Transcript of First Oral Argument in
***Roe v. Wade* 410 U.S. 113 (1973)**
U.S. Supreme Court
December 13, 1971

[Ed.: *The transcripts of Supreme Court oral arguments are public property. This transcript is based on the original in the Supreme Court files, but has been edited and corrected based on a comparison with the audio*.]

Before: Warren E. Burger, Chief Justice of the United States
William O. Douglas, Associate Justice
William J. Brennan, Jr. Associate Justice
Potter Stewart, Associate Justice
Byron R. White, Associate Justice
Thurgood Marshall, Associate Justice
Harry Blackmun, Associate Justice

Appearances:

Mrs. Sarah Weddington, for Appellant, Jane Roe
Jay Floyd, Assistant Attorney General of Texas, for Appellee, Henry Wade and the State of Texas

CHIEF JUSTICE BURGER: We will hear arguments in No. 18, Roe against Wade. Mrs. Weddington, you may proceed whenever you're ready.

Argument of Sarah Weddington, Attorney for Appellants:

MRS. WEDDINGTON: Mr. Chief Justice, and may it please the Court:
The instant case is a direct appeal from a decision of the United States District Court for the Northern District of Texas.

The court declared the Texas abortion law to be unconstitutional for two reasons:

First, that the law was impermissibly vague; and, second, that it violated a woman's right to continue or terminate a pregnancy.

Although the court granted declaratory relief the court denied appellants' request for injunctive relief.

The Texas law in question permits abortions to be performed only in instances where it is for the purpose of saving the life of the woman.

The case originated with the filing of two separate complaints, the first being filed on behalf of Jane Roe, an unmarried pregnant girl and the second being filed on behalf of Jane and Mary Doe, a married couple.

Jane Roe, the pregnant woman, had gone to several Dallas physicians seeking an abortion, but had been refused care because of the Texas law.

She filed suit on behalf of herself and all those women who have in the past at that present time or in the future would seek termination of a pregnancy.

In her affidavit she did state some of the reasons that she desired an abortion at the time she sought one. But, contrary to the contentions of appellee, she continued to desire the abortion. And it was not only at the time she sought the abortion that her desire was to terminate the pregnancy.

CHIEF JUSTICE BURGER: When this case was in the District Court, the case of Vuitch against The United States had not been decided here?

MRS. WEDDINGTON: That's correct.

CHIEF JUSTICE BURGER: Now, that's…. do you think that has disposed of some of the questions raised now?

MRS. WEDDINGTON: Your Honor, I do not. In the Vuitch decision this Court was working with a statute which provided that an abortion could be performed for reasons of health or life. Our Texas statute provides an abortion only where it is for the purpose of saving the life of the woman.

Since the Vuitch decision was rendered, the Texas Court of Criminal Appeals - which is our highest court of criminal jurisdiction - has held that the Texas law is not vague, citing the Vuitch decision, but saying that the Texas law is more definite than the D.C. law.

So, obviously the Court of Criminal Appeals doesn't feel that the two are the same.

And in the Vuitch decision, the Justices of this Court emphasized continuously that a doctor, as a matter of routine, works with the problem of what is best for the health of his patients.

We submit that a doctor is not used to being restricted to acting only when it's for the purpose of saving the life of the woman, and that health is a continuum which runs into life.

And a doctor in our State does not know whether he can perform an abortion only when death is imminent or when the woman's life would be shortened. He does not know if the death must be certain, or if it could be an increase in probability of her death.

So here, in the District, doctors are able to exercise their normal matter of judgment of whether or not the health of the woman - mental or physical - would be affected.

But, in Texas, we tell the doctor that unless he can decide whether it's necessary for the purpose of saving her life, and for no other reason, that he is subject to

criminal sanctions. I think it's important to note the range of problems that could be presented to a doctor.

The court, for example, cited the instance of suicide - if a woman comes in alleging that she will commit suicide. Is it then necessary for him to do or can he do an abortion for the purpose of saving her life?

Or, is that a situation where he has to have something more? I think all of those questions cannot be answered, at this point.

This brings up the married couple in our case. The woman in that case had a neurochemical condition. Her doctor had advised her not to get pregnant, and not to take the birth control pills. She was using alternative means of birth control, but she and her husband were fearful that she would become pregnant and that, although the neurochemical condition would impair her health, there was --- evidently her doctor did not feel that she would die if she continued the pregnancy.

And certainly they were very concerned about the effects of the statute, and her physician seemed uncertain about its implications.

The doctors in our State continue to feel that our law is vague. Certainly, we introduced affidavits in the lower court to that effect.

Since the time of the lower court ruling, the District Attorney in Texas has said that he considers the Federal court decision there not to be binding. And he is --- we do have a letter from him the first thing in our Appendix to the brief - stating that he will continue to prosecute.

So the doctors in Texas, even with the Federal decision and even after the Vuitch decision, do not feel free to perform abortions. And, instead, 728 women in the first nine months after the decision went to New York for an abortion.

Texas women are coming here. It's so often the poor and the disadvantaged in Texas who are not able to escape the effect of the law.

Certainly there are many Texas women who are affected because our doctors still feel uncertain about the impact of the law, even in light of the Vuitch decision.

JUSTICE STEWART: Well then, of course Mrs. Weddington, you make many additional constitutional attacks upon the Texas statute, and only one was before us in the Vuitch decision...

MRS. WEDDINGTON: Yes, Your Honor, we do.

JUSTICE STEWART: ….only the claim of unconstitutional vagueness. The Court explicitly didn't reach any of the other claims, and you make many other claims. Of course, before you get to any of those, there are a good many threshold questions, are there not, of jurisdiction...

MRS. WEDDINGTON: Yes, Your Honor, there are. I think it is important to point out to the Court that in my reading of Younger versus Harris, the companion cases, all the Court was concerned about in those cases was a situation where there was an attempt to interfere with a pending state criminal prosecution.
In this case, as I pointed out, the original parties to this matter are women, and in one case, the husband.

The women certainly are not subject to prosecution in the State of Texas. It is impossible for them to stand in the criminal dock and litigate their interests. They came seeking injunctive relief. But it was not against pending State criminal prosecution. They were not even aware of the prosecution against Dr. Hallford.

JUSTICE STEWART: Could they, under Texas law, be charged as accomplices or as co-conspirators, or anything like that?

MRS. WEDDINGTON: No, we have express Texas cases. In one situation, Woodrow v. State, an 1880 case, the woman had taken a potion to induce abortion, and the Texas court specifically said that the woman is guilty of no crime, even in that situation. And, that in fact she is the victim of our law.
There is no declaratory relief available for these plaintiffs. Their only forum was the Federal courts, and it was to those courts that they turned.

JUSTICE STEWART: You have three plaintiffs here representing a class, as I gather?

MRS. WEDDINGTON: Yes, sir.

JUSTICE STEWART: One, an unmarried pregnant woman; two, a married couple - and the doctor told them that it would be injurious to the wife's health to have a child and also injurious to her health to use the most efficient form of birth control; and, then third, is a physician who is under indictment, or was, at the time of this complaint.

MRS. WEDDINGTON: The physician intervened after the order was entered granting Jane Roe a three judge court. And he intervened, again, asking only that future prosecution under the law be enjoined. He did not ask any relief of the court relating to his pending State criminal prosecution.
He did specifically, in his complaint, reserve the right to ask for future relief. But, that was never done. And certainly, in the future, if he were to ask for relief, the court would have the guidance of the Younger versus Harris companion cases.

But there was in no way any request for any action to interfere with the pending criminal prosecutions then in process.

As to...there is an allegation that the question is moot since the woman has now had...has carried the pregnancy to term.

And I think it is…it is important to realize that there are several important aspects in which this case differs from the case that the Court might usually be presented.

First, the case is different in the nature of the interest which is involved, and in the extent to which personal determination is undermined by this statute - the effect that it has on women.

Second, it is unique in the type of injury that's presented. Certainly there are some injuries that can be compensated, and most last over a sufficient period of time for the courts to litigate the interest.

But in this case, a progressing pregnancy does not suspend itself in order to give the time….the courts time to act. Certainly Jane Roe brought her suit as soon as she knew she was pregnant. As soon as she had sought an abortion, and been denied, she came to Federal court.

She came on behalf of a class of women. And I don't think there's any question but that women in Texas continue to desire abortions, and to seek them out outside our State.

There was an absence of any other remedy, and without the ability to litigate her claim -as a pregnant woman who came seeking relief and who was affected by the time required by the Federal process; not because of any infirmity in her own attempt to litigate her interests – that this will, in fact, be a case certainly presenting substantial Federal question, and yet evading review in the future.

I think the third way in which it is unique is, as I stated, the fact that it is the only forum available to these women. They have no other way to litigate their interests.

JUSTICE BLACKMUN: Does that mean that there is no possibility of getting a declaratory judgment under Texas law?

MRS. WEDDINGTON: Yes, Your Honor. Declaratory judgments in the State of Texas are limited to the situation where property rights are involved. And we also have a very unusual situation in Texas, where we have two concurrent jurisdictions, one the civil and one the criminal. And even... there are some cases which indicate that our State Supreme Court would not have the ability to mandamus any of the criminal prosecution officers because the Texas Court of Criminal Appeals has jurisdiction as to all criminal matters in the State of Texas. So, even if the woman had been able to bring a declaratory judgment - which she couldn't - she couldn't have gotten any sort of relief against future prosecutions.

And it was exactly the absence of the court granting an injunction against future prosecutions which has resulted in the irreparable injuries these women have suffered.

In Texas, the woman is the victim.

The State cannot deny the effect that this law has on the women of Texas. Certainly there are problems regarding even the use of contraception.

Abortion now, for a woman, is safer than childbirth. In the absence of abortions - or legal medically safe abortions-women often resort to the illegal abortions, which certainly carry risks of death, all the side effects such as severe infections, permanent sterility, all the complications that result.

And, in fact, if the woman is unable to get either a legal abortion or an illegal abortion in our State, she can do a self-abortion, which is certainly, perhaps, by far the most dangerous. And that is no crime. She is in our State...

CHIEF JUSTICE BURGER: The microphone won't be effective if you...

MRS. WEDDINGTON: Excuse me, Your Honor. Thank you. Texas, for example, it appears to us, would not allow any relief at all, even in situations where the mother would suffer perhaps serious physical or mental harm. There is certainly a great question about it. If the pregnancy would result in the birth of a deformed or defective child, she has no relief. Regardless of the circumstances of conception, whether it was because of rape, incest, whether she is extremely immature, she has no relief.

I think it's without question that pregnancy to a woman can completely disrupt her life. Whether she's unmarried; whether she's pursuing an education; whether she's pursuing a career; whether she has family problems; all of the problems of personal and family life, for a woman, are bound up in the problem of abortion.

For example, in our State there are many schools where a woman is forced to quit if she becomes pregnant. In the City of Austin that is true. A woman, if she becomes pregnant, and is in high school, must resign or drop out of regular education process. And that's true of some colleges in our State.

In the matter of employment, she often is forced to quit at an early point in her pregnancy. She has no provision for maternity leave. She has.. she cannot get unemployment compensation under our laws, because the laws hold that she is not eligible for employment, being pregnant, and therefore is eligible for no unemployment compensation.

At the same time, she can get no welfare to help her at a time when she has no unemployment compensation and she's not eligible for any help in getting a job to provide for herself. There is no duty for employers to rehire women if they must drop out to carry a pregnancy to term.

And, of course, this is especially hard on the many women in Texas who are heads of their own households and must provide for their already existing children.

And, obviously, the responsibility of raising a child is a most serious one, and at times an emotional investment that must be made, cannot be denied. So, a

pregnancy to a woman is perhaps one of the most determinative aspects of her life.

It disrupts her body. It disrupts her education. It disrupts her employment. And it often disrupts her entire family life.

And we feel that, because of the impact on the woman, this certainly - in as far as there are any rights which are fundamental -- is a matter which is of such fundamental and basic concern to the woman involved that she should be allowed to make the choice as to whether to continue or to terminate her pregnancy.

I think the question is equally serious for the physicians of our State. They are seeking to practice medicine in what they consider the highest method of practice.

We have affidavits in the back of our brief from each of the heads of public---- of heads of obstetrics and gynecology departments from each of our public medical schools in Texas.

And each of them points out that they were willing and interested to immediately begin to formulate methods of providing care and services for women who are pregnant and do not desire to continue the pregnancy.

They were stopped cold in their efforts, even with the declaratory judgment, because of the DA's position that they would continue to prosecute.

JUSTICE STEWART: Mrs. Weddington, so far on the merits, you've told us about the important impact of this law, and you made a very eloquent policy argument against it. And I trust you are going to get to what provisions of the Constitution you rely on. Sometimes the Court... we would like to, sometimes but we cannot here be involved simply with matters of policy, as you know.

MRS. WEDDINGTON: Your Honors, in the lower court, as I'm sure you're aware, the court held that the right to determine whether or not to continue a pregnancy rested upon the Ninth Amendment which, of course, reserves those rights not specifically enumerated to the Government, to the people.

I think it is important to note, in a law review article recently submitted to the Court and distributed among counsel by Professor Cyril Means, Jr., entitled "The Phoenix of Abortional Freedom," that at the time the Constitution was adopted there was no common law prohibition against abortions; that they were available to the women of this country.

Certainly, under the Griswold decision, it appears that the members of the Court in that case were obviously divided as to the specific constitutional framework of the right which they held to exist in the Griswold decision.

I'm a little reluctant to... aspire to a wisdom that the Court did not... was not in agreement on. I do feel that it is---that the Ninth Amendment is an appropriate

place for the freedom to rest. I think the Fourteenth Amendment is equally an appropriate place, under the rights of persons to life, liberty, and the pursuit of happiness. I think that in as far as "liberty" is meaningful, that liberty to these women would mean liberty from being forced to continue the unwanted pregnancy.

JUSTICE STEWART: You're relying, in essence, in this branch of the argument simply on the due process clause of the Fourteenth Amendment?

MRS. WEDDINGTON: We had originally brought this suit alleging both the due process clause, equal protection clause, the Ninth Amendment, and a variety of others...

JUSTICE STEWART: And anything else that might obtain.

MRS. WEDDINGTON: Yeah, right. Since that District Court found the right to reside in the Ninth Amendment, we pointed our attention in the brief to that particular aspect of the Constitution.

But I think we would not presume - I do feel that in-so-much as members of the Court have said that the Ninth Amendment applies to rights reserved to the people, and those which were most important-and certainly this is - that the Ninth Amendment is the appropriate place insofar as the Court has said that... life, liberty, and the pursuit of happiness involve the very ..the most fundamental things of people; that this matter is one of those most fundamental matters. I think, in as far as the Court has said that there is a penumbra that exists to encompass the entire purpose of the Constitution, that I think one of the purposes of the Constitution was to guarantee to the individual the right to determine the course of their own lives.

Insofar as there was, perhaps, no compelling state interest - and we allege there is none in this case that, there again, that the right fits within the framework of the previous decisions of this Court.

JUSTICE STEWART: What is the asserted State interest? Is there any legislative history on this statute?

MRS. WEDDINGTON: No, sir, Your Honor. No, sir, there is not. The only legislative history, of course, is that which is found in other states which has been pointed out to the Court before - and, as Professor Means points out again, that these statutes were adopted for the health of the mother.

Certainly, the Texas courts have referred to the woman as being the victim, and they have never referred to anyone else as being the victim. Times have certainly changed. I think it's important to realize that in Texas self-abortion is no crime. The woman is guilty of no crime, even though she seeks out the doctor; even though she consents; even though she participates; even though she pays for the procedure. She, again, is guilty of no crime whatsoever.

It's also interesting that our statutes, the penalty for the offense of abortion depends on whether or not the consent of the woman was obtained prior to the procedure. It's double if you don't get her consent.

There is a... no indication- in Fondgren v. State, for example, the court ruled that a woman who commits an abortion on herself is guilty of no crime. Again, "she" being regarded as the victim, rather than the perpetrator of the crime.

Obviously, in our State, the offense is not murder. It is an abortion, which carries a significantly lesser offense. There is no requirement of ---- even though the State, in its brief, points out the development of the fetus in an eight-week period, the same State, does not require any death certificate, or any formalities of birth. The product of such a conception would be handled merely as a pathological specimen.

JUSTICE WHITE: And the statute doesn't make any distinctions based upon at what period of pregnancy the abortion is performed?

MRS. WEDDINGTON: No, Your Honor. There is no time limit or indication of time, whatsoever. So I think...

JUSTICE WHITE: Well, do you make any distinctions?

MRS. WEDDINGTON: No, sir. I do... I feel that the question of a time limit is not strictly before the Court, because of the nature of the situation in which the case is handled. Certainly I think, as a practical matter though, most of the states that do have some time limit indicated still permit abortions beyond the time limit for specified reasons, usually again where the health of the mother is involved.

JUSTICE WHITE: What's your constitutional position there?

MRS. WEDDINGTON: As to a time limit...

JUSTICE WHITE: What about whatever clause of the Constitution you rest on- Ninth Amendment, due process, the general pattern penumbra - will that take you right up to the time of birth?

MRS. WEDDINGTON: It is our position that the freedom involved is that of a woman to determine whether or not to continue a pregnancy. Obviously I have a much more difficult time saying that the State has no interest in late pregnancy.

JUSTICE WHITE: Why? Why is that?

MRS. WEDDINGTON: I think that's more the emotional response to a late pregnancy, rather than it is any constitutional...

JUSTICE WHITE: Emotional response by whom?

MRS. WEDDINGTON: I guess by persons considering the issue outside the legal context. I think, as far as the State...

JUSTICE WHITE: Well, do you or don't you say that the constitutional

MRS. WEDDINGTON: I would say the constitutional...

JUSTICE WHITE: ...right you insist on reaches up to the time of birth, or

MRS. WEDDINGTON: The Constitution, as I read it, and as interpreted and as documented by Professor Means, attaches protection to the person at the time of birth. Those persons born are citizens. The enumeration clause, we count those people who are born. The Constitution, as I see it, gives protection to people after birth.

JUSTICE BRENNAN: Mrs. Weddington, the issue here, I guess, on your appeal, is whether you're entitled to injunctive relief?

MRS. WEDDINGTON: Yes, Your Honor.

JUSTICE BRENNAN: Assuming that in all other respects your argument were accepted, why do you think, in addition to declaratory relief, you're entitled to injunctive relief? Those are different things, aren't they?

MRS. WEDDINGTON: Yes, sir. Certainly, in your dissent, you point out in Perez v. Ledesma- not a concurring opinion...

JUSTICE BRENNAN: It was a dissent?

MRS. WEDDINGTON: It was a dissent - that there are different standards that apply to the declaratory judgment, and to injunctive relief.

JUSTICE BRENNAN: So I guess we said that in Zwickler v. Koota, didn't we?

MRS. WEDDINGTON: Yes, that's correct. And that's what the Court said, following Zwickler v. Koota, that even though they were granting declaratory relief, that different considerations applied as to injunctive relief.
But it seems that the opinions of this Court have established that where there is great and immediate threat of irreparable injury, with no adequate remedy in state court, that an injunction is still proper.

And it is our position that there is great and immediate threat of irreparable injury in the form of a continuing pregnancy that will not abate, and that continues...

JUSTICE WHITE: So, you're really----you're asserting that the pregnant woman has standing in this case, and the married couple where the wife is not pregnant has standing?

MRS. WEDDINGTON: Yes, Your Honor.

JUSTICE WHITE: Then what about the doctor where a criminal prosecution is already pending against him?

MRS. WEDDINGTON: The doctor, as I said, was asking no relief as to the pending prosecution. He was only asking relief as to future prosecutions.

JUSTICE WHITE: But he was asking for a declaratory judgment?

MRS. WEDDINGTON: Yes, Your Honor. He joined in both the request for declaratory judgment

JUSTICE WHITE: Well, didn't Younger against- Younger and its companion cases cover declaratory judgments?

MRS. WEDDINGTON: Where there were pending where... Samuels v. Mackell, as I read it, did say that where you have a request for a declaratory judgment there would be an effect on a pending criminal prosecution.

JUSTICE BRENNAN: There was one pending...

MRS. WEDDINGTON: There was one pending when this action was brought, those against Dr. Hallford. However, in this case we submit that if there is to be any meaning to the Federal courts as the supreme arbiters of constitutional rights, that they must be able to act, at least in some form, when there are pending criminal prosecutions - not particularly against the person involved in the prosecution, but others...

JUSTICE BRENNAN: But other cases say, at least, that Federal courts may in limited situation- harassment, prosecution improperly is used as a device to harass the person prosecuted. Now, isn't that it?

MRS. WEDDINGTON: Yes, Your Honor. But again, as I understood it...

JUSTICE BRENNAN: Are you suggesting it ought to be broader than that?

MRS. WEDDINGTON: I'm suggesting that in this case the women in particular brought a declaratory action having nothing to do with the pending State criminal prosecution

JUSTICE BRENNAN: I thought we were talking now about-

MRS. WEDDINGTON: and that the intervention of the doctor certainly should not be sufficient

JUSTICE BRENNAN: We're talking about the doctor's case, aren't we?

MRS. WEDDINGTON: Right. That because the doctor intervened when he was asking no relief as to the pending State prosecution, that his intervention

JUSTICE BRENNAN: You mean he was asking... he was asking what? No injunction against the continuance of that prosecution?

MRS. WEDDINGTON: That's correct. He is willing to litigate

JUSTICE BRENNAN: But he did want a declaratory judgment...

MRS. WEDDINGTON: As to future prosecutions.

JUSTICE BRENNAN: Well, except that he wanted a declaratory judgment, as I understand it, that the underlying statute on which the prosecution is brought is unconstitutional. Isn't that it?

MRS. WEDDINGTON: Yes.

JUSTICE BRENNAN: Well, I thought that's what Samuels and Mackles said he couldn't have?

MRS. WEDDINGTON: And which your dissent said was incorrect.

JUSTICE BRENNAN: I repeat...

MRS. WEDDINGTON: It was a dissent, okay. I think perhaps we would stress that there are two separate actions before the Court first, that of the women; and, second, that of the doctor.

JUSTICE BRENNAN: So that even though the...

MRS. WEDDINGTON: Even though the doctor-even though the Court might find that the doctor was an inappropriate party for relief, it certainly would not effect the original action as brought by the women.

JUSTICE BRENNAN: All right, then I come back again. If we're left only with the ladies' action, are you suggesting that the declaratory relief they already obtained was not enough, because that doesn't help terminate the pregnancy?

MRS. WEDDINGTON: Because they are still subject to the irreparable injury, and have no adequate State remedy. And, if they are not able to continue to litigate their interest in this situation, any time there was any prosecution pending against anyone in the State, at any point in the appeal-for example, the

Thompson case was filed in 1968. It's been decided now in our State courts. It's on appeal, or it will be appealed here, I think. And, certainly if they cannot litigate their interests while there is a prosecution pending against the doctor, they will-in many instances where a statute….

JUSTICE BRENNAN: Well, I suppose the answer is that if there's a prosecution against the doctor, there's not going to be any doctor that's going to be available. Is that it?

MRS. WEDDINGTON: Yes. They cannot even decide to take the risk for themselves under the declaratory judgment. They must rely on another person to take that risk. But, certainly, the doctor raised not only his own rights, but the rights of his patients. And those same patients are suffering the same sort of irreparable injury that the original plaintiffs were suffering.

JUSTICE MARSHALL: Couldn't the doctor raise that same point in the criminal prosecution?

MRS. WEDDINGTON: Yes, Your Honor, he can. But I don't feel it's appropriate to make those women who are most vitally affected certainly more so than the doctor, who can merely decide not to perform an abortion, and thereby escape….

JUSTICE MARSHALL: I want to talk about the doctor. You said there were two separate issues here. And the issue involving the doctor, he could litigate everything he's now litigating in the State court?

MRS. WEDDINGTON: Yes, Your Honor. My point being that these women should not be compelled to leave it up to a doctor to litigate their interests.

JUSTICE STEWART: Well, he's going to defend himself in a criminal prosecution, isn't he? You can count on him to do that.

MRS. WEDDINGTON: Well, I think there are different interests involved. And in most criminal prosecutions the doctors would bring up other problems, such as

JUSTICE STEWART: "I didn't do it." Or something like that?

MRS. WEDDINGTON: Yeah. Or the witnesses disappeared, or it really was for this reason, in this particular case.

JUSTICE STEWART: But has this defense ever been interposed in a Texas criminal case - a constitutional defense?

MRS. WEDDINGTON: Yes, Your Honor. There is one recent opinion, Thompson v. The State of Texas, which the Attorney General attempted to bring to the attention of the Court, and it was not printed, and the Court rejected it. But it was

a decision about a month and a half ago which originated in Houston. A doctor there was indicted on a charge of abortion. At trial he used only an alibi defense. But on his appeal he did raise the same constitutional questions that we raised in the Federal courts.

JUSTICE STEWART: The court said that was too late?

MRS. WEDDINGTON: No, Your Honor, they could have, but they didn't. They went ahead and litigated those issues, and our Texas Court of Criminal Appeals-which is our highest court-has now held that the statute is not vague, citing Vuitch, which, again, I would contend is an incorrect reliance.

JUSTICE STEWART: That's the case you cited to the Chief Justice earlier in your argument?

MRS. WEDDINGTON: And, second, they did not determine whether or not there was a right to privacy; but did hold there was a compelling interest. So, in that particular situation, which is the only situation, a doctor did attempt to litigate the same issues.

JUSTICE STEWART: And the Texas Court of Criminal Appeals has basically upheld the constitutionality- the constitutional validity of…

MRS. WEDDINGTON: They have held, really, directly in opposition to the Federal Court opinion from which we are appealing.

JUSTICE BRENNAN: Is that case coming to this Court?

MRS. WEDDINGTON: They have filed a motion for rehearing in the State Court of Criminal Appeals, which will be argued tomorrow. I think it's very unlikely that the court would change its opinion, and it is the intention of those parties to appeal.

JUSTICE STEWART: Does the Texas law in other areas of the law give rights to unborn children---in the areas of trusts, estates and wills, or any of the other…

MRS. WEDDINGTON: No, Your Honor, only... only if they are born alive. We have-the Supreme Court of Texas recently has held in one case that there is an action for prenatal injuries at any stage prior to birth, but only upon the condition that it be born alive. The same is true of our property law. The child must be born alive. And I think there is a distinction between those children which are ultimately born; and I think it is appropriate to give them retroactive rights. But I think that's a completely different question from whether or not they had rights at the time they were still in the womb.

JUSTICE WHITE: What about the unborn child who is, as a result of an accident, killed----or whatever word you want to use for it?

MRS. WEDDINGTON: There has been no situation litigated like that in Texas. I suppose you noted that the…

JUSTICE WHITE: Well, what about around the country?

MRS. WEDDINGTON: The Iowa Supreme Court about two weeks ago held that where it was stillborn there was no cause of action whatsoever.

JUSTICE WHITE: For either the mother...

MRS. WEDDINGTON: Oh, I'm speaking-excuse me-solely for the fetus; that the fetus had no independent right; that the mother…….

JUSTICE WHITE: What about the mother recovering on the death of the child, or for the… whatever you want to call it?

MRS. WEDDINGTON: Only for her injury.

JUSTICE WHITE: Only for hers?

MRS. WEDDINGTON: Yes.

JUSTICE WHITE: Does that include anything with regard to the child?

MRS. WEDDINGTON: No, Your Honor. Thank you.

CHIEF JUSTICE BURGER: Thank you, Mrs. Weddington. Mr. Floyd?

Argument of Jay Floyd, Attorney for Appellee:

MR. FLOYD: Mr. Chief Justice, may it please the Court:. It's an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word.

Before I proceed to the original issue in this case-which was the propriety of the trial court grant, or denying of injunctive relief - I would like to bring to the Court's attention some grave matters concerning what has been referred to as the standing of the parties.

The couple involved: they were a married couple - childless married couple. The only matter - evidence, or whatever, in the record concerning their contentions is contained in their first amended original petition.

That is, that the woman would have difficulty if she became pregnant in carrying a child to childbirth. Further, that they were unprepared for parenthood. We submit to the Court that their cause of action is strictly based upon conjecture.

Will they continue the marriage? Will her health improve? Will they then be, at some time in the future, prepared or unprepared for parenthood? There is no fear of prosecution by Mary Doe. If we accept all contentions of this married couple, we submit that they still do not come under the prescribed conditions of Flast v. Cohen and Golden v. Zwickler.

We feel that the lower court properly denied them standing. As to the unmarried pregnant female, a unique situation arises in: Is her action now moot? Of course if moot, there is no case or controversy.

JUSTICE STEWART: It's a class action, wasn't it?

MR. FLOYD: It was a class action.

JUSTICE STEWART: Surely you would - I suppose we could almost take judicial notice of the fact that there are, at any given time, unmarried pregnant females in the State of Texas.

MR. FLOYD: Yes, Your Honor. I would say that the only thing that would uphold her standing would be - or eliminate the mootness issue - would be whether or not this is a class action on her part. Yes, Your Honor. The record that came up to this Court contains the amended petition of Jane Roe, an unsigned alias affidavit, and that is all.

She alleges that she was pregnant on April the 20th, 1970, which is some 21 months ago. Now I think that it is - it has been recognized by the appellant's counsel that she is no longer pregnant.

This Court has consistently held that the time of determination of mootness is when the hearing is before the Court. That is, the case can become moot from the hearing in the trial court until the time it reaches this Court.

We do not feel appellant's authority contained in her brief will substantiate her contention that the case is not moot. Ah the… I might add this: I believe the law to be that if there is a reasonable possibility of reoccurrence of the situation, then the case would not be moot. Now, this is the W.T. Grant case.

The other case, or cases, concerned orders of the Interstate Commerce Commission, in which the Court holds that there is a possibility or a reasonable possibility of continuation of those orders, and the capability of repetition. It deals mainly with the capability of repetition.

We think the case of Jane Roe can be easily compared to Hall v. Beals. In that particular case a group of voters instituted a class action complaining of a Colorado statute which prescribed a residency requirement of six months.

They had, at the time, lived in the State, or at the time of the election lived in the State, some four or five months. The case came up through the lower courts to this Court.

And, in the meantime Colorado repealed the statute and established a two-month residency requirement. The election was held in the meantime. The trial court plaintiffs complained of the two-month residency requirement. This Court held the cause of action moot even though it was denominated as a class action.

JUSTICE WHITE: There's a big difference. Colorado had amended its statute, and Texas has not.

MR. FLOYD: That is correct, Your Honor. But the fact was that you still had-if it is what you want to call it - the evil still existing.

JUSTICE WHITE: But, two months. But it was the other statute that had been the subject of the litigation. And that statute had been amended in Hall against Beals. That is not true here.

MR. FLOYD: That's now what we call a white horse.

JUSTICE WHITE: I understand.

MR. FLOYD: In connection with the class action aspect of this - and I say I have no authority to support this proposition; but it would appear that in order for a class action to continue, if there be one to begin with - is that one plaintiff must remain, or else an intervenor, or someone, to be a representative of the class. Because this is the whole purpose of the class action, to have a representative in court.

Now, the position of the appellant Hallford...

JUSTICE STEWART: How do you suggest, if you're right, how do you... what procedure would you suggest for any pregnant female in the State of Texas ever to get any judicial consideration of this constitutional claim?

MR. FLOYD: Your Honor, let me answer your question with a statement, if I may. I do not believe it can be done. There are situations in which, of course as the Court knows, no remedy is provided. Now I think she makes her choice prior to the time she becomes pregnant. That is the time of the choice. It's like, more or less, the first three or four years of our life we don't remember anything. But, once a child is born, a woman no longer has a choice, and I think pregnancy then terminates that choice. That's when.

JUSTICE STEWART: Maybe she makes her choice when she decides to live in Texas.

MR. FLOYD: May I proceed?

There is no restriction on moving. Your Honor, the appellant Hallford is under two indictments, charged with the offense of performing an abortion. There are no allegations in the complaint of appellant Hallford - or none in his affidavit that there is any bad faith prosecution, bad faith arrest, harassment of him at all, to bring him within Dombrowski's special circumstances.
We think the cases of Younger v. Harris and Samuels v. Mackell are controlling as to Dr. Hallford's position. We also feel that Dr. Hallford cannot rely upon his patients' right to bring him into Federal court. And I think the Tilston v. Ullman case will be authority for that proposition.

As to the matter of injunctive relief after the court once grants declaratory relief, I will make this comment: that it appears the Court can consider the propriety of declaratory relief, and can consider the propriety of injunctive relief.

That is, the Court can divorce the two. And, once granting declaratory relief that a statute is unconstitutional, in its discretion can determine whether or not injunctive relief is proper, and deny it if it so pleases.

Now, should this Court, as I understand it - and all of the parties feel that if this Court once acquired jurisdiction over the matter - that these parties would like the Court to consider all the constitutional issues.

JUSTICE WHITE: Are you... are you sustaining... are you... saying that the denial of injunction was proper, because the declaratory judgment was in error?

MR. FLOYD: No, Your Honor. I say the Court can grant declaratory relief on constitutionality, and deny injunctive relief.

JUSTICE WHITE: I know. But certainly, if the judgment about the - if the declaratory judgment was erroneous, it was also right to deny injunction.

MR. FLOYD: Yes, Your Honor.

JUSTICE WHITE: And that's your position?

MR. FLOYD: That's correct. I think if the Court, of course, says...

JUSTICE WHITE: You didn't cross-appeal? You could have.

MR. FLOYD: We could not, to this Court, Your Honor. We have to go to the Fifth Circuit. So, we have.

JUSTICE WHITE: But are you attempting to sustain the denial of injunction here on the grounds that the declaratory judgment was improper?

MR. FLOYD: We argue - we are asking the Court---asking the Court, to do this: that is, the Court gets into the merits of injunctive relief; whether or not it was

proper under the circumstances; that this Court go forward, and continue the other-or continue the constitutional issues and make a determination.

JUSTICE BRENNAN: Can we do that? We said you couldn't cross-appeal from the declaratory judgment. You could only cross-appeal from the grant or denial of an injunction?

MR. FLOYD: Yes, Your Honor.

JUSTICE BRENNAN: I suppose we could do it, if we bypass the Court of Appeals and bring up your appeal pending in the Fifth Circuit.

JUSTICE STEWART: Couldn't we - you're here. Your opponent has brought a direct appeal here, because your opponent was denied an injunction by the three judge District Court?

MR. FLOYD: Yes, sir.

JUSTICE STEWART: You could not bring a cross-appeal here, because you won, from the point of view of successfully resisting the injunction.

MR. FLOYD: Yes, sir.

JUSTICE STEWART: But now that you're here as the appellee, you're arguing that an injunction should not have issued. And part of that argument, very legitimately, can be that on the merits the court was wrong, and that it shouldn't have issued a declaratory judgment or an injunction.

MR. FLOYD: That's correct, Your Honor.

JUSTICE STEWART: That is your position?

MR. FLOYD: Yes, Your Honor. Now, the proceedings in the Fifth Circuit have been stayed, or abated.

JUSTICE BRENNAN: I must say, your position makes sense to me. But don't some of our prior cases rather foreclose it, unless we bypass the Fifth Circuit and bring your appeal pending right here?

MR. FLOYD: Well, Your Honor - and I don't want to be repetitious, but a motion has been filed in the Fifth Circuit to hold the appeal in abeyance until a determination by this Court.

JUSTICE BRENNAN: But you didn't ask - you didn't file any motion here asking us to bring your appeal pending in the Fifth Circuit here for decision with this appeal, did you?

MR. FLOYD: No. We have requested that in our----in our reply to the jurisdiction, and in our brief. We have presented it in that manner. Your Honor, we feel that this Court can, and should consider all the issues. And, under the Sterling, Florida Lime and Avocado Growers, and the Carter cases, which are cited in the briefs of the parties.

JUSTICE MARSHALL: What is Texas' interest? What is Texas' interest in the statute?

MR. FLOYD: Mr. Justice, the Thompson case, which has been cited to the Court - Thompson v. State - the Court of Criminal Appeals did not decide the issue of privacy. It was not before the court; or, the right of choice issue. The State - the State Court, the Court of Criminal Appeals, held that the State had a compelling interest because of the protection of fetal life ---- of fetal life protection. They recognized the humanness of the embryo, or the fetus, and they said we have an interest in protecting fetal life. Whether or not that was the original intent of the statute, I have no idea.

JUSTICE STEWART: Yet, Texas does not attempt to punish a woman who herself performs an abortion on herself.

MR. FLOYD: That is correct, Your Honor. And the matter has been brought to my attention: Why not punish for murder, since you are destroying what you - or what has been said to be a human being? I don't know, except that I will say this. As medical science progresses, maybe the law will progress along with it. Maybe at one time it could be possible, I suppose, statutes could be passed. Whether or not that would be constitutional or not, I don't know.

JUSTICE STEWART: But we're dealing with the statute as it is. There's no state, is there, that equates abortion with murder? Or is there?

MR. FLOYD: There is none, Your Honor, except one of our statutes that if the mother dies, that the doctor shall be guilty of murder.

JUSTICE STEWART: Well, that's ordinary...

MR. FLOYD: Yeah.

JUSTICE STEWART:...felony murder.

MR. FLOYD: I would say so. Yes, Mr. Justice.

JUSTICE MARSHALL: The Texas statute covers the entire period of pregnancy?

MR. FLOYD: Yes, it does, Mr. Justice. Yes.

JUSTICE BRENNAN: Mr. Floyd, I don't find that Thompson case cited in the brief here. I gather you said it just had been decided recently?

MR. FLOYD: Mr. Justice, this case is just a recent case.

JUSTICE BRENNAN: Do you have a citation?

MR. FLOYD: It is not in the reporter system yet.

JUSTICE BRENNAN: Are you going to provide us with a copy of it?

MR. FLOYD: I'll be happy to, yes, sir, provide the Court with copies of that.

JUSTICE BRENNAN: What is the date of it, and the number? Do you know?

MR. FLOYD: This is No. 44070, C. W. Thompson v. The State of Texas. The opinion was delivered on November the 2nd, 1971.

JUSTICE BRENNAN: Thank you.

MR. FLOYD: I shall be happy to furnish the Court with this copy, if the Court so desires.
JUSTICE STEWART: At the Court of Criminal Appeals?

MR. FLOYD: Yes, Your Honor.

JUSTICE BRENNAN: And now, that's the case Mrs. Weddington told me was pending on a motion for rehearing?

MR. FLOYD: Yes, Your Honor. Now, there's one...

CHIEF JUSTICE BURGER: If you leave that with the Clerk, Mr. Floyd, we'll distribute copies.

MR. FLOYD: Now, in addition, the Thompson case cited the Vuitch case, in regard to vagueness, and said that it was controlling the issue. And, as I recall, Dr. Thompson raised the issue of: Well, how can you find me guilty of murder I mean of abortion, if you make no determination that the fetus is alive at the time I performed this? In effect is what he's saying. He never admitted doing it. But he's saying, how can you prove it? Of course the Texas Court answered by saying, it is presumed the fetus was alive when an abortion is performed.

JUSTICE STEWART: You're saying, in answer to my brother Marshall's question - what is the interest of the State in this litigation; or, even, what is its purpose, its societal purpose - your answer was, I think, relying on your opinion, the most recent opinion of the Court of Criminal Appeals in Texas, it was the protection of

fetal life. And I think you also said that that was not, perhaps, its original purpose.

MR. FLOYD: Well, I'm not sure of that. I...

JUSTICE STEWART: Well, it may be rather important. In a constitutional case of this kind, it becomes quite vital, sometimes, to rather precisely identify what the asserted interest of the state is.

MR. FLOYD: I think that original purpose, Mr. Justice, and the present prevailing purpose, may be the same in this respect. There have been statistics furnished to this Court in various briefs from various groups, and from medical societies of different groups of physicians and gynecologists, or whatever it may be. These statistics have not shown me, for instance - for example, that abortion is safer than normal childbirth. They have not shown me that there are not emotional problems that are very important, resulting from an abortion. The protection of the mother, at one time, may still be the primary - but the policy considerations, Mr. Justice, would seem to me to be for the State legislature to make a decision.

JUSTICE STEWART: Certainly that's true. Policy questions are for legislative and executive bodies, both in the State and Federal Governments. But we have here a constitutional question. And, in deciding it, it's important to know what the asserted interest of the State is in the enactment of this legislation.

MR. FLOYD: I am... and this is just from my - I speak personally, if I may……. I would think that even when this statute was first passed, there was some concern for the unborn fetus.

JUSTICE STEWART: When was it enacted?

MR. FLOYD: 1859 was the original statute. This, I believe, was around 1900, 1907.

JUSTICE STEWART: It goes back...

MR. FLOYD: It goes back...

JUSTICE STEWART:...to the middle of the nineteenth century?

MR. FLOYD: Yes, sir.

JUSTICE STEWART: Before that there were no criminal abortion laws in Texas?

MR. FLOYD: As far as I know there were not, no. I think this is, maybe, set out in some of the briefs.

JUSTICE BLACKMUN: Well, in any event, Mr. Floyd, apart from your personal attitude, your court has spoken on the intent of the statute, has it not?

MR. FLOYD: Yes.

JUSTICE STEWART: Well, I can't quite square that most recent pronouncement with the earlier decisions of the Texas Court, that refer to the mother as the victim. Can you?

MR. FLOYD: Well, as I say, Your Honor, the... I don't think the courts have come to the conclusion that the unborn has full juristic rights - not ...not...yet. Maybe they will. I don't know. I just don't feel like they have, at the present time.

JUSTICE MARSHALL: In the first few weeks of pregnancy?

MR. FLOYD: Sir?

JUSTICE MARSHALL: In the first few weeks of pregnancy?

MR. FLOYD: At any time, Mr. Justice. We make no distinctions in our statute.

JUSTICE MARSHALL: You make no distinctions whether there's life there or not?

MR. FLOYD: We say there is life from the moment of impregnation.

JUSTICE MARSHALL: And do you have any scientific data to support that?

MR. FLOYD: Well we begin, Mr. Justice, in our brief, with the- the development of the human embryo, carrying it through the development of the fetus from about seven to nine days after conception.

JUSTICE MARSHALL: Well, what about six days?

MR. FLOYD: We don't know.

JUSTICE MARSHALL: But the statute goes all the way back to one hour?

MR. FLOYD: I don't... Mr. Justice, there are unanswerable questions in this field. I...

JUSTICE MARSHALL: I appreciate it.

MR. FLOYD: This is an artless statement on my part.

JUSTICE MARSHALL: I withdraw the question.

MR. FLOYD: Thank you. When does the soul come into the unborn - if a person believes in a soul - I don't know.

I assume the appellants now are operating under the Ninth Amendment rights. There are allegations of First Amendment rights being violated. However, I feel there is no merit - this statute does not establish any religion; nor does it prohibit anyone from practicing of any part of any religious group. I see no merit in their contentions that it could possibly be under freedom of speech or press. In fact, there have been some articles recently in this City's newspaper - yesterday, for instance about it. The other constitutional rights that the appellant speaks of, I think, are expressed in two manners: The individual, or marital right of privacy; and, secondly - or... or the right to choose whether or not to abort a child. Now, if the... those are out of the case, the marital privacy is out of the case. But be that as it may, neither individual nor marital privacy has been held to be absolute. We have legal search and seizure. We have the possession of illegal drugs; the practice of polygamy, and other matters. A parent, I do not believe or parents, cannot refuse to give their child some form of education.

As far as the freedom over one's body is concerned, this is not absolute - the use of illicit drugs; the indecent exposure legislation; and, as Mr. Goldberg stated in the Griswold case, that adultery and fornication are constitutional beyond doubt.

JUSTICE STEWART: "Are constitutional"? Or do you mean laws against them are constitutional?

MR. FLOYD: The laws against them are constitutional. Now... there is nothing in the United States Constitution concerning birth, contraception, or abortion. Now, the appellee does not disagree with the appellants' statement that a woman has a choice. But, as we have previously mentioned, we feel that this choice is left up to the is the woman’s prior to the time she becomes pregnant. This is the time of the choice. Now this was brought out in the Rosen v. Louisiana State Board of Medical Examiners case, and in Corkey v. Edwards, which are lower court opinions, and my understanding is that Corkey v. Edwards has been adopted in this Court.

JUSTICE STEWART: Has been?

MR. FLOYD: Has been, yes, Your Honor. I'm not positive, but I think it has been.

JUSTICE STEWART: Texas doesn't grant any exemption in the case of a rape, where the woman's pregnancy has resulted from rape-either statutory or otherwise-does it?

MR. FLOYD: There is nothing in our statute about that. Now, the procedure...

JUSTICE STEWART: And such a woman wouldn't have had a choice, would she?

MR. FLOYD: The procedure - and now I'm telling the Court something that's outside the record - as I understand, the procedure when a woman is brought in after a rape, is to try to stop whatever has occurred, immediately, by the proper procedure in the hospital. Immediately she's taken there, if she reports it immediately. But, no, there is nothing in the statute. Now as I previously informed the Court, the statistics - or the people who prepare the statistics, and the different statistics are... are not in conformity in connection with the medical aspects of abortion; that is, whether or not it's safer. There are some statistics that say it is and statistics that say it's not. There are….It has been provided to this Court, the common law and the legislative history of abortion; and that the morality of abortion has been injected in various cases by various groups. We think these matters are matters of policy which can be properly addressed by the State legislature. We think that the consideration should be given to the unborn, and in some instances, a consideration should be given for the father, if he would be objective to abortion.

Thank you, Your Honor.

CHIEF JUSTICE BURGER: Mr. Floyd, your time is consumed. Unless you have some correction you wish to make, Mrs. Weddington.

MRS. WEDDINGTON: Your Honor, I would only like to draw to the Court's attention at page 130 of the record, the notice of appeal by defendant State of Texas, from the judgment of the District Court to the Supreme Court of the United States. They have filed an appeal in this Court.

CHIEF JUSTICE BURGER: Thank you. Thank you, Mrs. Weddington. Thank you, Mr. Floyd. The case is submitted.