OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1379

TITLE EUGENE F. DIAMOND AND JASPER F. WILLIAMS, Appellants V. ALLAN G. CHARLES, ET AL.

PLACE Washington, D. C.

DATE November 5, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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EUGENE F. DIAMOND AND JASPER F. WILLIAMS, Appellants : No. 84-1379

v.

ALLAN G. CHARLES, ET AL.

- -x

Washington, D.C.

Tuesday, November 5, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:46 o'clock a.m.

APPEARANCES:

DENNIS J. HORAN, ESQ., Chicago, Ill.;
on behalf of Appellants.

R. PETER CAREY, ESQ., Chicago, Ill.;
on behalf of Appellees.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Horan, I think you may proceed when you're ready.

ORAL ARGUMENT OF DENNIS J. HORAN, ESQ.

ON BEHALF OF THE APPELLANT

MR. LANDRY: Mr. Chief Justice and may it please the Court:

This is an appeal from a final judgment of the Seventh Circuit, an appeal brought by the intervening defendants in that case. The first issue of the case is one that has been raised in the briefs about the standing of the intervening defendants to bring this appeal under the doctrine of case or controversy.

Three things happened below: There was a declaratory judgment; there was an injunction; and there was a judgment against the individual intervenors for $100,000 for legal fees. The liability for the judgment will be appealed to the Seventh Circuit, but the amount of the judgment can only be litigated here because it's intertwined with the issues in this case, that is to say, who is the prevailing party on these issues. If this Court reverses the Seventh Circuit, then the amount of the judgment will be lessened since they no longer are the prevailing parties on the issues before this Court.

The standing or the real controversy thus between the parties to this case is a very real sum of money, a judgment that runs in favor of the individual plaintiff physicians in this case and against the individual defendants intervenors whom I represent.

They represent, therefore, a far greater stake, one might say, in the outcome of this case than the intervening appellants in Bryant versus Yellin, who were given standing to appeal on the basis of the water problem that existed in the Imperial Valley on the standing argument that they desired to purchase farmlands in the Imperial Valley if farmland should become available because of the application of 46 in that case.

No one was required to sell, but standing to appeal was nonetheless granted for purposes of the appeal on the mere probability that someone might sell below market depending upon the outcome of Section 46.

QUESTION: Mr. Horan, again a matter of curiosity. You started the case off with a man named Campbell as a plaintiff. When did he get off the train?

MR. HORAN: Pardon me, Judge?

QUESTION: One of your original plaintiffs was named Campbell.

MR. HORAN: Campbell. He is still in the case technically. There has been no order dismissing him and no order removing him from the case.

QUESTION: But you don't even name him here as an Appellant.

MR. HORAN: Yes. Technically, he is in the case; as far as all the parties are concerned, he has been removed. It is not too different from what you heard in a previous argument.

Thus the litigants here, the intervening --

QUESTION: Are you representing him?

MR. HORAN: Yes, Your Honor.

QUESTION: Was he on the notice of appeal?

MR. HORAN: I'd have to check the notice of appeal, Your Honor. I'm not quite sure.

QUESTION: Well, my whole point is, how can he be here if he's not on the notice of appeal?

MR. HORAN: If he's not on the notice of appeal, then he is not a party before this court.

QUESTION: Well, how can he be before this Court?

MR. HORAN: I corrected, Your Honor. I say that if he is not on the notice of appeal, which it appears he is not, he is not a party before this Court.

QUESTION: Well, how can you -- he is not a

party before this Court?

MR. HORAN: Yes, Your Honor.

QUESTION: Thank you.

MR. HORAN: The judgment, however, is joint and several against all three of the individuals that I represent.

QUESTION: Are you still representing him here?

MR. HORAN: He is not a party before this Court. I would have to retract and say therefore he is not represented before this Court.

QUESTION: Very well.

MR. HORAN: The intervening defendants therefore state a very real interest which assures that the case will be litigated vigorously in an adversary context and in a form this Court --

QUESTION: Well, may I ask, Mr. Horan, what cases of this Court do you rely on as upholding the standing of a private citizen to assert the constitutionality of a state criminal statute?

MR. HORAN: There are many intervenors who have appeared before this Court --

QUESTION: No, that wasn't my question. My question is what cases of this Court do you rely on?

MR. HORAN: I'm trying to think of the title

of the cases that have been argued before this Court where intervenors have argued, for example, on the parental consent cases, have all appeared before this Court and argued and this Court has granted standing.

Perhaps it was not a specific issue in those cases, but nonetheless they did appear as intervenors, did appeal, and did appear before this Court in argument.

QUESTION: And they were state criminal statutes?

MR. HORAN: Yes, Judge.

QUESTION: And you can't remember the names?

MR. HORAN: Williams versus Zebares is one, from the State of Illinois, where we intervened and appeared and argued before this Court. We also argued in Harris versus McRae. Those were state statutes and --

QUESTION: State criminal statutes?

MR. HORAN: That was not a criminal statute. Akron was a criminal statute which involved intervention. Allen Sejudi, as I recall, represented the intervenors in those cases and argued before this Court on behalf of intervenors, asserting interests in the parental consent and in other sections of those statutes.

QUESTION: But is it not true that in those cases the State had also appeared as a party?

MR. HORAN: The State had also appeared, that is correct.

QUESTION: This is the first time we have had nobody except an intervening doctor, isn't it, on this side of the case?

MR. HORAN: This may be the first time in that sense, yes, Judge.

QUESTION: Would you help me a little bit. I understand you rely very heavily on the fact you've been hit rather heavily with a fee award in the lower court, and of course you do have an interest in that. If there were not the fee in the case, do you think you'd have standing independently?

MR. HORAN: Yes, Judge. We have asserted interests as intervenors which have twice been ruled on by the trial court and twice they have found that they are fundamental and substantial.

QUESTION: I understand the Court of Appeals recently disagreed with those holdings.

MR. HORAN: No, that was not as to the individuals in this case. That was as to --

QUESTION: I mean on a similar issue.

MR. HORAN: No, that was as to the ability of

an organization, not individuals who asserted a specific interest. The organization was a different -- came under a different rule of law.

QUESTION: Well, in any event, what is the theory on which, apart from the fee question, a doctor who is interested in the cause that you represent has standing to litigate in a case like this?

MR. HORAN: He has standing to litigate the standards of medical practice that ought to be applied. he has the standing to litigate interests in individuals such as his daughter, who would have an interest in the outcome of the Section 210 and 11(d). He has an interest that he can -

QUESTION: Well, let's stop with that one just for a minute. What is the nature of his interest as a parent? Does he allege that his daughter is apt to have an abortion or anything like that?

MR. HORAN: No. But it is possible that his daughter might be involved with a physician who is prescribing something that in effect is an abortifacient, and consequently under 210 and 11(d) he would have an interest in seeing to it that the standard is applied which requires the physician to reveal to that person --

QUESTION: He can't tell his own daughter this

information?

MR. HORAN: He might not be involved in the situation where his daughter is obtaining such a drug or device from another physician. That's why the --

QUESTION: Is there a realistic probability of something like this happening?

MR. HORAN: Yes.

QUESTION: Are you qualified to give us the position of the State of Illinois?

MR. HORAN: In the court below and before the Seventh Circuit, the State was a party, did litigate the issues, and we jointly filed joint briefs, so that the position of the State on each one of these issues was stated in those briefs. The Attorney General has filed a statement with this Court under Rule 10.4 that he does have an interest in the outcome of this case.

QUESTION: Did the State itself take an appeal to the Seventh Circuit?

MR. HORAN: Yes.

QUESTION: You're sure about that?

MR. HORAN: Yes.

QUESTION: Well, what is the position of the State now, and how do you know?

MR. HORAN: Because the State filed a letter which was referred to in the brief of the Appellees and

a copy of which is an appendix to our reply brief, stating that they have an interest in the outcome of the case.

They did not state the reason why they did not file a notice of appeal. My understanding is that the reason was simple inadvertence.

QUESTION: Can we rule in this case that we decided on your assurance of what the law is in the State of Illinois and what the State of Illinois intends to do? In other words, you can't give us any one word of authority from the State of Illinois?

MR. HORAN: One would have to divide that --

QUESTION: Am I right?

MR. HORAN: Not quite. One would have to divide --

QUESTION: Well, what exactly does the State of Illinois authorize you to say?

MR. HORAN: It authorizes us or me to say what it authorized to be said in the court below when we did file the joint briefs.

QUESTION: Well, we don't need you for that, do we? We can read the brief.

MR. HORAN: If I weren't here there'd be nobody here.

QUESTION: Well, the brief would be here.

MR. HORAN: I'm afraid they wouldn't, because if I weren't here the appeal wouldn't be here. That's the very point. That's why we're here.

QUESTION: That's right. And if you can't represent the State of Illinois, what is before us is exactly nothing.

MR. HORAN: Well, there is a provision in --

QUESTION: Is that right?

MR. HORAN: No, I disagree respectfully, Justice. There is a provision in the Illinois State statutes. It's Section 6. The Appellees cited it, Section 2. Section 6 allows any court in which a proceeding is taking place in which the Attorney General if Illinois has an interest that, in the event he is absent, that court could appoint any competent attorney as the attorney general for the purposes of that proceeding.

It requires mere absence. That is to say, the interest --

QUESTION: Yes, but no one has exercised that power of appointment.

MR. HORAN: No one has exercised that. I respectfully --

QUESTION: Certainly we haven't.

MR. HORAN: No.

QUESTION: And may I also ask, you suggested the Attorney General was inadvertent in failing to file a notice of appeal. But surely he had plenty of time to file a brief on the merits. That can't be attributed to inadvertence.

MR. HORAN: It cannot, and I cannot give a reason why that was not done. I do suggest, however, that unlike Bryant versus Yellin that I relied on so heavily, in Bryant the Solicitor General and the Department of the Interior took a position on the merits. They came to the conclusion that the appeal was unwarranted, and this was a matter of record. And the Court here did not find that any bar to allowing those private citizens to prosecute that appeal, and indeed to win the case.

QUESTION: Mr. Horan, may I ask on the attorney fee point that you mentioned, the $100,000 liability. I understand you contest that fee award. Do you contest both the amount of the fee and do you also take the position you're not really liable for any fees at all?

MR. HORAN: We contest --

QUESTION: I assume you take that position?

MR. HORAN: Yes, Judge. We contest the amount, but the amount can only be contested here

because it's intertwined --

QUESTION: I understand that. But in addition, I suppose you claim that as intervenors you're probably not liable for fees at all?

MR. HORAN: Yes. But thus far that has not been very successful.

QUESTION: To say the least.

MR. HORAN: To say the least.

If I may, we can move on to Section 210 and 11(d), which is the --

QUESTION: Of course, I suppose we could save you $100,000 by ruling you have no business in this litigation at all.

(Laughter.)

MR. HORAN: The other suggestion I had was that our opponents could stand up and attempt to defeat this argument, which may be described as bootstrap. They could stand up and waive all fees. That's a suggestion for them.

210 and 11(d) require that a physician who is going to prescribe an abortifacient advise the woman that it is indeed an abortifacient. The purpose of the statute is to protect women who do not want an abortion, and this Court has indicated that that is as fundamental a right as it is to decide to have an abortion.

The right cannot be exercised by the woman if indeed she does not know that the drug or device being administered to her is an abortifacient. That's the first prerequisite. The statute applies if and only if the doctor knows that the drug or device is an abortifacient and the drug or device is in fact an abortifacient, and yet he intentionally disregards that and prescribes it to the woman without indicating that it is such.

Conviction is a class C misdemeanor, which incidentally is the lowest class midemeanor under Illinois law, Illinois criminal law. And a conviction of a class C misdemeanor is not grounds for revocation or suspension of a physician's license.

The statute represents the State of Illinois' assertion of its legitimate right to assure awareness of the abortion decision and its significance, as this Court said it constitutionally could do so in Danforth. A physician does not have a right, constitutional or otherwise, to prescribe medication without indicating to the person to whom it is prescribed the risks attendant to it.

The statute places no burden whatsoever in the path of a woman who wishes to secure an abortion.

QUESTION: May I ask one other question about

the statute, Mr. Horan. In your reply brief you state there's nothing in the record to support the suggestion that an IUD or Stilbestrol is an abortifacient within the meaning of thestatute.

Does the statute itself or the legislative history or anything in the record identify any drugs or devices that are properly -- that a doctor should know are in fact, whatever the term is?

MR. HORAN: No, Judge. This was a facial attack and the specific items to which you're referring have never been brought into evidence in this case.

QUESTION: And is it entirely up to the doctor to decide for himself whether a particular drug or device is such a device within the meaning of the act? How does the doctor know?

MR. HORAN: There is both a subjective and an objective standard. The subjective standard requires his knowledge. Objectively, the item must in fact be such, must be recognized as such when used in the customary means for which it was produced.

QUESTION: Well, would it be a defense under the statute for a doctor always to say, well, I didn't realize this was an abortifacient?

MR. HORAN: If it's done in good faith, it would be a defense.

There is no burden on any woman seeking an abortion. The statute has nothing to do with it. Its intent and purpose is to protect the woman who does not want an abortion. I think that's essential here in deciding its constitutionality. In Maher, for example, this Court pointed out that a woman has at least an equal right to choose to carry her fetus to term.

The plaintiffs have raised in this Court for the first time an argument that the imposition of the statute does not accord with good medical practice or, another way of phrasing it, they say it requires false information. That's another issue that was not litigated.

In their cite on page 17 they cite to Williams Obstetrics page 89. A review of page 89 indicates, quite the contrary from the assertion of the argument, that the information that the State requires is accurate and factual and medically correct and in accord with medical practice.

The Seventh Circuit weighed heavily on the argument that this statute, when read with the other sections of the statute, required the physician to be the mouthpiece of the State as to a certain theory of life which it's not allowed to enunciate under Roe v. Wade. And I may digress for one moment to point out

that in this case here it is our contention there is no issue concerning Roe v. Wade, Ashcroft, Colautti, or any of the other cases, but that they are properly applied under our view.

The Seventh Circuit held that to fulfil the requirement of the statute the physician would have to talk about fetal death, and under the definition of fetal death it requires that he look to the definition of fetus, which means human being.

What the Seventh Circuit overlooked was that at the time it wrote the decision that section of the statute had been amended, Section 2-6, and it had been amended to read that "a fetus is an individual organism of the species homo sapiens from fertilization until live birth," which as far as I think humans can do is absolutely neutral on the issue of whether or not we're involved with a human being at that stage. I think it was a rather significant omission by the court in arriving at that conclusion.

There are two other sections of the statute, and I must refer to them as old 6-1 and old 6-4 because the statute was amended, and the new amendments we refer to as new 6-1 and new 6-4 to try to allay a little of the confusion that the amendments caused.

Incidentally, the Seventh Circuit found, and

it's true, if one looks at the history of abortion legislation in the State of Illinois, the many amendments, the changes in the statute, the constantly going back to the legislature to do it over again, one would find out that they correlate pretty well with the opinions of this Court. And many of the sections of this statute are the way they are because of the time that Ashcroft was passed and the State of Illinois was attempting to bring its law in conformity with Ashcroft.

Our argument below, after notifying the Seventh Circuit of the change in the statute, was that the issues with regard to old 6-1 and old 6-4 were moot, primarily because the changes were substantial. The statute was narrowed. Different standards were involved.

And that statute, new 6-1 and new 6-4, is the subject matter of a separate lawsuit called Keith versus Daley, which is being vigorously litigated below. Extensive affidavits have been filed, briefs have been filed. It is the subject matter of an agreed-to between the State and the litigants preliminary injunction, and is undertaking no activity until this case is decided. So new 6-1 and new 6-4 are in a separate lawsuit where the constitutionity of those statutes are being litigated.

Now, back to old 6-1 and old 6-4. The Seventh Circuit addressed those statutes even though the challenge to them and the standing of the challenge to them was based upon the potentiality of future convictions. In fact, 6-4 had been enjoined from the day it was passed until the day it was amended out of existence.

6-1 was in existence for only eight months, so that when the Seventh Circuit dealt with this issue it held that, because of the possibility of future prosecutions against these physicians for the eight-month period of time several years prior, that that statute was not moot. And it therefore held that the statute was not moot and reached the merits on the issue.

Our position is then and is now that under the teachings of this Court that statute was moot, ought not to have been addressed, or the Seventh Circuit ought to have remanded in the same case to consider the effect of the new amendments, which was not done. The plaintiffs chose, as is their right, to file a separate suit and litigate those issues separately. The court would not consolidate the cases and therefore we had a bifurcated litigation going on, which ought not to have been the case but nonetheless was.

QUESTION: This is just with respect to one or two of the statutes?

MR. HORAN: Only with -- this only refers to 6-1 and 6-4.

QUESTION: Right.

MR. HORAN: It does not refer to --

QUESTION: Now, if we happen to agree with you, what should we do, vacate and tell them to dismiss the case to that extent?

MR. HORAN: Dismiss that case as to these issues, yes. And then those issues will be litigated in the new case, Keith versus Daley, in a statute much more narrowly drawn in an attempt, and a good attempt I think, to comply with Ashcroft.

QUESTION: Mr. Horan, do you contend that the changes were mandated by Ashcroft? You said they were trying to comply. If so, it seems to me, perhaps without intending to do so, you're suggesting that perhaps the old version would have been invalid under Ashcroft.

MR. HORAN: No, I don't suggest that. I suggeset that what was done in Ashcroft was, if I may use the expression, a scheme of regulation involving two physicians, one of whom, being an ob-gyn, has the jurisdiction up until the time of birth, the other of

whom, being the pediatrician, takes over the jurisdiction at the time of birth forward. There being two individuals involved, Ashcroft has tried to work out that scheme and now the states are trying to follow the scheme that's outlined in Ashcroft.

It does not mean that the separate standard that was set out in 6-1 was indeed unconstitutional. As a matter of fact, it is our contention --

QUESTION: Another way of putting it, I suppose, is that if there's no decision on the old version of 6-4 and 6-1 the legislature would remain free in your view to re-enact those statutes?

MR. HORAN: No. No, Judge. It would be purposeless, because new 6-1 and new 6-4 represent the regulation under Ashcroft.

QUESTION: Well then, it really doesn't make much difference what we do with the old, is that what you're saying?

MR. HORAN: No, it does make some difference if you reach the old one, because the standard of care is not that dissimilar in terms of the actual standard of care as divided amongst the two physicians that I have just described.

QUESTION: So you think the Court of Appeals decision in this case will probably rub off on the other

one?

MR. HORAN: It will certainly rub off.

The Seventh Circuit, incidentally, had previously upheld the same standard of care that 6-1 contains. The Eighth Circuit and the lower court in Ashcroft upheld it in 188.030.2 of their statutes. You remember that the debate here was on .3. The .3 contained two provisions, one of which was the second physician, but the second sentence of .3, which was upheld by this court by implication when it upheld the first sentence, the second sentence contains the same standard of care as 6-1.

It says that: "During the performance of the abortion the physician performing it and subsequent to the abortion the physician required by this section to be in attendance shall take all reasonable steps in keeping with good medical practice consistent with the procedure used to preserve the life and health of the viable unborn child, provided that that does not pose an increased risk to the life or health of the woman."

That was the same standard that was contained in 188.030.3, which was the subject matter of the Ashcroft case. And it's that standard that the states are trying to enunciate now in the statutes which they are passing and which Illinois has done.

The Seventh Circuit ruled that 6-1 was vague because 6-1, it said, does not specify who must make the viability determination, physician or assistant. Now, to come to that conclusion one must ignore other sections of the statute, namely 2-2, which defines viability as a medical judgment of the attending physician based on the particular facts of the case before him.

If one reads both sections together, it's quite clear that it is the attending physician who makes the medical judgment of viability. 6-1 is a post-viability standard of care. It applies only after viability is known in fact and applies only if there is a deliberate disregard of the fact that the child is viable.

In addition, another section, 6-5, requires that there be absolutely no tradeoff in terms of risk. Any medical risk involved vitiates the import of 6-1. That is to say, a physician need not follow 6-1 if in doing so, that is to say in selecting a method of abortion or using a standard of care to save the viable child, it would in any way increase the risk to the woman.

There is no tradeoff that was found perhaps to be inappropriate under Colautti.

QUESTION: Are you saying that the argument against the Pennsylvania statute doesn't apply to this statute, the argument we just earlier?

MR. HORAN: I don't have an opinion on that case, Your Honor, but that argument certainly does not apply here.

The standard set out in 6-1 and in 6-5, read in conjunction with 2-2, certainly is not vague. It identifies for any reasonable physician reading it what it requires and let's him know that only an intentional failure to exercise that standard is subject to prosecution under the statute. The standard is a common, medically accepted standard, and really causes no problem for physicians to understand.

Old 6-4 is another post-viability statute, substantially similar to the one I have just described, with a slight difference. It does not use the word "viability." Instead, it uses a statement of the standard that comports with the standard adopted in Roe.

It says when there exists in the medical judgment of the physician performing the pregnancy termination, based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of the mother,

with or without artificial support. The statute applies after viability and contains a different standard, a possibility, in reference to the subjective judgment made by the attending physician.

The intent of this section is to sweep under the protection of 6-4 a greater number of viable children than would be done so by 6-1. If 6-4 is constitutional, 6-1 is obviously so and 6-4 would be the standard that the states would adopt.

The Seventh Circuit held 6-4 unconstitutional solely on the basis that it applied to pre-viability abortions and therefore has a chilling effect. It does not apply to pre-viability abortions because it contains word by word the standard for viability that this Court adopted in Roe.

The word "possibility" can only be interpreted to refer to the subjective quality of the physician's judgment, asking him to bring into the sweep of the statute's protection not a remote possibility of viable children who might survive, but a reasonable possibility of children who might survive.

CHIEF JUSTICE BURGER: Your time has expired, counsel.

MR. HORAN: Thank you.

CHIEF JUSTICE BURGER: Mr. Carey.

ORAL ARGUMENT OF R. PETER CAREY, ESQ.,

ON BEHALF OF APPELLEES

MR. CAREY: Mr. Chief Justice and may it please the Court:

In an attempt to promote the State's theory of fetal life, the Illinois statute unconstitutionally overrides the physician's obligation to protect the life and health of a woman needing medical care, and further, requires a physician to deliver a morally charged and medically inaccurate message based upon the State's theory of life to patients seeking contraceptive advice.

The legal questions raised in this appeal were correctly settled by the Seventh Circuit's application of the principles enunciated in Roe, Colautti, and Akron. Intervenor's continuation of the conflict in this Court reflects only his refusal to abide by constitutional limits on state authority and his refusal to accept prior decisions of this Court.

Intervenor's desire to impose his personal antipathy against abortion on physicians and women does not cure the unconstitutional deficiencies of this statute or establish Article 3 jurisdiction.

Illinois' Attorney General has not filed a notice of appeal from the Seventh Circuit's decision,

nor, contrary to the intervenor's initial representation, did the Attorney General join in the jurisdictional statement. After this Court noted probable jurisdiction, the Attorney General for Illinois did not file a brief in this Court, nor did he request to be heard at oral argument.

I might also add that I am aware of nothing that authorizes Mr. Horan to speak for the State of Illinois, either its Attorney General or any of the State's attorneys who are charged with prosecuting violations of this statute in the 102 counties in Illinois.

QUESTION: Well, Mr. Carey, what about our case of Singleton against Wulff, decided in 1976, where a majority of the Court held that doctors could raise not only their own rights, but the rights of their patients?

MR. CAREY: Yes, Your Honor, that's correct. But in that case the challenge was to a statute which impacted on the physician. Here we have, if you will, the reverse. We have a private citizen of Illinois coming in and attempting to uphold a criminal statute which regulates an area in which he doesn't practice. If the statute were upheld, he wouldn't be subject to prosecution under it. He doesn't perform abortions or

give birth control devices.

QUESTION: Yes, but doesn't he allege similar financial interests to those of the doctors in Singleton?

MR. CAREY: The financial interests that are alleged by Dr. Diamond are extremely attenuated. His situation is much more akin, I think, to this Court's decision in Linda R.S. versus Robert D., where you recall that a mother sought to overturn Texas' interpretation of their statute which Texas said didn't apply to the collection of child support from fathers of illegitimate children, but only to fathers of legitimate children.

She brought suit and this Court found that even if the statute were changed or found to be unconstitutional as she suggested, the thought would be only that these fathers would be subject to prosecution, not that child support would reach her. And the same is true here.

The Attorney General's participation --

QUESTION: May I ask, on the standing question, how can you consistently take the position here that there's no -- you really don't have an adversary, and yet if what your opponent told us is correct, you asked for $100,000 from him in the district

court on the ground that he was your adversary? How can you have it both ways?

MR. CAREY: I might say I'd like to know how he can have it both ways. But there is a distinction, in that the decision of the district court on fees is not final. In fact, it's recently been subject to briefing. The position of the district court as I understood it was that the award of fees was joint and several amongst all defendants, with the defendants intervenors having one-half of the total fee award.

The district court noted in its decision on fees that it was concerned because of what it viewed as the dilatory tactics that were engaged in by intervenors the litigation.

QUESTION: Well, would you not agree that as a normal proposition, if he has no standing to litigate, which I understand to be your position, you certainly shouldn't have standing to get fees from him?

MR. CAREY: No, I think that's not quite right. He chose to intervene in the case. He chose to participate in the case. He chose to participate in the case actively. He exposed himself knowingly to the possibility of fees being assessed against him.

QUESTION: You're going to get -- presumably, if you win you get some kind of an injunction against

the State of Illinois enforcing the statute. You're not going to get any relief against these people, are you?

MR. CAREY: No, I'm not, and in fact that's exactly the argument they are making to the district court at this very time. They recently filed a memorandum which I received yesterday evening in the district court on the fee question. The district court had asked that the parties brief rather the applicability of Graham.

And they point out to the court that their interests are simply the same as the interests of the State parties, but that doesn't convert this otherwise private parties as State actors and provides no basis for the award of fees under Section 1988.

The Attorney General's participation in this --

QUESTION: May I inquire. If the Appellant here lacked standing, then I take it the Court of Appeals would have rendered just an advisory opinion?

MR. CAREY: No, Your Honor. Excuse me, but the State through the Attorney General was before the Court of Appeals.

QUESTION: I see.

MR. CAREY: And the State is not before this Court. So at the time that the appeal was decided, and

indeed at the time of the entry of the preliminary and final injunction in the district court, the State through both the Attorney General and the State's attorney in the district court and in the appellate court through both of those as well was actively in the case and trying to uphold the statute.

They are not before this Court, however.

Just as the State of New Jersey in Princeton versus Schmid did not give any indication as to how the case should be resolved -- that case involved the constitutionality of a New Jersey statute as applied to a person who had leafletted on Princeton's campus, and the Court found that there was no jurisdiction -- so the State's lack of a position on the merits of this case or any indication of its preference for disposition of any of the issues in this case requires dismissal.

Intervenor has no legally cognizable interest. He simply desires that the State enact, uphold and enforce unconstitutional laws which reflect his view that life begins at fertilization and which impair the exercise of women's constitutional privacy rights.

Turning to the statute itself, Sections 210 and 11(d) represent the State's attempt to dissuade women from using certain types of birth control by

establishing the theory that life begins at fertilization and then requiring the physician to espouse that theory to his patients seeking contraceptive advice.

The State accomplishes this by defining "human being" as a fertilized ovum, then defining "fetus" as a human being from fertilization until live birth. "Abortifacient" is defined under Section 210 as any drug or device which causes fetal death, whether or not the fetus is known to exist.

Then we have 11(b) which requires the physician to advise patients receiving Stilbestrol and IUD's and certain birth control devices that they are not contraceptives, but are rather abortifacients, a term which is defined in this very statute as causing fetal death, whether or not the fetus is known to exist.

QUESTION: Mr. Carey, your opponent says that the statute doesn't define either Stilbestrol or IUD as one of these devices.

MR. CAREY: He is correct in the sense that the statute does not say, when we use "abortifacient" we mean IUD's and DES. But I think that the record evidence is uncontradicted by the affidavits of the plaintiff physicians that their reading of the

definition of "abortifacient" in 210 and the incorporated definitions of "fetus" and "human being" necessarily leads them to the conclusion that IUD's and Stibestrol are covered.

QUESTION: Is there a finding to that effect?

MR. CAREY: I believe that the district court did find that, yes, and that the Seventh Circuit agreed with that.

The conclusion that the physicians reached, that IUD's and DES are subject to the provisions of 210 and 11(d), is not rebutted by the intervenor's suggestion in his brief in this Court to the contrary or by anything in the evidence.

210 and 11(d), contrary to intervenor's contention, are not informed consent. These provisions do not advise the woman of what is to be done or its consequences. Rather, these provisions require that physicians provide all women, regardless of their circumstances, with medically irrelevant information. It is intervenor, not the medical profession, who seeks to deceive women who need medically accurate information regarding birth control.

Indeed, the patient information brochure which is required by federal regulation to be given to women contains medically accurate information regarding the

health risks and consequences of IUD's, DES, and oral contraceptives. Contrary to 210 and 11(d), this federally mandated information clearly informs the woman that none of these drugs or devices will cause an abortion or terminate a pregnancy.

Moreover, the availability of this information to the woman undercuts intervenor's undocumented insinuations that the medical profession is engaged in wholesale deception of women.

Finally, intervenor's interpretation of this statute that physicians are free to use value-neutral language to comply with it is contrary to the express statutory language, ignores the coercive force of the criminal statute, and is inconsistent with the position advanced by intervenor in the briefs.

The word "abortifacient" necessarily signifies an abortion, which necessarily presumes the existence of a pregnancy. Surely this word will often need explanation, and just as surely physicians will avoid the possibility of prosecution by using the statutory explanation, "causing fetal death."

Section 6-4 is directly contrary to this Court's prior holdings in Danforth and Colautti because it burdens the abortion decision and its effectuation prior to viability. The fetal standard of care applies

when the physician determines there exists a possibility of sustained survival, a possibility, not a reasonable likelihood.

A similar standard of care was found unconstitutional in Danforth because it applied prior to viability. Likewise, this provision applies before there is a reasonable likelihood of sustained fetal survival and must, for that reason, be unconstitutional.

Intervenor's suggestion to the contrary is refuted by the existence of Section 6-1, which clearly applies after viability and establishes the same standard of care. Also, their suggestion is controverted by the language of 6-4. The "possibility of viability" language in 6-4 necessarily suggests that it applies to a time before viability.

Moreover, if there is any doubt on this question, then 6-4 is unconstitutionally vague under this Court's decision in Colautti, for according to intervenor this condition which the State is attempting to govern by Section 6-4 differs in some indeterminate way from viability as set forth by this Court in Roe and Danforth.

Finally, as with Section 6-1, Section 6-4's stanard of care is impermissibly vague.

Turning then to Section 6-1, this is the post-viability standard of care provision, very much like the one in Danforth and very much like the one in Colautti. It is vague in at least two ways, each of which is sufficient to sustain the decision below. First, the statute does not clearly specify the attending physician's viability determination controls. Second, the statute fails to inform the physician that the woman's life or health is preeminent to the fetus when they conflict.

Turning to the first of these, this section, unlike Section 6-4, applies when the fetus is known to be viable. This phrase was added after the district court in Wynn versus Scott had construed Section 6-1 to leave the viability determination to the attending physician's judgment.

Section 6-1 thus allows the State to question the correctness of the viability determination in a later criminal prosecution. Intervenor concedes that the State cannot constitutionally do so under Colautti, but argues instead that the "known to be" phrase means known by the attending physician to be. Intervenor's construction is contrary to the express statutory language used by the legislature to limit the viability determination to the attending federal in Section 6-4.

Additionally, the intervenor construes the "known to be" phrase to have a different meaning in the second sentence of Section 6-1 than the meaning which he attributes to that phrase in the first sentence of 6-1, thereby illustrating the vagueness of that phrase.

Alternatively, if physicians and assistants are not bound by the physician's viability determination, chaos will occur as each assistant attempts to avoid criminal prosecution by acting contrary to the physician's instructions where the physician has determined that the fetus is not viable.

Women who receive post-viability abortions do so because their life or health is threatened. This statute does not clearly specify that the woman's life and health are preeminent from the decision of whether or not to have an abortion through its effectuation. Contrary to intervenor's suggestion, this problem is not solved by Section 6-5.

Section 6-5 does not provide the protection of the woman's life and health which the intervenor claims. Section 6-5 simply doesn't make the woman's life and health preeminent. It applies by its own words only during the course of the pregnancy termination, a point after which the choice of abortion techniques has already occurred.

Choice of abortion technique, as this Court recognized in Colautti, is a complicated medical judgment, about which physicians can and do disagree. Intervenor's unsupported assertion that certain techniques were developed to injure fetuses ignores the fact that these same techniques reduce risks to women whose life and health is threatened in a post-viability abortion situation.

The distress to the fetus in this situation, the threat to the woman, the skills of the physician, and the varying side effects and complications of each of these techniques makes compliance with 6-1 impossible; and, as the uncontroverted affidavits state, 6-1 does not present to them a clear understanding of what physician conduct is considered criminal.

Although the intervenor suggests to the contrary, the words "life and health" don't appear in Section 6-5. Rather, Section 6-5 applies when the physician determines that to follow the dictates of Section 6-1 would cause increased medical risk to the woman.

The difference in language necessarily creates vagueness. Illinois uses the health and life standard to control the availability of post-viability abortions. By not using that standard in 6-5, it

intended to somehow limit the factors which the physician had available to him to consider in deciding whether or not to apply the 6-1 standard.

A reaffirmance of Colautti's requirement that when fetal and maternal interests conflict the physician must be allowed to consider the woman's health and life preeminent in making post-viability abortion decisions is necessary because, if I may say so, some including Illinois have not followed that decision.

Starting with Griswold and most recently in Akron, this Court consistently has recognized the woman's right to personal autonomy in reproductive matters. These prior decisions are dispositive of the issues in this case.

Sections 210 and 11(d) cannot be reconciled with Akron's prohibition of criminal regulation designed to deter reproductive choices. Sections 6-1 and 6-4 cannot be reconciled with Colauti's prohibition of vague statutes that require tradeoffs between a woman's health and that of the fetus.

None of the provisions can be reconciled with Roe's clear affirmation that the constitutional right of privacy cannot be vitiated by the State's theory of life.

For these reasons and those in our brief, the

decision of the Court of Appeals should be affirmed or on the Article 3 point this appeal should be dismissed. Unless the Court has any other questions, thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:37 a.m., argument in the above-entitled case was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1379 - EUGENE F. DIAMOND AND JASPER F. WILLIAMS, Appellants V. ALLAN G. CHARLES, ET AL.

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)