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Supreme Court, U.S.

FILED

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NO. 808

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

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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

Attorneys for Appellees

Box 12548

Capitol Station

Austin, Texas

CERTIFICATE OF SERVICE

I, Robert C. Flowers, Assistant Attorney General of the State of Texas, certify that copies of Appellees' Reply to Jurisdictional Statement of Appellants have been served on the attorneys for Appellants by depositing said copies in the United States mail, postage prepaid, certified mail, return receipt requested, on this ---- day of November, A. D. 1970, addressed to Roy Lucas, The James Madison Constitutional Law Institute, Four Patchin Place, New York, New York, 10011, to Norman Dorsen, School of Law, New York University, Washington Square South, New York, New York, 10003, to Linda N. Coffee, 2130 First National Bank Building, Dallas, Texas, 75202, to Sarah Weddington, 3710 Lawton, Austin, Texas, 78731, and to Roy L. Merrill, Jr., Daugherty, Bruner, Lastelick & Anderson, 1130 Mercantile Bank Building, Dallas, Texas, 75201.

ROBERT C. FLOWERS
Assistant Attorney General

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

CIVIL ACTION NO. 3-3690-B

JANE ROE, *Plaintiff*
JAMES HUBERT HALLFORD,
vs. *Intervenor*
HENRY WADE,
Defendant

NOTICE OF APPEAL

Notice is hereby given that HENRY WADE, Criminal District Attorney of Dallas County, Texas, defendant above named, and THE STATE OF TEXAS, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 17th day of June, 1970.

July 9, 1970.

CRAWFORD C. MARTIN
Attorney General of the State of Texas
Austin, Texas

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
Attorney for Defendant,
HENRY WADE

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APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-3690-B

JANE ROE, *Plaintiff*

vs.

HENRY WADE, *Defendant*

vs.

JAMES HUBERT HALLFORD, M.D.
Intervenor

CIVIL ACTION NO. 3-3691-C

JOHN DOE and MARY DOE,
Plaintiff

vs.

HENRY WADE, *Defendant*

NOTICE OF APPEAL

Notice is hereby given that JANE ROE, Plaintiff above named, appeals to the United States Court of Appeals for the Fifth Circuit from that portion of the final judgment entered in this action on the 17th day of June, 1970, denying the injunctive relief prayed for in Plaintiff's Complaint.

July 24, 1970.

By:-----

LINDA N. COFFEE

2130 First National Bank Bldg.
Dallas, Texas 75202 RI 8-1211

Attorney for Plaintiff

JANE ROE

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

CIVIL ACTION NO. 3-3690-B

JANE ROE, *Plaintiff*

vs.

HENRY WADE, *Defendant*

vs.

JAMES HUBERT HALLFORD, M.D.

Intervenor

CIVIL ACTION 3-3691-C

JOHN DOE and MARY, DOE,

vs.

Plaintiff

HENRY WADE, *Defendant*

NOTICE OF APPEAL

Notice is hereby given that JAMES HUBERT HALLFORD, M.D., Intervenor and Plaintiff above named, appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 17th day of June, 1970.

July 23, 1970.

By-----

FRED BRUNER

**DAUGHERTY, BRUNER, LASTELICK
and ANDERSON**

**1130 Mercantile Bank Building
Dallas, Texas 75201 742-3941**

***Attorneys for Intervenor and
Plaintiff***

JAMES HUBERT HALLFORD, M.D.

APPENDIX D
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTIONS NOS. 3-3690-B and 3-3691-C

JANE ROE, *Plaintiff*

v.

HENRY WADE, *Defendant*

JAMES HUBERT HALLFORD, M.D.

Intervenor

v.

HENRY WADE, *Defendant*

JOHN DOE and MARY DOE,

Plaintiffs

v.

HENRY WADE, *Defendant*

Before **GOLDBERG**, Circuit Judge, **HUGHES** and
TAYLOR, District Judges

NOTICE OF APPEAL
to
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Texas, Responding Party Defendant, Appellant, hereby appeals to the Supreme Court of the United States from that part of the final judgment entered in the above causes on the 17th day of June, 1970, in favor of Plaintiffs, Jane Roe, John Doe and Mary Doe, and Intervenor, James Hubert Hallford, M.D., and against the named Defendant, Henry Wade, and Responding Party Defendant, State of Texas, wherein the Court granted summary declaratory relief finding the Texas Abortion

Laws, Articles 1191, 1192, 1193, 1194 and 1196, Texas Penal Code, unconstitutional.

This appeal is taken pursuant to Title 28, U.S.C., Section 1253.

I.

The Clerk will please prepare a transcript of the record in these causes, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. All pleadings of the parties in these causes including all briefs in support of the State of Texas' pleadings.

B. The court reporter's transcription of the proceedings before the Court.

C. All evidentiary items on file in this cause including depositions, stipulations and request for admissions and replies thereto, if any.

D. All orders of the Court.

II.

The following questions are presented by this appeal:

A. Whether the Plaintiffs and Intervenor had standing to challenge the constitutionality of Articles 1191, 1192, 1193, 1194 and 1196, Texas Penal Code?

B. Whether the Plaintiffs and Intervenor failed to state a claim upon which relief could be granted for the reason that they failed to plead facts which raised any substantial constitutional question?

C. Whether the Plaintiffs and Intervenor failed to state a claim upon which relief could be granted for the reason that they failed to show that they suffered

or will suffer any irreparable injury and that they had no adequate remedy at law?

D. Whether Intervenor, James Hubert Hallford, M.D.'s, Complaint is barred by 28 U.S.C. 2283?

E. Whether, as held by the Court, Article 1191, Texas Penal Code, is unconstitutional?

F. Whether, as held by the Court, Article 1192, Texas Penal Code, is unconstitutional?

G. Whether, as held by the Court, Article 1193, Texas Penal Code, is unconstitutional?

H. Whether, as held by the Court, Article 1194, Texas Penal Code, is unconstitutional?

I. Whether, as held by the Court, Article 1196, Texas Penal Code, is unconstitutional?

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Attorney General of Texas

NOLA WHITE
First Assistant to the Attorney
General

ALFRED WALKER
Executive Assistant to the Attorney
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ROBERT C. FLOWERS
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By-----

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APPENDIX E

In The
**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 30329

HENRY WADE, Criminal District Attorney
of Dallas, Texas,

Appellant,

v.

JANE ROE, et al.,

Appellees.

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

MOTION TO HOLD APPEAL IN ABEYANCE

I. INTRODUCTION

The present appeal to this Court was taken by Appellant Wade from a declaratory judgment rendered below by a statutory three-judge federal district court that the Texas Abortion Laws violate the federal constitution by reason of unconstitutional vagueness and overbreadth. The judgment below, while granting declaratory relief, denied an injunction against future enforcement of the aforesaid statutes. From that portion of the judgment, Appellees here have taken an appeal directly to the Supreme Court of the United States pursuant to 28 U.S.C. §1253 (1964 ed.). Appel-

lees make the present motion to hold the appeal in abeyance pending disposition by the Supreme Court. In the event that the Supreme Court's action allows the appeal here to go forward, Appellee respectfully requests an additional 20 days time within which to file a brief, and leave to file a brief of 50 pages.

II. REASONS FOR HOLDING APPEAL IN ABEYANCE

Title 28, U.S. Code §1253, authorizes an appeal from a three-judge district court order "granting or denying . . . an interlocutory or permanent injunction. . . ." The decision below denied such an injunction. While it is unusual that declaratory relief is granted, and an injunction denied, there have been such cases from time to time in the past, and the Supreme Court has heard such appeals. *See, e.g., Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 328 (1970); *Williams v. Rhodes*, 393 U.S. 23, 26-28 (1968). It is the action on the injunction which governs appealability.

When the appeal goes up properly, the entire case is opened for review. As *Dandridge v. Williams*, 397 U.S. 471 (1970) teaches:

"The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment. . . ." 397 U.S. at 475 n. 6.

Hence Appellant Wade may contest the declaratory judgment in the Supreme Court by way of defense to the propriety of not granting an injunction. Wade is in no way prejudiced by the holding of the present appeal in abeyance. He need do little more than change the heading on the brief already submitted to this Court.

III. RELIEF REQUESTED

Accordingly, Appellee respectfully requests the following:

(1) That the present appeal be held in abeyance pending disposition of this case by the Supreme Court of the United States in an appeal filed by Appellee (See Jurisdictional Statement attached hereto);

(2) That the record on this appeal be certified to the District Court for transmission to the Supreme Court of the United States for use in the appeal of this case docketed there as No. 808, October 1970 Term;

(3) That in the event this appeal is ultimately allowed to go forward, Appellee be granted an additional 20 days within which to file a brief, and that leave be granted to file a printed brief of 50 pages length, exclusive of indices and appendices.

Respectfully submitted:

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Attorney for Appellees.

APPENDIX F
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Cause No. 30329

HENRY WADE,

Appellant

v.

JANE ROE, et al.,

Appellees

**APPELLANT'S MOTION IN OPPOSITION TO
MOTION TO HOLD APPEAL IN ABEYANCE**

Appellant HENRY WADE hereby opposes the motion to hold the appeal in abeyance which was previously filed by appellees herein, and would show the Court:

1.)

Appellees have invoked the jurisdiction of this Court, as the record herein reflects (Record, pp. 21, 22).

2.)

Under authority of *Gunn v. University Committee to End the War in Viet Nam, et al.*, — U.S. —, 26 L.Ed.2d 684, 90 S.Ct. —, the only forum available to appellant for appeal of the order of the District Court herein is this honorable Court. Appellees will be in no way prejudiced by this Court's determination of the appeal from the declaratory judgment herein.

WHEREFORE, appellant prays that appellee's motion to hold this appeal in abeyance be in all things denied.

JOHN B. TOLLE

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Dallas, Texas 75202