IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-18

JANE ROE, ET AL.,

Appellants,

vs.

HENRY WADE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
N. D. TEXAS, DALLAS DIVISION.

BRIEF OF AMERICANS UNITED FOR LIFE, AMICUS CURIAE, IN SUPPORT OF APPELLEE.

CHARLES E. RICE,
820 Cavanaugh,
South Bend, Indiana 46617,
219 233-6919,
Attorney for Americans United for Life.

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INTEREST OF THE AMICUS CURIAE.

Americans United for Life is a national, non-sectarian, educational organization of citizens who affirm the sacredness of all human life from conception to natural death. Its principal offices are at 422 Washington Building, Washington, D. C. 20005. It is a particular purpose of Americans United for Life to promote a wider application of constitutional rights to children in the womb. It is this purpose which gives Americans United for Life an interest in this appeal. For this appeal involves the issue of whether the child in the womb is entitled to the protection of constitutional rights in the specific situation where his abortion is sought where it is not necessary to save the life of the mother.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The aspect of this case argued in this brief involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code. The specific portion of the Fourteenth Amendment involved reads as follows: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The pertinent provisions of the Texas Penal Code forbid abortion where it is not necessary to save the life of the mother; they are set forth verbatim in the briefs of appellant and appellee.

QUESTION PRESENTED.

Whether an injunction should issue to bar enforcement of the Texas statutes that forbid abortion where it is not necessary to save the life of the mother.

SUMMARY OF ARGUMENT.

The child in the womb is a person within the meaning of the equal protection clause of the Fourteenth Amendment. The equal protection clause forbids classifications by law that are arbitrary, capricious or unreasonable. To allow the child in the womb to be killed by abortion, where it is not necessary to save the life of his mother, would be to subject him to an arbitrary, capricious and unreasonable classification. This is so because he is in fact a living human being and his young age and his situation do not provide a sufficient basis for a legal determination that he is subject to death where older human beings are not so subject. Enforcement of the statute in question should not be enjoined since such an injunction would allow the child in the womb to be killed by abortion where it is not necessary to save the life of his mother. It would therefore deprive him of the equal protection of the laws.

ARGUMENT.

I.

THE CHILD IN THE WOMB IS A PERSON WITHIN THE MEANING OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Levy* v. *Louisiana,* 391 U. S. 68, 70, 20 L. Ed. 2d 436, 439, 88 S. Ct. 1509 (1968), the Court said:

> We start from the premise that illegitimate children are not "nonpersons." They are humans, live, and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.

The child in the womb meets these criteria of personhood under the Equal Protection Clause. He is human, he lives and he has his being. That is, he is a living human being. As the highest court of New Jersey summarized the state of scientific knowledge, "Medical authorities have long recognized that a child is in existence from the moment of conception." (*Smith* v. *Brennan,* 31 N. J. 353, 362, 157 A 2d 497, 502 (1960))

The character of the child in the womb as a person is clearly recognized in the law of torts. The attitude of the law of torts toward the child in the womb was summarized by Dean William L. Prosser:

> So far as duty is concerned, if existence at the time is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. After its birth, it

> has been held that it may maintain a statutory action for the wrongful death of the parent. So far as causation is concerned, there will certainly be cases in which there are difficulties of proof, but they are no more frequent, and the difficulties, are no greater, than as to many other medical problems. All writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and in urging that recovery should be allowed upon proper proof. [Prosser, Handbook of the Law of Torts (4th Ed., 1971), 336]

It is significant that a majority of courts, keeping pace with advancing scientific knowledge, now hold that even a stillborn child may maintain a wrongful death action where his death was caused by a prenatal injury. [*Kwaterski* v. *State Farm Mut. Ins. Co.,* 34 Wis. 2d 14, 148 N. W. 2d 107 (1967); *State to Use of Odham* v. *Sherman,* 234 Md. 179, 198 A. 2d 71 (1964); see discussion in Prosser, Handbook of the Law of Torts (4th Ed., 1971)]

A similar trend can be seen in the law of property. As long ago as 1946, it was noted in *Bonbrest* v. *Kotz,* 65 F. Supp. 138, 140 (D. C., Dist. Col., 1946), that, "From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as a human being, but as such from the moment of conception—which it is in fact." The law of property has long recognized the rights of the child in the womb for purposes which affect the property rights of that child. In *Thellusson* v. *Woodford,* 4 Ves. 227, 31 Eng. Rep. 117, 163 (1798), the court rejected the contention that a devise for the life of a child in the womb was void because such a child was a non-entity:

> Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions . . . He may take by devise. He may be entitled

> under a charge for raising portions. He may have an injunction; and he may have a guardian.

When the property rules of the English common law were adopted by American courts the same approach was taken:

> It has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years that a child *en ventre sa mere* is "born" and "alive" for all purposes for his benefit. [In re Holthausen's Will, 175 Misc. 1022, 1024, 26 N. Y. S. 2d 140, 143 (Surr. Ct., 1941)]

Indeed, there is authority for the proposition that the child in the womb will be regarded as in existence even where it is against his interest to do so. [In re Sankey's Estate 199 Cal. 391, 249 Pac. 517 (1926)]

For purposes of equity, too, the law has recognized the existence of the child in the womb. An unborn child, for example, can compel his father to provide him support. [*Kyne* v. *Kyne,* 38 Cal. App. 2d 122, 100 P. 2d 806 (1940); *Metzger* v. *People,* 98 Colo. 133, 53 P. 2d 1189 (1936)] He can compel his mother to undergo a blood transfusion for his benefit, even where such transfusion is forbidden by the mother's religious beliefs. In *Raleigh Fitkin-Paul Morgan Memorial Hospital* v. *Anderson,* 42 N. J. 421, 423, 201 A. 2d 537, 538 (1964), cert. denied 377 U. S. 985, 12 L. Ed. 2d 1032, 84 S. Ct. 1894 (1964), the mother for religious reasons refused to have blood transfusions which were medically necessary to save the life of the child in her womb. The court held that the child's right to live outweighed even the mother's right to the free exercise of her religion. The court said:

> We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.

It would be possible to multiply medical opinions [See, for example, Bradley M. Patten, M.D., Foundations of Embryology (1964), 35, 82] and reinforcing legal decisions in support of the proposition that the child in the womb should be recognized as a person within the meaning of the Equal Protection Clause. Suffice it to say that the child in the womb satisfies the three criteria for personhood—he is human, he lives and he has his being—enunciated in *Levy* v. *Louisiana,* 391 U. S. 68, 70, 20 L. Ed. 2d 436, 439, 88 S. Ct. 1509 (1968). He is clearly alive and in being. As the living offspring of human parents, he can be nothing else but human. As a living human being he is therefore a person within the meaning of the Equal Protection Clause.

Even if one somehow does not concede that the child in the womb is a living human being, one ought at least to give him the benefit of the doubt. Our law does not permit the execution, or imprisonment under sentence, of a criminal unless his guilt of the crime charged is proven beyond a reasonable doubt. The innocent child in the womb is entitled to have us resolve in his favor any doubts we may feel as to his living humanity and his personhood.

II.

IF THE LAW WERE TO ALLOW THE CHILD IN THE WOMB TO BE KILLED WHERE IT IS NOT NCESSARY TO SAVE THE LIFE OF HIS MOTHER, IT WOULD MAKE HIM THE VICTIM OF AN UNREASONABLE CLASSIFICATION AND AN INVIDIOUS DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Takahaski* v. *Fish and Game Commission,* 334 U. S. 410, 420, 92 L. Ed. 1478, 1487, 63 S. Ct. 1138 (1948), the Court said, "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy

that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws." It is true that the Equal Protection Clause does not forbid all classifications. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." [*Williamson* v. *Lee Optical of Oklahoma,* 348 U. S. 483, 489, 99 L. Ed. 563, 573, 75 S. Ct. 461 (1955).]

In *Skinner* v. *Oklahoma,* 316 U. S. 535, 541, 86 L. Ed. 1655, 1660, 62 S. Ct. 1110 (1942), the Court invalidated an Oklahoma compulsory sterilization statute on the ground that it denied equal protection of the laws because it arbitrarily determined who would be subject to sterilization. One comment by the Court in Skinner is particularly relevant in this abortion case because it emphasizes the special scrutiny that must be given to statutes that interfere with basic rights:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it cau cause races and types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

The right to live is more basic even than the right to procreate. And there is "no redemption" for the aborted child

in the womb. The abortion is to his "irreparable injury" and by it he "is forever deprived of a basic liberty." Any law which interferes with the right to live must therefore be carefully scrutinized. It is appropriate to apply here the principles which govern the application of the Equal Protection Clause to another basic right—the right to be free from racial discrimination. The Court declared in *McLaughlin* v. *Florida,* 379 U. S. 184, 196, 13 L. Ed. 2d 222, 231, 85 S. Ct. 283 (1964), that a state law "which trenches upon the constitutionally protected freedom from invidious official discrimination based on race . . . even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related to the accomplishment of a permissible state policy."

There is no sufficient necessity which justifies a law which permits the killing of the child in the womb where it is not necessary to save the life of his mother. We are not concerned in this appeal with the question of whether a state law can constitutionally allow abortion where it is necessary to save the life of the mother. Rather the issue is whether the constitution permits the child in the womb to be killed where it is not necessary to save the life of his mother. To permit the child in the womb to be killed in such a case improperly discriminates against him on account of his age and situation. For the law does not allow a born child or an adult to be killed at the discretion of another or in any other situation where his killing is not necessary to save the life of another. (See *United States* v. *Holmes* (E. D. Pa. 1842) 1 Wall Jr. 1, Fed. Cas. No. 15,383; *Regina* v. *Dudley* (1884) 15 Cox C. C. 624, 14 Q. B. D. 273)

Discrimination in employment on account of age is now forbidden by federal law which enunciates a strong public policy. [29 U. S. Code 622-23] And while age may be a reasonable criterion for determining the right to vote or to

drive a car, it can hardly be contended that it is a reasonable basis for determining whether one has a right to continue living. The child in the womb should have the same right as his older brother or sister not to be killed where it is unnecessary to save the life of his mother. Nor should the fact that he temporarily reposes in his mother's womb rather than in an incubator or a crib operate to deprive the child of the right to continue living.

The child's right to continue living ought not to be considered inferior to any asserted right of the mother in this case, where her own life is not in danger. This includes the mother's right to privacy. In *Wyman* v. *James,* 400 U. S. 309, 318, 27 L. Ed. 2d 408, 414, 91 S. Ct. 381 (1971), the Court held that a home visit by a welfare caseworker was not an infringement on the right of privacy of the plaintiff, a mother who was a recipient of Aid to Families with Dependent Children. Significantly, the Court noted:

> The public's interest in this particular segment of the area of assistance to the unfortunate is protection and aid for the dependent child whose family requires such aid for that child. The focus is on the *child* and, further, it is on the child who is *dependent.* There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights. (Emphasis in original)

The dependent child in the womb is entitled to similar protection when what is involved is his very right to continue living.

CONCLUSION.

For the reasons stated herein Americans United for Life respectfully submits that the judgment appealed from, denying an injunction against the enforcement of the Texas statutes forbidding abortion where it is not necessary to save the life of the mother, should be affirmed on the ground that those statutes are constitutional.

Respectfully submitted,

CHARLES E. RICE,
820 Cavanaugh,
South Bend, Indiana 46617,
219 233-6919,
Attorney for Americans United for Life.