L.W. 3524 (U.S. June 20, 1970) (No. 297, Oct. 1970 Term).

[34] The standing of a physician to assert a patient's rights along with his own follows from *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965), and *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953). On this standing point, lower court decisions involving abortion laws all agree. *See also Planned Parenthood Ass'n of Phoenix* v. *Nelson*, Civ. No. 70-334 PHX (D. Ariz. Aug. 24, 1970) (per curiam); *Doe* v. *Bolton*, —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam); *Roe* v. *Wade*, —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam); *United States ex rel. Williams* v. *Follette*, 313 F. Supp. 269, 273 (S.D.N.Y. May 12, 1970).

[35] —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam).

A third federal decision, *Doe* v. *Bolton*,[36] followed *Belous*, *McCann*, and *Roe*, holding:

> "[T]he concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.
>
> ". . . [T]he reasons for an abortion may not be proscribed. . . ."

Numerous lower courts have followed this lead, in both federal and state disputes.[37] In addition, three-judge courts have been requested and/or convened in a number of states

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[36] —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam).

[37] *See, e.g., State* v. *Munson* (S.D. 7th Jud. Cir., Pennington County Apr. 6, 1970) (Clarence P. Cooper, *J.*) (recognizing the woman's " 'private decision whether to bear her unquickened child' "); *State* v. *Ketchum* (Mich. Dist. Ct. Mar. 30, 1970) (Reid, *J.*) ("the statute as written infringes on the right of privacy in the physician-patient relationship, and may violate the patient's right to safe and adequate medical advice and treatment."); *Commonwealth* v. *Page*, Centre County Leg. J. at 285 (Pa. Ct. Comm. Pl., Centre County July 23, 1970) (Campbell, *P.J.*) ("the abortion statute interferes with the individual's private right to have or not to have children."); *People* v. *Gwynne*, No. 176601 (Calif. Mun. Ct., Orange County Aug. 13, 1970) (Schwab, *J.*); *People* v. *Gwynne*, No. 173309 (Calif. Mun. Ct., Orange County June 16, 1970) (Thomson, *J.*); *People* v. *Barksdale*, No. 33237C (Calif. Mun. Ct., Alameda County Mar. 24, 1970) (Foley, *J.*); *People* v. *Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct., Orange County Jan. 9, 1970) (Mast, *J.*); *People* v. *Anast*, No. 69-3429 (Ill. Cir. Ct., Cook County, 1970) (Dolezal, *J.*) (holding the Illinois abortion statute "unconstitutional (1) for vagueness; and (2) for infringing upon a woman's right to control her body."); *cf. United States* v. *Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *ques. of juris. postponed to merits*, 397 U.S. 1061, *further juris. questions propounded*, 399 U.S. 923 (1970); *United States ex rel. Williams* v. *Follette*, 313 F. Supp. 269, 272-73 (S.D.N.Y. 1970) (questions substantial, but habeas petitioner-physician remitted to state courts).

to consider questions quite similar to those raised here.[38] The convening of a statutory court, of course, requires that the questions presented be "substantial." [39]

Scholarly commentary also recognizes that these issues are of tremendous national importance, and "substantial" in the sense of warranting determination by this Court. Retired Justice Clark addressed himself to the applicability of *Griswold* in the abortion context more than a year ago.[40] According to Justice Clark's analysis,

> "Griswold's act[41] was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention fails?" [42]

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[38] *See, e.g., Gwynne* v. *Hicks,* Civ. No. 70-1088-CC (C.D. Calif., filed May 18, 1970); *Arnold* v. *Sendak,* IP 70-C-217 (S.D. Ind., filed Mar. 29, 1970); *Corkey* v. *Edwards,* Civ. No. 2665 (W.D.N.C., filed May 12, 1970); *YWCA of Princeton* v. *Kugler,* Civ. No. 264-70 (D.N.J., filed Mar. 5, 1970); *Hall* v. *Lefkowitz,* 305 F. Supp. 1030 (S.D.N.Y. 1969), *dismissed as moot* Op. No. 36936 (S.D.N.Y. July 1, 1970) (per curiam) (statute repealed); *Benson* v. *Johnson,* Civ. No. 70-226 (D. Ore., filed Aug. 4, 1970); *Doe* v. *Dunbar,* Civ. No. C-2402 (D. Colo., filed July 2, 1970); *Henrie* v. *Blankenship,* Civ. No. 70-C-211 (N.D. Okla., filed July 6, 1970); *Planned Parenthood Ass'n of Phoenix* v. *Nelson,* Civ. No. 70-334 PHX (D. Ariz. Aug. 24, 1970) (per curiam); *Ryan* v. *Specter,* Civ. No. 70-2527 (E.D. Pa., filed Sept. 14, 1970); *Doe* v. *Rampton,* Civ. No. 234-70 (D. Utah, filed Sept. 16, 1970).

[39] *Idlewild Bon Voyage Corp.* v. *Epstein,* 370 U.S. 713, 715 (1962) (per curiam).

[40] Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal,* 2 LOYOLA UNIV. (L.A.) L. REV. 1-11 (1969).

[41] Although it is a minor point, Griswold was the Executive Director of Planned Parenthood in the *Griswold* case. It was the physician, the late Dr. Buxton of the Yale Medical School who had examined the patients and prescribed contraceptive devices.

[42] Clark, *supra* note 40, at 9.

To examine Justice Clark's hypothetical question in the full constitutional context, and to decide the propriety of injunctive relief in this case, the Court should note probable jurisdiction, and set the matter down for full briefing and argument.

B. Having Determined the Merits in Appellants' Favor, the Three-Judge Court Should Have Enjoined Future Enforcement of the Invalid Statutes:

Not only do the substantive issues in this case involve important federal questions, but the remedy following judgment also presents a novel point on which this Court has not clearly ruled.

Although no state proceedings were pending or imminently threatened against Appellants Jane Roe, John Doe, and Mary Doe, or members of their respective classes, the District Court declined to grant any injunctive relief whatever. This denial of necessary relief is contrary to decisions by this Court, and has the probable effect of inviting federal-state friction, rather than lessening such untoward interaction. Moreover, the denial of injunctive relief to Dr. Hallford was equally improper, as he had requested an injunction against the commencement of any future prosecutions. As to charges then pending against Dr. Hallford, an injunction would have been proper in addition, for reasons which shall appear more fully hereinafter.

Relying entirely on *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), the three-judge court recognized a "federal policy of non-interference with state criminal prosecutions [which] must be followed except in cases where 'statutes are justifiably attacked on their face as abridging free ex-

pression,' or where statutes are justifiably attacked 'as applied for the purpose of discouraging protected activities.' " 380 U.S. at 489-90. The quote from *Dombrowski,* however, was not pertinent, for Appellants' principal thrust was not against pending prosecutions, but against any *future* enforcement and effects of the challenged statutes. The pregnant Plaintiff, Jane Roe, for example, could never be prosecuted under Texas law regardless of the number of abortions she underwent, but the statute, unless enjoined, would have the effect of keeping her from obtaining an abortion.

For the most part, Appellants were strangers to any existing or contemplated prosecutions. Their chief controversy was over the drastic impact of the statutes on their lives, not any possibility of imminent enforcement. In *Dombrowski,* the appellants were actively threatened with prosecution, and an injunction would necessarily have abated that threat by operating directly on law officers who stood ready to go forward with existing indictments. Accordingly, "special circumstances" were necessary to justify the conclusion ultimately reached.

If, however, *Dombrowski* had been purely a challenge to quantifiable and recurring effects of a state criminal statute, without the pendency of criminal charges, the case would have been different. This is shown by the ease with which this Court has reversed lower courts that refused declaratory and injunctive relief against loyalty oath statutes backed by criminal sanctions. *See Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Baggett* v. *Bullitt,* 377 U.S. 360, 365-66 (1964). Injunctive relief against the statute in *Dombrowski* would have presented no special problem, if the statute had been a loyalty oath backed by the very same criminal penalties, and no indictments had been waiting in the wings.

Dombrowski falls in the middle ground between (1) injunctive actions which are filed and completed prior to the commencement of any state criminal proceedings, and (2) actions which are filed after "proceedings in a State court," [43] are underway. The *Dombrowski* case itself was filed but not completed before State proceedings began.[44] Hence, while *Dombrowski* acknowledged that "[28 U.S.C. §2283 (1964 ed.)], and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted," [45] this Court nonetheless required "special circumstances" to justify interference with a criminal proceeding begun shortly after the federal complaint was filed.

The present case lies chronologically in the earliest of the categories, (1), because, as to the bulk of relief sought against future enforcement of the anti-abortion statute, state proceedings have never been contemplated. Appellants were thus in the same position as petitioners contesting a loyalty oath that was backed by criminal sanctions. Their entitlement to an injunction against future enforcement should have followed as a matter of course. Put another way, Appellants were "strangers to [any pending] state court proceedings." *Hale* v. *Bimco Trading Co.*,

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[43] 28 U.S.C. §2283 (1964 ed.).

[44] While *Dombrowski* did not clarify the thorny definitional problems surrounding the concept of a "proceeding" in a state court, the Court did hold that at least an indictment must be returned. The federal complaint came before the indictments in *Dombrowski*, and was held to relate back where a district court erroneously dismissed the complaint. An almost identical situation in the abortion context is before this Court in *Hodgson* v. *Randall*, No. 728, docketed Sept. 21, 1970, where law enforcement authorities secured the dismissal of a federal action for want of a case or controversy, and proceeded within two days to obtain an indictment against a physician who had been a federal plaintiff.

[45] 380 U.S. at 484 n. 2.

306 U.S. 375, 378 (1939) (Frankfurter, *J.*).[46] The fact of pending prosecutions against other physicians, or against Dr. Hallford based upon alleged past conduct, had no bearing on Appellants' request for prospective injunctive relief.

Accordingly, the three-judge court should have undertaken an inquiry as to the propriety of injunctive relief without reference to *Dombrowski* v. *Pfister,* and without any greater concern for hypothetical federal-state friction than exists in the ordinary case where state judicial machinery has not entered the controversy. Indeed, denial of injunctive relief was an open invitation for Texas authorities to maintain existing enforcement policies. Should this have occurred against Dr. Hallford, or any other physician member of the class he represented, a federal injunction would have been sought from the district court as "necessary in aid of its jurisdiction, or to protect or effectuate its"[47] declaratory judgment invalidating the statute. A confrontation between federal and state judiciary might then have ensued. To avoid such a possibility, the three-judge court should have enjoined future enforcement of the statute on June 17, 1970, when it ruled the statute invalid. In other words, an injunction *ab initio* would have prevented federal-state conflict, and enhanced the very policy the three-judge court thought it was following by denying the injunction.

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[46] *Hale* teaches that strangers to state proceedings may secure federal injunctive relief against a state statute, even though the effect of the federal decision may be to confuse cases pending at the same time before the highest court of the state. *Hale* affirmed a three-judge court decision enjoining enforcement of a Florida statute although "the injunction in effect stayed proceedings in the Supreme Court of Florida." 306 U.S. at 376.

[47] 28 U.S.C. §2283 (1964 ed.).

A further reason for having granted the injunction was to avoid irreparable injury to individuals in the class of Jane Roe, and to physicians deterred by the ongoing possibility that the State might continue to enforce the statute until the controversy was determined by *this* Court. Without a coercive order on record, Texas law enforcement authorities are free to ignore the declaratory judgment rendered below, because the judgment is subject to possible reversal here. It requires no argument to show that a declaratory judgment by this Court ends the controversy,[48] but such judgments at the district court level carry much less practical import.

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[48] A decision by this Court on the propriety of injunctive relief, however, is necessary for guidance of lower courts in similar future controversies. Otherwise, the law of the district courts would be final law in all cases where the merits were correctly resolved, but an injunction improperly denied. In addition, as commentators have frequently observed, this Court has not resolved a sufficient variety of cases concerning the parameters of 28 U.S.C. §2283 (1964 ed.), to provide answers to questions such as those presented here. The criteria for commencement of "proceedings in a State court," for example, are uncertain, as is the relevance of a State proceeding brought after a federal complaint. Also, the extent to which the anti-injunction statute affects declaratory judgments is in dispute, as well as the availability of injunctions against future prosecutions where one or more indictments is outstanding, or prosecutions threatened. Similarly, the availability of injunctive relief against prosecutions which threaten to inhibit wide areas of constitutionally protected conduct outside the First Amendment context is uncertain. For a more comprehensive review of the need for further guidelines from this Court in these areas, see Stickgold, *Variations on the Theme of Dombrowski v. Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights*, 1968 WIS. L. REV. 369; Brewer, *Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Judicial Relations*, 34 FORDHAM L. REV. 71 (1965); Note, *The Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation*, 83 HARV. L. REV. 1870 (1970); Comment, *Federal Injunctions Against State Actions*, 35 GEO. WASH. L. REV. 744 (1967).

Appellant Dr. Hallford sought not only an injunction against future enforcement of the Texas anti-abortion statutes, but also an injunction to bar the commencement of State proceedings against him based upon two outstanding indictments. This request for injunctive relief presents several substantial questions which merit review by this Court.

Assuming that the district court improperly denied an injunction directed generally against future enforcement of the anti-abortion laws, one question is whether that injunction, if entered, should cover the commencement of prosecution under the aforesaid indictments. Whether a bare indictment, returned from the secrecy of a grand jury, alone constitutes a "proceeding in a State court" is an open question.[49] If there is no "proceeding," as this Court found in *Dombrowski,* the degree of irreparable injury needed to justify an injunction must apparently be considered nonetheless. Here, unlike *Dombrowski,* law enforcement authorities have not to date gone forward with prosecutions; hence the degree of friction between state and federal judicial systems is considerably lessened.

Also here, as in *Griswold* v. *Connecticut,*[50] and unlike *Dombrowski,* the permissible range of leeway for State regulation of marital and personal privacy is small. While

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[49] Taken together, *Dombrowski,* 380 U.S. at 484 n. 2, and *Hill* v. *Martin,* 296 U.S. 393, 403 (1935), suggest that a "proceeding" begins at some time after indictment. Respectable authorities argue that the indictment or information is an administrative act, done *ex parte* and in secrecy; hence, no "proceeding" exists until trial or arraignment, when both parties are first before a "State court." *See* Brewer, *supra* note 48, at 92; Comment, 35 GEO. WASH. L. REV. at 766-67.

[50] 381 U.S. 479 (1965).

government may regulate many facets of speech coupled with conduct, there is much doubt whether government can so intrude into the domain of privacy. Thus, to allow any prosecution at all of Dr. Hallford is to permit the State to invade the privacy of physician and patient in an area where the district court concluded that the State had little business at all.

If one assumes that 28 U.S.C. §2283 (1964 ed.), is *prima facie* a bar to an injunction on Dr. Hallford's behalf, the further question remains whether, notwithstanding §2283, an injunction would be "necessary in aid of [the three-judge court's] jurisdiction," or "to protect or effectuate" the outstanding declaratory judgment. On this theory, since the court had jurisdiction to grant an injunction on behalf of all parties, it would be incongruous to exclude Dr. Hallford. Indeed, the alleged patients who were aborted, according to the two indictments, might be able to enjoin the compulsion of process against them in order to protect their privacy.

In light of the above, the questions presented in this case, both on the merits, and with respect to relief, are substantial, novel, and hitherto unresolved by this Court. Accordingly, the Court should note probable jurisdiction, and set the case down for plenary review.

II.

A Married Couple, and Others Similarly Situated, Have Standing to Challenge the Texas Anti-Abortion Laws, Because Said Laws Have a Present and Destructive Effect on Their Marital Relations, They Are Unable to Utilize Fully Effective Contraceptive Methods, Pregnancy Would Seriously Harm the Woman's Health, and Such a Couple Could Not Obtain Judicial Relief in Sufficient Time After Pregnancy to Prevent Irreparable Injury.

A further aspect of the judgment below is presented on this appeal. In one part of the lower court's opinion is the holding that "Dr. Hallford has standing to raise the rights of his patients, single women and married couples, as well as rights of his own" (App. at 9a n. 3). Yet, the judgment states that "[p]laintiffs John and Mary Doe failed to allege facts sufficient to create a present controversy and therefore do not have standing" (App. at 5a). Accordingly, both declaratory and injunctive relief were denied as to John and Mary Doe.

John and Mary Doe alleged a present impact of the Texas anti-abortion laws on their marital relations which, when considered in light of their assertion of the interests of a class, created a present controversy over a future right to relief in the event Mary Doe or another class member became pregnant.

This Statement has already pointed out, *supra* at 6-7, that the judicial machinery is not equipped to grant relief

to a party such as Mary Doe after she becomes pregnant. The only meaningful relief must be forthcoming prior to the twelfth week of pregnancy. While twelve weeks is a lengthy period of time, pregnancy is rarely detected before the fourth week, and often not until considerably later, depending upon the degree of medical sophistication of the patient.

Based upon an assumed size of the class represented by Mary Doe, and the known failure rate of the contraceptive she used, it would not be speculative to assume that one or more members of the class would be or become pregnant during the litigation. To assume to the contrary, as the district court did, was not only medically unsound, but served to elevate "ripeness" requirements to an unnecessarily high point, namely a point which deprived the entire class of the relief sought simply because no class member stepped forward as pregnant. Indeed, Jane Roe, the pregnant plaintiff, won a judgment which proved meaningless to her, because it was too late.

Ample precedent, moreover, could have been found to conclude that a present controversy existed between the Does and Appellees. Not only should the lower court have considered "'the hardship of denying judicial relief,'"[51] but the dilemma faced by the class of Mary Does when they become pregnant is "'capable of repetition, yet evading review' . . ." *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969). The situation, admittedly difficult if one ignores its uniqueness, is nonetheless one in which the "mere possibility of [recurrence] . . . serves to keep the case alive." *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633 (1953). To the

[51] Friendly, *J.,* in *Toilet Goods Ass'n* v. *Gardner,* 360 F.2d 677, 684 (2d Cir. 1966), *aff'd,* 387 U.S. 167, 170 (1967).

extent that the lower court, almost without discussion, rejected the standing of John and Mary Doe for want of an Article III case or controversy, the court erred. To the Does the case was and is a very real one. There was never an absence of adversity. The relief requested had significant meaning for the Does throughout, and the denial of that relief could provide harmful precedent for similar situations. Accordingly, this Court should reverse the determination below, after noting jurisdiction to consider the claim by John and Mary Doe that they too were entitled to declaratory and injunctive relief.

CONCLUSION

For the reasons set out in this Jurisdictional Statement, the Court should note probable jurisdiction, and set the case down for plenary consideration with briefs on the merits and oral argument.

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