10-1985

Diamond v. Charles

Lewis F. Powell Jr

Another abortion case!

Aff'm

CA7 invalidated several sections of Ill. abortion laws.

Case is not moot even though amendments in 1984, Possibility of prosecuting doctors remained.

CA7 generally followed our precedents

PRELIMINARY MEMORANDUM

April 19, 1985 Conference
List 1, Sheet 1

No. 84-1379-AFX

DIAMOND, et al.
(Illinois officials and doctors)

v.

CHARLES, et al.
(doctors opposed to Illinois abortion regulations)

Appeal from CA7
(Wood, Pell [scj], Campbell [sdj])

Federal/Civil

Timely

SUMMARY: Appellants maintain that the CA7 erred in holding 3 provisions of the Ill Abortion Law unconstitutional and permanently enjoining their enforcement.

FACTS AND HOLDING BELOW: On Oct 30, 1979, the Ill General Assembly amended the state's abortion law to provide for increased regula-

Affirm.
The case is not moot for the reasons CA7 discussed.

tion of certain procedures. Sections 6(1) and 6(4) concern an attending physician's "standard of care" with respect to maintaining an aborted fetus' life; §§(2)(10) and 11(d) require any person prescribing an "abortifacient" (any instrument or drug designed to cause fetal death) to inform the recipient. Violations of these provisions are criminal offenses. That same day, appellees, several doctors and an abortion clinic, filed this §1983 suit in the DC NDIll (Flaum, J.) against appellants, the Ill Attorney General, a class of Ill State Attorneys, and several intervening doctors, alleging that the provisions were unconstitutional and seeking declaratory and injunctive relief.

On Nov 16, 1979, the DC preliminarily enjoined enforcement of §§6(1) and 6(4) because they incorporated an unconstitutional definition of viability; the DC refused to enjoin enforcement of §§2(10) and 11(d). On appeal, the CA7 held that §§2(10) and 11(d) should also be enjoined because they forced physicians "to act as the mouthpiece for the State's theory of life." 627 F.2d 772, 789-790 (1980).

After another preliminary hearing before the DC, which is not part of this appeal, the DC (Kocoras, J.), in Oct 1983, was prepared to rule on cross-motions for summary judgment. At this point, the 3 challenged laws provided as follows:

(1) Section 6(1), which imposes a standard of care on physicians who perform abortions on a "viable" fetus:[1]

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[1]The Ill Abortion Law defines "viability" as "that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained

Footnote continued on next page.

"No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable, before or after birth, commits a Class 2 felony if the death of a viable fetus or infant results from such failure." Ill. Rev. Stat. ch. 38, ¶81-26, §6(1) (emphasis added).

criminal statute

(2) Section 6(4), which imposes a similar standard of care on physicians performing abortions on a possibly viable fetus:

"No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted 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 more than momentary survival of the fetus, apart from the body of the mother, with or without artificial support. Ill. Rev. Stat. ch. 38, ¶81-26, §6(4) (emphasis added).

(3) Sections 2(10) and 11(d), which define "abortifacient" and require a physician who prescribes an "abortifacient" method of birth control to inform his patient that he has done so:

Section 2(10). "'Abortifacient' means any instrument, medicine, drug or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed." Ill. Rev. Stat. ch. 38, ¶81-22, §2(10).

Section 11(d). "Any person who sells any drug ... which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers

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survival of the fetus outside the womb, with or without artificial support." Ill. Rev. Stat. ch. 38, ¶81-22, §2(2).

The law defines "fetus" as "a human being from fertilization until birth. Id., §2(9).

> any instrument ... which he knows to be an abortifacient, and intentionally, knowingly, or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor." Ill. Rev. Stat. ch. 38, ¶81-31, §11(d).

The DC held that §6(1) was valid and declined to enjoin enforcement of this provision. The court also held, however, that §§6(4), 2(10), and 11(d), were unconstitutional and thus permanently enjoined their enforcement.

For the first time before the CA7 at oral argument, appellants suggested that appellees' challenges to §§6(1) and 6(4) were moot given the legislature's June 1984 amendments. Sections 6(1) and 6(4) were amended to place more emphasis on the physician's medical judgment.[2] Apparently, these amended provisions are currently the subject of a temporary restraining order entered by the DC NDIll in Keith v. Daley, No. 84 C 5602 (1984). For that reason the CA7 declined to rule

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[2]Section 6(1), as amended, deletes the "known to be viable" proviso and expressly incorporates the definition of "viability" contained in §2(2):
"Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus." P.A. 83-1128, H.B. 1399, §6(1).

Section 6(4), as amended, follows suit, providing in pertinent part:
"Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable possibility of sustained survival of the fetus outside the womb, with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus. P.A. 83-1128, H.B. 1399, §6(4).

on the validity of these provisions.

The CA7 rejected appellants' suggestion of mootness and held that the 3 provisions at issue were unconstitutional. Accordingly, the court affirmed the DC's permanent injunction with respect to §6(4) §§2(10) and 11(d), and directed the DC to enter a permanent injunction against enforcement of §6(1).

1. Mootness. The court concluded that the amendment to §6(1) did not moot the case because the State could still prosecute doctors, such as appellees, for violating the terms of that provision, which remained in effect from Oct 1983 to June 1984; §6(1) contained a 3-year limitations period. The court reasoned that this possibility of prosecution constituted a live controversy within Article III. With respect to §6(4), the court observed that this provision had been subject to a continuous injunction since 1979. Hence, there was no possibility of prosecution. Nevertheless, the court held that the amendment did not moot the case. Following the statement in City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 282, 289, n. 10 (1982),[3] the court concluded that appellants had failed to prove that the State will not "return to its old ways" if the court dismisses appellees'

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[3] In City of Mesquite, the plaintiff contended that a municipal zoning ordinance was unconstitutionally vague. During the pendency of the plaintiff's appeal, the defendant City revised the ordinance and removed its objectionable language. The Court held that the revision did not moot the plaintiff's appeal, observing:
"The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'" 455 U.S., at 289, n. 10 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)).

claim. Moreover, appellants had not demonstrated that any "chilling effects" of §6(4) were eliminated by the recent amendment.

2. Section 6(1). Although the State's interest in preserving fetal life is compelling at the stage of viability, the State may only regulate in such a context if it narrowly tailors its regulations to the precise interest at stake. Roe v. Wade, 410 U.S. 113, 163, 165 (1973). Colautti v. Franklin, 439 U.S. 379, 387 (1979), makes clear that the State, in serving its compelling interest, must respect the physician's central role in consulting with the woman and in determining how to carry out her abortion. In particular, the State may not interfere with the attending physician's medical judgment in determining the precise point in a woman's pregnancy at which viability exists. Id., at 395-396; accord, Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976) ("the determination of whether a particular fetus is viable is, and must be, a matter for the responsible attending physician"). The court held §6(1) invalid because it does not specify that the attending physician's viability determination alone shall govern; in this respect, the provision "improperly encroaches on the attending physician's medical judgment in treating his patient." 749 F.2d, at 459.

Moreover, the court observed that §6(1) fails to give physicians and their assistants explicit notice of the type of conduct the State purports to condemn.

> "Because [§6(1)] abuts upon a woman's fundamental right to consult her doctor about abortion and to receive the doctor's unimpeded medical judgment, it threatens to chill the exercise of her freedom. Specifically, the section encumbers the woman's exercise of a constitutionally protected right by placing obstacles in the form of criminal sanctions in the path of the doctor upon whom she is entitled to rely." Id., at 460.

Under the circumstances, the court concluded that §6(1) is "unconstitutionally vague." In a footnote, the court noted that the statute's amended definition of viability (§2(2)) did not remedy §6(1)'s imprecision because §6(1) still fails to inform the physician as to whose viability determination controls.

3. Section 6(4). Unlike §6(1), this provision purports to regulate the performance of abortions at a stage before viability. This statute creates a direct interference with a woman's right to discuss abortion with her physician and to receive her physician's unimpeded medical judgment because of its criminal penalties. The court concluded that the statute creates the distinct possibilty that the woman will be unable to exercise her right to choose abortion because her doctor refuses to perform an abortion at the risk of going to jail. Given this burden on the woman's right to have an abortion, the State must have a compelling interest and prove that it has written §6(4) to protect only that interest. The State's compelling interest in preserving fetal life cannot justify §6(4) because that provision applied to certain pre-viability abortions. Similarly, the State's compelling interest in protecting the woman's health cannot save §6(4) because that provision penalizes hostile activity which is harmful to the fetus' health and does not in any manner seek to protect the mother's health. In light of the State's failure to present any other compelling interest which could justify §6(4)'s restriction on a woman's freedom to choose an abortion, the court held that §6(4) unconstitutionally infringes the woman's fundamental right.

4. Sections 2(10) and 11(d). The Court in Roe v. Wade, and City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct.

2481 (1983), ruled that States do not have the power to override the rights of a pregnant woman by adopting one theory of when life begins. City of Akron explictly prohibited the State from foisting upon the pregant woman its view that life begins at conception in order to justify its regulation of abortion. 103 S. Ct., at 2500. The court concluded that §§2(10) and 11(d) constitute such an attempt by the State because the sections incorporate the definition of "fetus" in which the State classifies a fetus as a human being from fertilization until death.

The court rejected appellants' argument that the sections do not at all require physicians to reiterate the State's theory that life begins at conception.

> "However physicians choose to comply with the mandate of section 11(d), they nevertheless must notify their patients that the drug or device which they have prescribed will terminate the life of any fetus which their patients might be carrying. This section not only intrudes upon the medical discretion of the attending physician, but it also impermissibly imposes the State's theory of when life begins upon the physician's patient." 749 F.2d, at 462.

The court concluded that the State's interest in protecting "maternal emotional and physical health" cannot justify §§2(10) and 11(d) because the sections impose on those women who prefer abortifacient methods of birth control the State's theory that abortifacients kill unborn children. "The State may not treat such women inequitably in order to protect the emotional health of women who oppose abortifacients." Ibid. Also, the State's interest in preserving fetal life cannot justify these provisions: these provisions operate in situations where the woman is not pregnant; and when the woman is pregnant, the provisions impermissibly restrict the attending physician's discretion at a stage in the mother's pregnancy at which neither of the

State's recognized interests (preserving fetal life or protecting the mother's health) may be compelling. Finally, these provisions infringe upon a constitutionally protected right to choose a method of contraception in a sitution where the State has no compelling countervailing interest. Carey v. Population Services Int'l, 431 U.S. 678, 688-689 (1977).

CONTENTIONS:

Appellants--

Sections 2(10) and 11(d). Appellants contend that these provisions, which merely seek to ensure that women are informed about abortifacients, are fully consistent with the Court's guidelines in Danforth and City of Akron. These cases hold that the State has the authority to take steps to inform women about the nature and consequences of abortion procedures. Appellants take issue with the CA7's reasoning that these provisions render physicians "mouthpieces" of the State. City of Akron held that only when the statute directs the doctor to use specific words, as did the Akron ordinance at issue, can the use of those words be attributable to the State. Section 11(d), however, does not require the doctor to recite any specific litany; the statute simply requires the doctor to state the truth--that he is prescribing an abortifacient. Moreover, appellants disagree with the CA7's conclusion that the provisions somehow infringe a woman's right to decide to use contraceptives. The provisions' "plain meaning" encompasses only abortifacients (drugs or devices that prevent birth after fertilization), not contraceptives (drugs or devices that prevent fertilization). Finally, appellants argue that the CA7's suggestion that §11(d) is unconstitutional because "it is somehow inequita-

ble to require that women wishing to use abortifacients be hold that they are using them" is preposterous. Jur. St. 26. Sections 2(d) and 11(d) are designed to protect the fundamental rights of women who are opposed to abortion by allowing them to choose intelligently to refrain from using abortifacients. Thus, these provisions protect the women most likely to experience harm--those who unknowingly accept abortifacients and later learn what they thought was a contraceptive or other medication was in fact something they morally oppose.

Mootness. Appellants claim that the 1984 amendments render any challenge to §6(1) moot, because these amendments substantially clarify any vagueness in the law. The amended version of §6(1) specifies the physician's duty toward the fetus--to use the same skill, care and diligence to preserve the life and health of the fetus to be aborted as would be required to preserve the life and health of a fetus intended to be born. In addition, the amendments, because of appellees' facial challenge, cure whatever "chilling effect" the unamended provisions may have had. Similarly, the CA7 erred to believe that there was any reasonable possibility that the State would reenact the old provisions. Finally, the CA7 erred to hold that the possibility of prosecution for violating the unamended version of §6(1) established the necessary case or controversy. This conclusion has no basis in reality because the State has never sought to prosecute physicians on the basis of the prosecutor's "second-guessing" of their decisions.

Validity of §6(1). Appellants contend that the CA7 ignored the canon of statutory construction that courts should interpret statutes to avoid declaring them unconstitutional. Section 6(1) may fairly be read as allowing only the attending physician's determination of via-

bility to control. With this construction, the provision is no longer vague and satisfies constitutional standards. This limiting construction was supported by the Ill Attorney General and State Attorney Daley in briefs filed before the CA7. Under these circumstances, the CA7 clearly erred in adopting the more expansive reading of §6(1).

Validity of §6(4). Appellants point out that the State has a legitimate interest in protecting fetal life. The only effect of §6(4) is to restrict hostile activity directed toward the fetus. In no circumstances does §6(4) place any obstacle on the decision whether or not to terminate the pregnancy. The woman remains free to consult with her physician and decide to terminate her pregnancy for whatever reason she and her physician decide upon. Appellants argue that "proper balancing" of the State's interest and the woman's right to privacy dictates that §6(4) be upheld. Roe v. Wade recognized the woman's right to decide to have an abortion. This right does not include the right to kill the fetus when there is a reasonable possibility that the fetus is capable of sustained survival outside the womb. The Court should review the issue presented by §6(4)--the extent of the State's authority to regulate abortions before the viability stage on behalf of the fetus in a manner that does not infringe upon a woman's right to terminate her pregnancy.

Appellees--

Sections 2(10) and 11(d). Appellees agree with the CA7 that these provisions may not stand in light of Danforth and City of Akron because they unconstitutionally intrude on the physician's medical discretion and force the physician to "foist upon" the patient the

State's view that life begins at conception. The State in these provisions is improperly attempting to influence the woman's constitutionaly protected right of private decisionmaking in matters relating to birth control by requiring physicians to inform all women that certain methods of birth control cause the death of an unborn child or human being.

Mootness. For the reasons stated by the CA7, appellees agree that the 1984 amendments to §6(1) and §6(4) do not render the case moot.

Validity of §6(1). The CA7, applying settled law, correctly concluded that §6(1) was unconstitutional in light of its vagueness with respect to whether the physician's viability determination controlled. Appellants essentially concede the point, but then pull a "limiting construction" out of thin air. Contrary to appellants' suggestion, no limiting construction has been proffered by a state court or enforcement agency. Appellants simply have borrowed an "argument" first raised in a reply brief to the CA7.

Apart from this constitutional infirmity, §6(1) was properly struck down because it unnecessarily chills a physician's exercise of his medical judgment and thus indirectly inhibits a woman's exercise of her fundamental right to consult her doctor about abortion. In addition, §6(1) is not drafted with the precision necessary when the State imposes criminal penalties for a physician's handling of abortion procedures.

Validity of §6(4). In Colautti v. Franklin, 439 U.S. 379 (1979), the Court made clear that before viability a State may not impose direct obstacles, such as criminal penalties, to further its interest in

the potential life of the fetus. The CA7 simply followed this decision to strike down §6(4) because it effectively interferes with a woman's right to terminate her pregnancy at a stage where the State's interest is not compelling.

Finally, appellees maintain that there is no need for the Court to set this case for full briefing and oral argument. The CA7's correct application of well-settled precedent should be summarily affirmed.

DISCUSSION: Although the 1984 amendments perhaps lessen the significance of the CA7's ruling, they do not appear to eliminate an Article III "case or controversy." Physicians may still be prosecuted for violating §6(1), and the perceived "chilling effects" of the provision continue. how?

Turning to the merits, the Court's current bout with Thornbourgh v. American College of Obstetricians and Gynecologists, No. 84-495 (draft per curiam dismissing the appeal; circulated Jan 10, 1985), indicates that the Court does not welcome docketing another abortion case. I have little to add to the CA7's resolution of the issues involved. Although the court chose to interpret §6(1) literally, so as not to have the physician's determination control, the court should not be faulted for reading the statute as loosely as it was drafted. The state legislature appears to have wanted to inject some uncertainty into the field, and it is just this type of vagueness that this Court has consistently rejected.

With respect to §6(4), I tend to think that the CA7 correctly recognized that the provision would inhibit a woman's ability to exer-

cise her right to terminate her pregnancy under circumstances where the State's interest is not compelling. Perhaps the CA7 did not give sufficient weight to the State's interest in nurturing fetal life, but at the same time, the court recognized that the provision swept too broadly so as to infringe the woman's fundamental right to choose to terminate her pregnancy without any unnecessary obstacles from the State.

Despite appellees' arguments, I cannot find much fault with the CA7's treatment of §§2(10) and 11(d). On the surface, it is difficult to argue with appellees' point that a woman should know that the drug she is taking will kill a fetus. On the other hand, the CA7 followed Danforth and City of Akron to conclude that these provisions placed physicians in the precarious position of carrying out the State's view of when life begins. Under the circumstances, the provisions effectively interfered with the woman's right to choose a particular method of contraception and to decide whether to terminate her pregnancy.

Given the 1984 amendments, which substantially reduce the importance of the CA7's ruling, as well as the CA7's correct application of this Court's precedents to the specific provisions at issue, I recommend that the Court affirm the CA7's judgment.

I recommend affirm.

There is a motion to dismiss or affirm.

April 8, 1985 Lazerwitz Opn in petn

Although the statutory provision as viability could have been read narrowly, I think CA7's interpretation was appropriate given that the State never contended that the narrow view was its view until late in the game. Moreover, such a "saving" construction more appropriately should come from state courts. (yes)

On balance, I would affirm. I expect that the Court may be persuaded to duck this by noting that the amendments render CA7's decision to be of little importance - maybe enough to DWSFQ. But given the controversy in Thornburgh, there may be 4 votes to note. (Anne would)

AML

April 19, 1985

Court ..... *Voted on*....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 84-1379

Submitted ....., 19... *Announced* ....., 19...

DIAMOND

vs.

CHARLES

J.P.S. thinks part of sec. relates to OK.

Note

Related for C.J.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.				Jour		3	to	Note					
Brennan, J.				✓			✓						
White, J.				✓			✓						
Marshall, J.							✓						
Blackmun, J.							✓						
Powell, J.							✓						
Rehnquist, J.	Note ✓		for	84-495				Thornburg (Pa. case)					
Stevens, J.				✓		as to 1st Q							
O'Connor, J.				✓									

27P.

May 16, 1985

Court ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 84-1379

Submitted ....., 19... Announced ....., 19...

~~5 [illegible]~~

§6(1) - p 2, 6

§6(4) - p 3

§2(10) & 11(d) - p 3

DIAMOND

vs.

CHARLES

Abortion care

Noted

Set with Thornburg

84-495

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.				✓									
Brennan, J.							✓						
White, J.				✓			acc w/ board						
Marshall, J.							✓						
Blackmun, J.							✓						
Powell, J.							✓						
Rehnquist, J.				✓									
Stevens, J.				✓	—		Q #1 (Mootness Q ?)						
O'Connor, J.				✓									

ccc 10/15/85 Renewed

Cabell would affirm CA 7's invalidation of §§ 6(1) and 6(4), but would reverse as to 2(10) and 11(d)

BENCH MEMORANDUM

To: Mr. Justice Powell October 15, 1985

From: Cabell

No. 84-1379, Eugene F. Diamond & Jasper F. Williams v. Allan G. Charles, et al.

On Appeal from CA7

Argument: Tuesday, November 5, 1985

Questions Presented

1. Was there a justiciable case or controversy present in a facial challenge to sections 6(1) and 6(4) of the Illinois Abortion Law, when relevant statutory provisions had been amended and substantially altered?

2. May Illinois require physicians who prescribe or administer abortifacients to inform their patients that they have done so?

3. If the court of appeals did not err in addressing old section 6(1), did it nevertheless err in failing to adopt a saving interpretation?

4. Can Illinois require the use of a method of abortion most likely to preserve the life of the fetus after the fetus has a reasonable possibility of survival?

I. STATEMENT OF THE CASE

This case is a companion to No. 84-495, Thornburgh v. American College of Obstetricians. This memo omits or abbreviates discussion on those points covered in the bench memo for that case.

CAT invalidated four sections of Ill law.

Appellants, Drs. Diamond and Williams (the latter now deceased), appeal from the final judgment of the 7th Circuit Court of Appeals holding sections 2(10), 6(1), 6(4), and 11(d) of the Illinois Abortion Law unconstitutional.

On October 30, 1979, Appellees filed a complaint enjoining the enforcement of the Illinois Abortion Law of 1975 [sic], which had been passed that day by the General Assembly. Then-District Judge Flaum enjoined the enforcement of sections 6(1) and 6(4) (duty of medical care toward "viable" fetus) because they incorporated an invalid definition of viability. He upheld sections 2(10) and 11(d) (duty to inform about abortifacient).

The Court of Appeals reversed Judge Flaum's holding on those latter two sections.

On remand, Judge Kocoras issued a permanent injunction against sections 2(10), 11(d), and 6(4), but upheld section 6(1) and dissolved the preliminary injunction that had been entered against it. Both sides appealed. During the pendency of that appeal, the Illinois legislature amended section 6(1) and 6(4). The Court of Appeals, however, ruled that the controversy concerning old sections 6(1) and 6(4) was not moot because there was no assurance that the State would not "return to its old ways" and because the defendants had not "demonstrated that [the amendment] irrevocably eradicated the effects" of section 6(4). The Court of Appeals then found both sections 6(1) and 6(4) unconstitutional. The court also affirmed the permanent injunction against sections 2(10) and 11(d).

This Court noted probable jurisdiction on May 20, 1985, and scheduled this case for argument with Thornburgh.

II. DISCUSSION

Challenges to the earlier version of sections 6(1) is not moot because there is still the "threat of prosecution" under the prior provision. Challenges to the earlier version of section 6(4) is not moot because the amendment did not materially alter the alleged infirmities. On the merits, it appears that (1) the Court of Appeals erred in holding unconstitutional the provision requiring that physicians inform their patients of the use of an abortifacient because of the substantial discretion

left to the physician; (2) the Court of Appeals did not err in failing to adopt a strained saving interpretation of section 6(1); and (3) section 6(4) intrudes on a patient's rights by requiring the use of a method of abortion most likely to preserve fetal life when the fetus is only potentially viable.

A. Mootness of Challenges to Sections 6(1) and 6(4)

The appellants contend that although there is a justicable case or controversy with respect to amended sections 6(1) and 6(4), the Court of Appeals erred in reviewing the unamended provisions. Relying on County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), appellants argue that the voluntary cessation of the illegal conduct does dispel the controversy with respect to the unamended provisions because "(1) it can be said with assurance that 'there is no reasonable expectation ...' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effect of the alleged violation."

While I believe, unlike the Court of Appeals, that it is unlikely that the General Assembly will re-enact the old provision that it recently amended, the controversy with respect to these old sections is not moot. As the Court of Appeals found, the defendants offered no evidence to rebut the possibility of such prosecution for violations of "old 6(1)" that occurred with the section was in effect. This ground is certainly sufficient to support a review of the old 6(1). The controversy with respect to old section 6(4) still exists because, as appellant concedes, new section 6(4) contains the same provisions found to be

There still could be prosecutions.

constitutionally repugnant. The constitutional violation has recurred; the defendants have therefore failed to meet the first part of the Davis test and the controversy regarding section 6(4) is not moot.

B. Abortifacient Requirements of Sections 11(d) and 2(10)

Section 2(10) defines abortifacient. Section 11(d) requires physicians who administer or prescribe abortifacients to inform their patients that they are doing so. The Court of Appeals found that the requirement constituted an attempt to "foist[] upon the pregnant woman its view that life begins at conception." The court also held that the provision "not only intrudes upon the medical discretion of the attending physician, but it also impermissibly imposes the State's theory of when life begins upon the physician's patient." Inexplicably, the court read the statute to require physicians to inform their patients that "abortifacients cause the death of unborn children."

This Court's opinion in Danforth, as elaborated upon in Akron, construed "informed consent" to mean "the giving of information to the patient as to just what would be done and as to its consequences." Akron, 462 U.S., at 447. Here, such information is particularly important. There is widespread "public confusion over the distinction between "contraceptives" and "abortifacients". There is a broad pharmacological overlap between them (widely prescribed "contraceptives" also act as abortifacients). Some women have an understandable wish to avoid fertilization but at the same time would allow any fertilized egg to progress towards full term without interference. I believe that the distinction

between an abortifacient and a contraceptive is an important one, and that the state's justifiable effort to ensure that consent to treatment in which an abortifacient might be used supports these sections.

Moreover, section 11(d) does not require the physician to use any particular language or term to describe the "abortifacient." The physician has broad discretion ~~to the physician~~ to determine the manner of disclosure. The provision "properly leaves the precise nature and amount of this disclosure to the physician's discretion and 'medical judgment.'" Akron, supra, at 447. Unlike the informed consent provisions invalidated in Akron, see id., at 444-445, these sections merely ensure awareness of a decision about abortion itself, without touching upon the "significance" of that decision.

The appellee's argument that the Court's informed consent decisions should extend only to pregnant women because only pregnant women were at issue in Danforth and Akron is without merit. It is a proper use of a state's regulatory police powers to require disclosure of the effects of an abortifacient, even if labelled "contraceptive," before prescribing the substance to a woman. Such provisions do not "run afoul" of the First Amendment more than any other disclosure provisions that have been approved by the Court. Nor do they promote the State's theory of life (the physician is not required to use the term "unborn child," "fetus," or any other such term). Although the preamble to the statute contains a "reaffirmation of the long-standing policy of this State, that the unborn child is a human being from the time

of conception," this is no reason to overturn an otherwise valid statutory provision. Finally, the traditional informed consent doctrines do not alleviate this problem because they apply only to intrusive medical procedures.

C. The Court of Appeals' Failure To Adopt a "Saving" Interpretation of Section 6(1) and Its Unconstitutionality

Section 6(1) makes it a felony for a physician to fail to use the same care in aborting a viable fetus that the physician would be required to use in bringing a viable fetus to live birth. Section 6(1) applies when the fetus is "known to be viable," but does not specify whether the physician is to make this determination of viability. (The 1984 amendment to section 6(1) made the physician's opinion controlling.)

The appellants argue that the court of appeals should have read the statute as allowing the physician's determination to control. Since September 1983, the term "viability" has been defined in section 2 of the act as being determined by "the medical judgment of the attending physician." This definition of viability is indistinguishable from the definition upheld in Danforth. See 428 U.S., at 64. The court of appeals dismissed this reading in a footnote (no. 5) with the argument that the provision was not constitutional on its face: "section 6(1) still fails to inform the physician as to whose viability determination controls."

Section 2's definition of "viable" should not be read into section 6(1) because of the construction of section 6 as a whole. Section 6(4) tracks the language of section 6(1) except expressly states that the physician's determination of viability

is controlling. An implied incorporation of the section 2 definition of viability in section 6(1) would make section 6(1) identical to section 6(4) and render 6(4) surplusage.

As the Court of Appeals recognized, the unamended statute did not state whose determination of viability was to be conclusive, and the State therefore had not precisely informed physicians of the prohibited conduct. The court then held that the vagueness of section 6(1) threatened to chill the exercise of the physician's best medical judgment and thereby chill the exercise of the woman's fundamental right to consult her doctor about abortion and to receive her doctor's unimpeded medical judgment. I agree that the section is unconstitutional without the amendment. This Court has repeatedly held that "the determination of whether a particular fetus is viable is, and must be a matter for the judgment of the responsible attending physician." Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976).

The Illinois legislature has subsequently amended section 6(1) to expressly incorporate the definition of viability contained in section 1.

D. Method of Abortion Most Likely To Allow Fetal Survival

Section 6(4) imposes a standard of care similar to that of section 6(1) when the physicians performs an abortion on a possibly viable fetus. Under section 6(4), it is a Class 3 felony to fail to observe the same standard of care in aborting a possibly viable fetus that the medical team would be required to observe in bringing that fetus to a live birth. The section has been the subject of a continuous injunction since the initial

challenge to its constitutionality in 1979. The court of appeals found that the section chilled a physician's exercise of unimpeded judgment for fear of criminal sanctions. Although I do not believe that this statute is going to "impede" a physician's judgment, I do believe that it impermissibly interfers with the physician-patient relationship. The fear of criminal sanctions might cause a physician to decline to perform an abortion, or to compromise the care provided to the mother as he attempts to save the fetus facing immediate and grave danger.

Only a compelling state interest would justify such interference in the woman's exercise of her right to an abortion. As Ashcroft noted, the State has a "compelling interest in protecting the lives of viable fetuses." 462 U.S., at 486. That interest will not justify intervention here, however, because the fetus is only potentially viable. Nor will the State's compelling interest in the health of the mother, outlined in Akron, justify this interference because the statute does not seek to protect the health of the mother. The State has presented no other compelling interest, and therefore the statute is unconstitutional.

E. Problems in Standing

For the first time, the appellees in their reply brief challenge the standing of Diamond and Williams to litigate these issues on behalf of the state. According to appellees, the state adopted appellants' brief before the Circuit Court. The State has not, however, explicitly taken such a position here. The only letter from the State concerning the appeal before this

Court states: "The Illinois Attorney General's interest in this proceeding is identical to that advanced by it in the lower courts and is essentially coterminous with the position on the issues set forth by the appellants."

I believe that because the State adopted the brief of Diamond and Williams below, the description of the State's interest as "identical to that advanced by it in the lower courts" is sufficient to allow appellants to claim that they litigate for the state. Certainly the State cannot reasonably be seen as withdrawing from the litigation. I would therefore treat the gauzy letter to the clerk as an adoption of appellants' brief.

Moreover, under Supreme Court Rule 10.4, "All parites to the proceeding in the court from whose judgment the appeals is being taken shall be deemed parties in this Court, unless the appellant shall notify the Clerk of this Court in writing ... that one or more of the parties below has no interest in the outcome of the appeal."

III. CONCLUSION

The court of appeals has three hits, two runs, one error.

Mootness. The threat of prosecution is sufficient to allow the challenge against 6(1) to continue; the challenge to 6(4) survives because the amendments did not alter the constitutional infirmities. The judgment of the Court of Appeals should be affirmed.

Notice of Abortifacient -- Sections 2(10) & 11(d). The Illinois provision merely required disclosure of the existence of the potential abortion. It had no required disclosure about the significance of the decision to terminate pregnancy. It gave the doctor broad discretion. It addressed an area of substantial confusion among patients. The Court of Appeals' holding on sections 2(10) and 11(d) should be reversed.

Saving Interpretation. The court of appeals reached the same result through a different route, but ~~their~~ the refusal to adopt the saving interpretation is logical in light of the entire section 6. Affirm here. Unamended section 6(1) is unconstitutional because it does not allow the attending physician's determination of viability to control. Affirm here, too.

Duty of Care in Section 6(4). The imposition of a duty of care on physicians regarding potentially viable fetuses overextends the State's compelling interest in preserving fetal life and impermissibly compromises the quality of care afforded the primary patient.

Chinnis October 15, 1985

October 22, 1985

DIAMOND GINA-POW

84-1379 DIAMOND v. CHARLES(CA7) (Set for November 5)

MEMO TO FILE

The purpose of this is to aid my memory with respect to the pertinent sections of the Illinois abortion laws, and briefly to state what CA7 held.

Section 6(1): Imposes a standard of care on physicians who perform abortions on a "viable fetus". This provision is miserably drafted and difficult to understand. CA7, correctly I am inclined to think, held the statute void for vagueness. It provides in summary (and I paraphrase):

> "A person (physician) who terminates the pregnancy after the fetus is known to be viable shall exercise that degree of professional skill ... to preserve the life of the fetus as such physician would be required to exercise to perserve the life and health of a fetus not aborted and was to be born".

The section makes violation a "class two felony if the death of a viable fetus or infant results from such failure". CA7, in addition to finding vagueness, invalidated the statute for the following reasons.

Section 6(1) applies when the fetus is "known to be viable", but provides no standard for determining viability. Thus, the section could make a physician's conduct a crime if he failed to observe appropriate standards of care in situations where some other physician reasonably believed that the fetus was viable. Although the Court of Appeals recognized the state's compelling interest in preserving fetal life after viability, it found that this section interferred with the exercise of medical judgment by the attending physician. In Danforth we held that the "determination of whether a particular fetus is viable is a matter for the responsible attending physician". (See Juris. St. A26-29.

Section 6(4): In another poorly drawn provision, Section 6(4) imposes a similarly vague standard of care on a physician who performs an abortion when there exists, in the medical judgment of the physician ... a possibiliy known to him of more than momentary survival of the fetus, apart from the body of the mother." Thus, a physician would commit a class three felony if he failed to observe the same standard of care in aborting a possibly viable

fetus that he would be required (under Section 6(1) to observe in bringing a viable fetus to live birth". Unlike Section 6(1), Section 6(4) regulates not only the abortion of a viable fetus, but also the abortion of a fetus that is potentially viable. CA7 concluded that Section 6(4) regulates the performance of "abortions that is staged prior to viability", despite the holding in Roe v. Wade that the state's interest in perserving fetal life is not compelling prior to viability. Section 6(4) creates a direct interference with a woman's right to discuss abortion with a physician and receive a physician's unimpeded medical judgement. The section places obstacles in the form of criminal sanctions in the path of the physican upon whom the woman is entitled to rely for advice. In so finding, CA7 cited the DC's opinion in Akron. See Juris. St. A. 32, 35. In addition, CA7 found that the woman may be unable to exercise her privacy right because her doctor refuses to perform an abortion at the risk of a criminal sanction. This possibility, CA7 held, "significantly burdens a woman's right to terminate her pregnancy."

Sections 2(10) and 11(d): Section 2(10) defines the term "abortifacient" to mean "any instrument, medicine or

Webster's Dictionary (1952) defines "abortifacient" as a "drug or an agent that causes an abortion"

devise which is known to cause fetal death when employed in the customary use for which is manufactured, whether or not the fetus is known to exist".

Section 11(d) requires that physicians who prescribe or administer abortifacients inform their patients that they have done so, and a physician who knowingly fails to informs his patient is guilty of a class C misdemeanor.

These sections deal with artificial means of birth control, and Section 2(10) refers to abortifacients as instruments, medicine or devise "known to cause fetal death". In effect, as I understand this, the physician must inform the woman for whom he or she prescribes a birth control device that it is "known to cause fetal death when employed in the usual and customary manner".

In both Roe and Akron, the Court held that states do not have the power to override the right of a pregnant woman by adopting one theory of when life begins. In Danforth, we agreed that the state may require the providing of sufficient information for "informed consent" - i.e. that the physician should inform the woman as to what will be done (if an abortion is performed) and its possible consequences". See 428 U.S. 52, 67 n a. In Akron, we elaborated on Danforth to invalidate a

requirement that the physician must recite a lengthy and inflexible list of information as to what might happen to the patient. We also held that the state could not intrude upon the discretion of the pregnant woman's physician with respect to the medical advice that should be given.

In this case, the serious flaw - at least so it seems to me now - is that the required information may include the substance of the statutory definition of abortifacient, namely, that the instrument device or substance is one "known to cause fetal death". Thus, the Illinois statute adopts the view of the anti-abortionist that life begins with conception. The statute does not quite say this, but describing the result as "fetal death" certainly implies it. CA7 construed the definition as incorporating the "state's theory that life begins at conception", rejecting the contrary argument that these sections "merely require that the physicians notify their patients that they are prescribing abortifacients, and not that they will kill their patient's unborn children.

* * *

The foregoing is an incomplete summary of the statutes at issue, and - in conclusory terms - the

reasoning of CA7 in invalidating them. I will be particularly interested in Cabell's view as to whether these sections violate prior decisions of this Court. I have not yet read his bench memo.

* * *

Appellant's brief - fairly well written - emphasizes the state police power to regulate abortions pursuant to the compelling state interest in maternal and fetal health. The brief makes a lawyer like effort to support the Illinois regulations on the ground that they do not violate prior cases.

With respect to Sections 2(10) and 11(d), appellant's brief states that "abortifacients do not prevent fertilization and are not contraceptives since they operate after fertilization has taken place. The opinion of CA7 is criticized for referring to drugs and devices that induce abortion at early stages of pregnancy as "contraceptives". This is said to be "inaccurate and misleading", as a contraceptive is an artificial means of preventing fertilization of the human ovum", while abortifacients do not prevent fertilization and are means of abortion after fertilization has taken place. It is

argued reasonably, I think, that the state is entitled to require disclosure of the difference the state makes.

LFP, JR.

Nov 3 File

84-1379 Dramund et al v. Charleston et al (CA7) (11/5)

Outline of Bench Memo
with which I may or may not
agree after more mature consideration.

× × ×

CA7 invalidated 4 provisions of Ill. law:

not moot

1. § 6(1) & 6(4) were amend. after DC decision, but CA7 considered the orig. versions as not being moot because "threat of prosecution" under orig. criminal provisions remain. Not moot

× × ×

Original § 6(1), a crim. provision, void for vagueness

1. § 6(1) requires same care in abortng a fetus "known to be viable" as required w/r to delivery of a fetus intended to be born (i.e. at birth).

A criminal statute (2nd degree felony)

CA7 found § 6(1) void for vagueness because it does not specify whose determination of viability controls (i.e. "known be be viable" by whom? Danforth

Aff'm in CA7

Danforth holds the "judgment" as to viability must be left to attending physician. (Amend of 1984 corrected this)

2. 56(4). is like § 6(1) except it applies to abortng a "possibly viable" fetus. As to it, the same degree of care must be exercised when a fetus is brought to live birth (i.e. to be born normally)

Aff'm in CA7

Another criminal statute (felony 3rd class)

CA7 held void for vagueness: who determines "possible" viability?

Child physicians ~~who may be sued~~ whose judgment as to viability is subject to judicial review in a criminal charge

84-1379 Deamond, et al (9th abortion case)

3. §§ 2(10) + 11(d). ~~Informed consent~~ Informed consent provisions

§2(10) defines "aborti-facient" as any "instrument, medicine or device known to cause fetal death" (Webster (1952) defines aborti-facient as a "drug or an agent that causes an abortion") Substantially the same.

Ask counsel

I am not clear to begin at rest on this - my Clerk would Reverse CA7

I am inclined to affirm

§11(d) - on its face - does not require a physician to use the definition in §2(10) — according to my Clerk. If this is correct the physician is left with broad discretion as to what is told patient about the drug or device he prescribes (an Akron requirement)

But I am not at all sure that the §2(10) definition of 'aborti-facient" is not required: that is that the physician is required to advise that ~~as~~ certain drugs or devices "will cause fetal death" — reflecting State's view that life begins with conception.

Ask

& CA7 so construed these two sections in invalidating them. Aren't we bound by CA7's construction?

Abortion care

84-1379 DIAMOND v. CHARLES

Argued 11/5/85

Ill Statute

Carey (appellants)

Appellants have no authority to speak for State of Ill. They were intervenors, & State is out of case.

State was before CA 7 ~~as~~ but is not here.

§ 6(4) is contrary to Danforth & ~~Bellotti~~ Colautti 439 U.S. 379

6(1) - Post viability provision is similar to one in ~~Bellotti~~ Colautti & Danforth (?) & is invalid. ~~Cases~~ Broader criminal penalties no that State may contest the Supreme's decision.

~~~~ "absolute consent"

Moran (~~Pet~~)(appellants)

Represents individuals who support validity of Ill statute. State was an orig. party & in CA7 – but didn't join in this appeal.

Moran has been made liable for a $100,000 fee.

? ~~Pe~~ Purpose of statute is to inform woman who doesn't want an abortion

? § 2(6) was amended

State sought to conform its statute to Ashcroft (my case)

§ 6(4) had ~~x~~ been enjoined from time it was adopted. ~~Then~~ This has now been amended. CA7 ~~a~~ addressed the old § 6(4) in theory some physicians may be liable.

New 6(1) & new 6(4) have been amended.

Argues that if we leave CA7's op. standing it will be read as affecting validity of the new statutes.

CA7 overlooked § that makes ~~discretion~~ exercise of discretion by physician controlling § 6(4) doesn't apply to pre-viability ~~ab~~ abortions.
~~~~

No. 84-1379, Diamond v. Charles Conf. 11/8/85

The Chief Justice Dismiss - no standing

Justice Brennan Dismiss for WANT Juris
no standing
Tex issue not here

Justice White Reverse
There is standing - physicians
have standing.

Justice Marshall Dismiss

Justice Blackmun Dismiss

Justice Powell Dismiss for Want Juris
Intervenors lack standing to
raise Const. questions. State no
longer a party, & failed no Brief.
Letter from State ambiguous.

Justice Rehnquist Dissent on lack of standing

Singleton v Wolf might support standing

- but Wolf probably was wrong.

Atty's fees issue may be heard

Justice Stevens Dissent

~~Singleton~~

It would extend Singleton to apply it here

Fee issue not in record

Justice O'Connor Dissent

No standing

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 20, 1985

No. 84-1379

Diamond v. Charles

Dear Chief,

Harry has agreed to do the opinion for the Court in the above.

Sincerely,,

Bill

The Chief Justice
Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P

From: **Justice Blackmun**

Circulated: FEB 14 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1379

EUGENE F. DIAMOND AND JASPER F. WILLIAMS, APPELLANTS *v.* ALLAN G. CHARLES ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February ——, 1986]

JUSTICE BLACKMUN delivered the opinion of the Court.

Appellant Eugene F. Diamond is a pediatrician engaged in private practice in Illinois. He seeks to defend before this Court the constitutionality of four sections of the Illinois Abortion Law of 1975, as amended.[1] These sections impose criminal liability for the performance of an abortion under certain circumstances, and, under other circumstances, require that the woman be provided with particular abortion-related information. The State of Illinois has chosen to absent itself from this appeal, despite the fact that its statute is at stake. Because a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense, we dismiss the appeal for want of jurisdiction.

I

On October 30, 1979, over gubernatorial veto, the Illinois Legislature amended the State's 1975 abortion law to provide for increased regulation. 1979 Ill. Laws, Pub. Act 81–1078. That very day appellees, four physicians who provide obstet-

[1] 1975 Ill. Laws, Pub. Act 79–1126, as amended, now codified as Ill. Rev. Stat. ch. 38, ¶¶ 81–21 to 81–34 (1983). The 1975 Act was passed over the Governor's veto. Substantial portions of it already have been ruled to be unconstitutional. See, *e. g.*, *Wynn* v. *Scott*, 449 F. Supp. 1302 (ND Ill. 1978), aff'd *sub nom. Wynn* v. *Carey*, 599 F. 2d 193 (CA7 1979).

ric, gynecologic, and abortion services in Illinois, filed a class action in the United States District Court for the Northern District of Illinois. They alleged a deprivation of rights in violation of 42 U. S. C. § 1983 by the Illinois officials charged with enforcing the Abortion Law.[2] Appellees sought declaratory and injunctive relief.[3]

The next day, the District Court certified the plaintiff class and temporarily restrained enforcement of the entire statute. On November 8, appellant Diamond filed a motion to intervene as a party defendant, either permissively or as of right, and to be appointed guardian *ad litem* for infants who survive abortion.[4] The motion for intervention professed to be based on Doctor Diamond's conscientious objection to abortions, and on his status as a pediatrician and as a parent of an unemancipated minor daughter.[5]

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[2] The defendants named in the complaint were the Attorney General of the State and the Director of the Illinois Department of Public Health, each in his official capacity, and the State's Attorney of Cook County, in both his official capacity and as representative of a class consisting of the State's Attorneys in all the counties of the State of Illinois. A suit against a state officer in his official capacity is, of course, a suit against the State. See *Kentucky* v. *Graham*, 473 U. S. ——, —— (1985) (slip op. 6). The District Court certified a defendant class of State's Attorneys. *Charles* v. *Carey*, Civ. No. 79C 4541 (ND Ill., Oct. 31, 1979).

[3] On the same day another and similar action was filed in the same court by three other Illinois obstetrician-gynecologists and two Illinois clinics that provide abortion services. The two suits were consolidated by court order on Nov. 14, 1979.

[4] Doctor Diamond's Motion to Intervene and for Appointment of Guardian was joined by Doctor Jasper F. Williams, and David K. Campbell. Doctor Williams, a physician engaged in private practice in Illinois, in the alternative sought appointment as guardian *ad litem* for unborn children subject to abortion. We are advised that Doctor Williams died on April 15, 1985, after the filing of the notice of appeal to this Court. No one has been substituted for him. Mr. Campbell, who sought intervention as the spouse of a woman of childbearing age, did not file or join a notice of appeal to this Court.

[5] Diamond claimed that under the Abortion Law as a whole fewer abortions would be performed, and that those performed in accordance with the

Over appellees' objection, the District Court granted Diamond's motion to intervene.[6] The District Court did not indicate whether the intervention was permissive or as of right and it did not describe how Diamond's interests in the litigation satisfied the requirements of Fed. R. Civ. Proc. 24 for intervenor status. The court denied the guardianship motion.

On November 16, the District Court entered a preliminary injunction against a number of sections of the Abortion Law, including §§ 6(1) and 6(4).[7] These sections prescribe the standard of care that must be exercised by a physician in performing an abortion of a viable fetus,[8] and of a possibly viable

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Abortion Law would be designed to preserve the life of aborted fetuses, resulting in more live births. Diamond also rested his motion for intervention on § 13 of the Abortion Law, which provides that a physician who refuses to perform abortions based on conscientious objections will not be subject to liability. He relied, furthermore, on § 11(a), to the effect that violations of the Abortion Law constitute unprofessional conduct, and on § 3.3, which provides for parental consultation.

[6] Although the Motion to Intervene was on behalf of Doctor Diamond, Doctor Williams, and Mr. Campbell, see n. 4, *supra*, the District Court granted leave to intervene to Americans United for Life Legal Defense Fund, counsel for the intervenors below, and for Diamond before this Court.

[7] The preliminary injunction also applied to the following sections: § 2(2) (defining "viability"); § 3.3 (parental consultation); § 3.4 (spousal consultation); § 3.5(2), in part (the portion requiring that the patient be told, *inter alia*, that "The State of Illinois wants you to know that in its view the child you are carrying is a living human being whose life should be preserved. Illinois strongly encourages you not to have an abortion but to go through to childbirth"); § 4 (abortion subsequent to first trimester); §§ 5(1), (2), and (3) (definition of "viability"); § 9 (prohibition of saline amniocentesis after first trimester); § 10(i) (certification as to nonviability or as to medical indicators for abortion when fetus was viable); § 10(j) (reporting requirements for saline amniocentesis); § 10(*l*), in part (the reporting requirement as to the basis for a judgment concerning the existence of a medical emergency); and § 12, in part (the third sentence, prohibiting experimentation with or exploitation of fetal tissue).

[8] 6(1) then provided:

fetus.[9] A violator of § 6(1) is subject to a term of imprisonment of between three and seven years and a fine not exceeding $10,000. Ill. Rev. Stat., ch. 38, ¶¶ 1005–8–1(5) and 1005–9–1(1) (1983). A violator of § 6(4) is subject to a term of imprisonment of between two and five years and a fine not exceeding $10,000. Ill. Rev. Stat., ch. 38, ¶¶ 1005–8–1(6) and 1005–9–1(1) (1983).

"No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable before or after birth commits a Class 2 felony if the death of a viable fetus or infant results from such failure." Ill. Rev. Stat., ch. 38, ¶ 81–26 (1983).

On June 30, 1984, the Illinois Legislature amended § 6(1), overriding another veto of the Governor. 1984 Ill. Laws, Pub. Act 83–1128, § 1. The Court of Appeals addressed the constitutionality of § 6(1) as it appeared prior to the 1984 amendment. See *Charles* v. *Daley*, 749 F. 2d 452, 455 (CA7 1984).

[9] Section 6(4) then provided:

"No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted 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. Any physician or person assisting in such pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus, before or after birth, is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such failure." Ill. Rev. Stat., ch. 38, ¶ 81–26 (1983).

Section 6(4) was amended by the 1984 statute cited in n. 8, *supra*, but the Court of Appeals assessed its constitutionality, also, on the version quoted above. See *Charles* v. *Daley*, 749 F. 2d, at 455.

The plaintiffs appealed the denial of the preliminary injunction as to § 2(10), which defines the term "abortifacient," [10] and as to § 11(d), which requires a physician who prescribes an abortifacient to tell the patient what it is.[11] A violator of § 11(d) is subject to a term of imprisonment of not more than 30 days, and a fine not exceeding $500. Ill. Rev. Stat., ch. 38, ¶¶ 1005–8–3(1) and 1005–9–1(3) (1983). No cross-appeal was taken. The Court of Appeals for the Seventh Circuit instructed the District Court to enter a preliminary injunction as to §§ 2(10) and 11(d), because these statutory provisions forced physicians "to act as the mouthpiece for the State's theory of life." *Charles* v. *Carey*, 627 F. 2d 772, 789 (1980).[12]

On remand, the District Court permanently enjoined, among others, §§ 6(4), 2(10), and 11(d). *Charles* v. *Carey*, 579 F. Supp. 464 (ND Ill. 1983).[13] On appeal and cross-ap-

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[10] Section 2(10) provides:

"'Abortifacient' means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed." Ill. Rev. Stat., ch. 38, ¶ 81–22 (1983).

[11] Section 11(d) provides in relevant part:

"Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor." Ill. Rev. Stat., ch. 38, ¶ 81–31 (1983).

[12] The Court of Appeals instructed the District Court also to enter a preliminary injunction against the following sections: § 3.2(A)(1)(a)(iii); § 3.5(2); § 6(6); § 3.2(A)(1)(a) (defining the terms "by the physician who is to perform the abortion" and "the woman is provided at least 24 hours before the abortion"); § 3.2(A)(1)(b) (defining the term "from the physician at least 24 hours before the abortion is to be performed"); § 3.2(B)(1) (waiver of waiting period); § 10(k) (reporting requirement for waiver of the waiting period); § 3.2(A)(1)(a) (defining the term "with a true copy of her pregnancy test results"); and § 6(2). See 627 F. 2d, at 792, and n. 36.

[13] Other sections of the Abortion Law had been preliminarily enjoined

peal, the Court of Appeals affirmed the entry of the permanent injunction as to the three sections, and also permanently enjoined § 6(1). 749 F. 2d 452 (CA7 1984). The State did not appeal the grant of the permanent injunction. Diamond, however, filed a notice of appeal to this Court and a jurisdictional statement. As we have indicated, see n. 4, *supra*, Dr. Diamond is the sole appellant here. We noted probable jurisdiction. —— U. S. —— (1985).

The State, through the office of its Attorney General, subsequently filed with this Court a "letter of interest," invoking our Rule 10.4, which provides: "All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this Court . . . ." In that letter Illinois stated:

> "Although not an appellant, the Office of the Attorney General . . . is a party in the United States Supreme Court and is designated an appellee. The Illinois Attorney General's interest in this proceeding is identical to that advanced by it in the lower courts and is essentially co-terminous with the position on the issues set forth by the appellants." Letter dated July 15, 1985, to the Clerk of the Court from the Director of Advocacy, Office of the Attorney General of Illinois. See App. to Reply Brief for Appellants A–1.

Illinois' absence as an appellant requires that we examine our jurisdiction to entertain this appeal.

II

Article III of the Constitution limits the power of federal courts to deciding "cases" and "controversies." This requirement ensures the presence of the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitu-

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under a separate opinion by the District Court following remand. See *Charles* v. *Carey*, 579 F. Supp. 377 (ND Ill. 1983).

tional questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements. This Court consistently has required, in addition, that the party seeking judicial resolution of a dispute "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979); see also *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975).

In *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U. S. 464, 473 (1982), the Court observed: "The exercise of judicial power . . . can so profoundly affect the lives, liberty, and property of those to whom it extends" that the decision to seek review must be placed "in the hands of those who have a direct stake in the outcome." *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1972). It is not to be placed in the hands of "concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973).

III

Had the State of Illinois invoked this Court's appellate jurisdiction under 28 U. S. C. § 1254(2) and sought review of the Court of Appeals' decision, the "case" or "controversy" requirement would have been met, for a State has standing to defend the constitutionality of its statute. Diamond argues that Illinois' "letter of interest" demonstrates the State's continued concern with the enforcement of its Abortion Law, and renders the State the functional equivalent of an appellant. Accordingly, Diamond asserts, there is no jurisdictional problem in the case. This claim must be rejected.

It is true that, as a party below, the State remains a party here under our Rule 10.4.[14] But status as a "party" does not

[14] The purpose of the Rule is to provide a means for a party below, who

equate with status as an appellant. To appear before the Court as an appellant, a party must file a notice of appeal, the statutory prerequisite to invoking this Court's jurisdiction. See 28 U. S. C. § 2107.[15] Illinois' mere expression of interest is insufficient to bring the State into the suit as an appellant. By not appealing the judgment below, the State indicated its acceptance of that decision, and its lack of interest in defending its own statute.[16] The State's general interest may be adverse to the interests of appellees, but its failure to invoke our jurisdiction leaves the Court without a "case" or "controversy" between appellees and the State of Illinois. Cf. *Princeton University* v. *Schmid*, 455 U. S. 100 (1982).

Had the State sought review, this Court's Rule 10.4 makes clear that Diamond, as an intervening defendant below, also

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was not notified that this Court's review has been sought by another party, to make its interests known to the Court. Frequently, an appellant would seek review as to only one party below, permitting the judgment to stand as to others. See R. Stern & E. Gressman, Supreme Court Practice, § 6–20 (5th ed. 1978), and § 6.35 (3d ed. 1962) (describing evolution of the Rule). This Court's Rule 10.4 therefore avoids the adjudication of rights in a party's absence, but it does not provide a means to obtain review when there has been no filing by that party of a notice of appeal.

[15] 28 U. S. C. § 2107 provides that, with specified exceptions, "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."

[16] The State's reasons for abandoning this suit are not articulated in the record. We have noted above, however, that, during the pendency of this case before the Court of Appeals, Illinois again amended its Abortion Law. 1984 Ill. Laws, Pub. Act 83–1128. At the time of the Court of Appeals' decision, which was based on the pre-amendment version of the Abortion Law, the amended sections were subject to a temporary restraining order. See *Keith* v. *Daley*, No. 84 C 5602 (ND Ill. 1984). The Court of Appeals declined to assess the constitutionality of the 1984 amendments and rejected challenges of mootness based on those amendments. *Charles* v. *Daley*, 749 F. 2d, at 455, 457–458. The State's inaction may well be due to its concern with the amended, not the earlier, form of the statutes under attack.

would be entitled to seek review, enabling him to file a brief on the merits, and to seek leave to argue orally. But this ability to ride "piggyback" on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join.

IV

A

Diamond claims that his interests in enforcement permits him to defend the Abortion Law, despite Illinois' acquiescence in the Court of Appeals' ruling of unconstitutionality. This claim also must fail. Doctor Diamond attempts to equate his position with that of appellees, the physicians who instituted this suit in the District Court. Appellees, however, had standing to bring suit against the state officials who were charged with enforcing the Abortion Law because appellees faced possible criminal prosecution. See, *e. g.*, *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973). The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic "case" or "controversy" within the meaning of Art. III.

The conflict presented by Diamond is different. Were the Abortion Law to be held constitutional, Diamond could not compel the State to enforce it against appellees because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973); see *Leeke* v. *Timmerman*, 454 U. S. 83 (1981); *Sure-Tan, Inc.* v. *NLRB*, —— U. S. —— (1984). See also *Younger* v. *Harris*, 401 U. S. 37, 42 (1971); *Bailey* v. *Patterson*, 369 U. S. 31, 33 (1962). Cf. *Allen* v. *Wright*, —— U. S. ——, —— (slip op. 16) (1984) ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court").

The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with

even greater force to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made. The State's acquiescence in the Court of Appeals' determination of unconstitutionality serves to deprive the State of the power to prosecute anyone for violating the Abortion Law. Diamond's attempt to maintain the litigation is then simply an effort to compel the State to enact a code in accord with Diamond's interests. But "the power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U. S. 592, 601 (1982). Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" identified in *Sierra Club* v. *Morton*, 405 U. S., at 740, in defending the standards embodied in that code.

B

Even if there were circumstances in which a private party would have standing to defend the constitutionality of a challenged statute,[17] this is not one of them. Diamond is not able to assert an injury in fact. A physician has standing to challenge an abortion law that poses for him a threat of criminal prosecution. *Doe* v. *Bolton*, 410 U. S., at 188; see *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 62 (1976). In addition, a physician who demonstrates that abortion funding regulations have a direct financial impact on his practice may assert the constitutional rights of other individuals who are unable to assert their rights themselves. See *Singleton* v. *Wulff*, 428 U. S. 106 (1975). Diamond attempts to assert an equivalent interest based upon his personal status as a doctor, a father, and a protector of the unborn. We

[17] The Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41, n. 22 (1976).

must reject Diamond's claims that his personal and professional interests confer standing.

Diamond, who is a pediatrician, claims that if the Abortion Law were enforced, he would gain patients; fewer abortions would be performed and those that would be performed would result in more live births, because the law requires a physician to attempt to preserve the life of the aborted fetus. By implication, therefore, the pool of potential fee-paying patients would be enlarged. The possibilities that such fetuses would survive and then find their way as patients to Diamond are speculative, and "unadorned speculation will not suffice to invoke the federal judicial power." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 44. Diamond's situation, based on speculation and hoped-for fees is far different from that of the respondent-physicians in *Wulff*, *supra*, where actual fees were limited by the challenged Missouri statute.

Diamond also alleges that, as a physician, he has standing to litigate the standards of medical practice that ought to be applied to the performance of abortions. Diamond's purported interest rests on § 11(a) of the Abortion Law, which provides that the requirements of that law constitute the standards of conduct for the medical profession. Since that provision is neither before the Court nor integrally related to any of the sections at issue in this proceeding, it cannot confer standing on Diamond. Although Diamond's allegation may be cloaked in the nomenclature of a special professional interest, it is simply the expression of a desire that the Illinois Abortion Law as written be obeyed. Article III requires more than simply a desire to vindicate value interests. See *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973). It requires an "injury in fact" which distinguishes "a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *Id.*, at 689, n. 14. Diamond has an interest, but no direct stake, in the abortion process. This "abstract con-

cern . . . does not substitute for the concrete injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 40. Similarly, Diamond's claim of conscientious objection to abortion does not provide a judicially cognizable interest.

Doctor Diamond also asserts that he has standing as the father of a daughter of childbearing years. First, to the extent that Diamond's claim derives from § 3(3) of the Abortion Law, the parental notification section, he lacks standing to continue this litigation, for it does not address the validity of that provision. Second, to the extent that he claims an interest in ensuring that his daughter is not prescribed an abortifacient without prior information—a concern ostensibly triggered by the invalidation of §§ 2(10) and 11(d)—he has failed to show that he is a proper person to advance this claim on her behalf. Diamond has not shown either that his daughter is currently a minor or that she is otherwise incapable of asserting her own rights. Diamond's failure to adduce factual support renders him incapable of maintaining this appeal in his capacity as a parent. See *Bender* v. *Williamsport Area School District*, —— U. S. ——, —— (1986) (STEVENS, J., concurring in the judgment) (slip op. 13).

Nor can Diamond assert the constitutional rights of the unborn fetus.[18] The interest in protecting potential life belongs exclusively to the State. See *Keith* v. *Daley*, 764 F. 2d 1265, 1271 (CA7), cert. denied (as to interlocutory review) *sub nom. Illinois Pro-Life Coalition, Inc.* v. *Keith*, —— U. S. —— (1985), ("it is the state alone who can assert an interest in the unborn"). Only the State may invoke regulatory measures to protect that interest and only the State may in-

[18] Diamond claims that he is asserting the rights of his prospective patients, who survive abortion, to be born with as few handicapping conditions as possible. Diamond asserted this claim before the District Court as a basis for being appointed guardian *ad litem* for unborn fetuses. That claim was rejected by the District Court.

voke the power of the courts when those regulatory measures are subject to challenge.

V

Finally, Diamond asserts that he has standing based on two interests that relate not to the Abortion Law, but to his involvement in this litigation. Neither interest suffices.

A

Diamond's status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on this appeal. Although intervenors are considered parties entitled, among other things, to seek review by this Court, *Mine Workers* v. *Eagle-Picher Co.*, 325 U. S. 335, 338 (1945), an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III. See *id.*, at 339. See also *Bryant* v. *Yellen*, 447 U. S. 352, 368 (1980).

This Court has recognized that certain public concerns may constitute an adequate "interest" within the meaning of Fed. Rule Civ. Proc. 24(a)(2), see *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129, 135 (1967), and has held that an interest under Rule 24(a)(2), which provides for intervention as of right,[19] requires a "significantly protectable interest." See *Donaldson* v. *United States*, 400 U. S. 517, 531 (1971). However, the precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in

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[19] Fed. Rule Civ. Proc. 24(a)(2) provides for intervention

"(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

the Courts of Appeals.[20] We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III. To continue this suit in the absence of Illinois, Diamond himself must satisfy the requirements of Art. III. The interests Diamond asserted before the District Court in seeking to intervene plainly are insufficient to confer standing on him to continue this suit now.

B

At oral argument, Diamond stated that the District Court has assessed attorney's fees against him and the State, jointly and severally. This fee award, Diamond asserted, provided the requisite standing to litigate this case:

> "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." Tr. of Oral Arg. 4.

Diamond is claiming that an award of fees entered after a decision on the merits by the District Court and the Court of Appeals, and after probable jurisdiction had been noted by this Court, gives him a direct stake in the enforcement of the

[20] The Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing. Compare *United States* v. *39.36 Acres of Land*, 754 F. 2d 855, 859 (CA7 1985), petn. for cert. pending *sub nom. Save the Dunes Council, Inc.* v. *United States*, No. 85–426 (intervention requires an interest in excess of that required for standing), with *Southern Christian Leadership Conference* v. *Kelley*, 241 U. S. App. D. C. 340, 747 F. 2d 777 (1984) (equating interest necessary to intervene with interests necessary to confer standing), and *United States* v. *American Tel. & Tel. Co.*, 206 U. S. App. D. C. 317, 642 F. 2d 1285 (1980) (intervention is proper only if the would-be intervenor has an interest in the outcome of the suit different from that of the public as a whole) with *Sagebush Rebellion, Inc.* v. *Watt*, 713 F. 2d 525 (CA9 1983) (resolving intervention questions without reference to standing doctrine) and *Planned Parenthood of Minnesota, Inc.* v. *Citizens for Community Action*, 558 F. 2d 861 (CA8 1977) (same).

Illinois Abortion Law. In short, because Diamond stands to lose the amount of the fee unless the State's regulations concerning abortion are reinstated, he claims he has been injured by the invalidation of those regulations.[21]

But *Valley Forge Christian College*, 454 U. S., at 472, makes clear that Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue:

> "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38, 41 (1976)."

Any liability for fees is, of course, a consequence of Diamond's decision to intervene, but it cannot fairly be traced to the Illinois Abortion Law. The fee award is wholly unrelated to the subject matter of the litigation, and bears no relation to the statute whose constitutionality is at issue here. It is true, that were the Court to resolve the case on the merits against appellees, appellees would no longer be "prevailing parties" entitled to an award of fees under 42 U. S. C. § 1988. But the mere fact that continued adjudication would

[21] While not determinative of the standing claim in this case, Diamond responded to the fee award by filing a motion to dismiss him from the litigation and name Americans United for Life, Inc., as the sole intervenor. See n. 6, *supra*. In the alternative, Diamond asked the District Court to clarify the original intervention order by stating that "AUL is an intervening defendant for all purposes, including the assessment of attorney's fees." The motion further stated that "AUL is the real party in interest." In assessing fees against appellant Diamond, the District Court stated that "the State defendants and intervenors played at least equal roles in defending the abortion statute." *Charles* v. *Daley*, No. 79–C–4541 (ND Ill. Apr. 22, 1985).

provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Art. III.

VI

The State of Illinois, by failing to appeal, has indicated no direct interest in upholding the four sections of the Abortion Law at issue here. Diamond has stepped in, attempting to maintain the litigation abandoned by the State in which he resides. Because he lacks any judicially cognizable interest in the Abortion Law, his appeal is dismissed for want of jurisdiction.

It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 14, 1986

Re: No. 84-1379 - Diamond and Williams v. Charles

Dear Harry:

Please join me.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 18, 1986

No. 84-1379

Diamond v. Charles, et al.

Dear Harry,

I agree.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

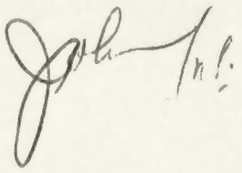
February 18, 1986

Re: 84-1379 - Diamond v. Charles

Dear Harry:

Please join me.

Respectfully,



Justice Blackmun

Copies to the Conference

ccc 02/18/86

TO: JUSTICE POWELL

No. 84-1379, Diamond v. Charles

Justice Blackmun's Circulation

I have reviewed Justice Blackmun's circulation, and find that it is in accordance with our discussions in this case and with your conference notes.

Unless you have particular questions, I recommend that you join.

February 18, 1986; 11:24 AM Cabell Circ. Mem.

February 25, 1986

84-1379 Diamond v. Charles

Dear Harry:

Please join me.

Sincerely,

Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 25, 1986

Re: 84-1379 Diamond v. Charles

Dear Harry,

Although I agree with much of your opinion's reasoning and with its result, I plan to write separately, at least in part. In my view, the trial court erred in allowing Dr. Diamond to intervene. I think he lacked Article III standing to defend the challenged provisions of the Illinois statute. It seems to me Dr. Diamond's lack of standing to intervene in the first place is useful in resolving whether Illinois' presence as an appellee under our Rule 10.4 gives us a case or controversy.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

– Pages: 7, 8, 11, 12 –

Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: MAR 13 1986

Have now made changes I suggested. See p 12 L.F.P.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1379

EUGENE F. DIAMOND AND JASPER F. WILLIAMS, APPELLANTS *v.* ALLAN G. CHARLES ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[March ——, 1986]

JUSTICE BLACKMUN delivered the opinion of the Court.

Appellant Eugene F. Diamond is a pediatrician engaged in private practice in Illinois. He seeks to defend before this Court the constitutionality of four sections of the Illinois Abortion Law of 1975, as amended.[1] These sections impose criminal liability for the performance of an abortion under certain circumstances, and, under other circumstances, require that the woman be provided with particular abortion-related information. The State of Illinois has chosen to absent itself from this appeal, despite the fact that its statute is at stake. Because a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense, we dismiss the appeal for want of jurisdiction.

I

On October 30, 1979, over gubernatorial veto, the Illinois Legislature amended the State's 1975 abortion law to provide for increased regulation. 1979 Ill. Laws, Pub. Act 81–1078. That very day appellees, four physicians who provide obstet-

[1] 1975 Ill. Laws, Pub. Act 79–1126, as amended, now codified as Ill. Rev. Stat. ch. 38, ¶¶81–21 to 81–34 (1983). The 1975 Act was passed over the Governor's veto. Substantial portions of it already have been held to be unconstitutional. See, *e. g.*, *Wynn* v. *Scott*, 449 F. Supp. 1302 (ND Ill. 1978), aff'd *sub nom. Wynn* v. *Carey*, 599 F. 2d 193 (CA7 1979).

ric, gynecologic, and abortion services in Illinois, filed a class action in the United States District Court for the Northern District of Illinois. They alleged a deprivation of rights in violation of 42 U. S. C. § 1983 by the Illinois officials charged with enforcing the Abortion Law.[2] Appellees sought declaratory and injunctive relief.[3]

The next day, the District Court certified the plaintiff class and temporarily restrained enforcement of the entire statute. On November 8, appellant Diamond filed a motion to intervene as a party defendant, either permissively or as of right, and to be appointed guardian *ad litem* for fetuses who survive abortion.[4] The motion for intervention professed to be based on Doctor Diamond's conscientious objection to abortions, and on his status as a pediatrician and as a parent of an unemancipated minor daughter.[5]

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[2] The defendants named in the complaint were the Attorney General of the State and the Director of the Illinois Department of Public Health, each in his official capacity, and the State's Attorney of Cook County, in both his official capacity and as representative of a class consisting of the State's Attorneys in all the counties of the State of Illinois. A suit against a state officer in his official capacity is, of course, a suit against the State. See *Kentucky* v. *Graham*, 473 U. S. ——, —— (1985) (slip op. 6). The District Court certified a defendant class of State's Attorneys. *Charles* v. *Carey*, Civ. No. 79C 4541 (ND Ill., Oct. 31, 1979).

[3] On the same day another and similar action was filed in the same court by three other Illinois obstetrician-gynecologists and two Illinois clinics that provide abortion services. The two suits were consolidated by court order on Nov. 14, 1979.

[4] Doctor Diamond's Motion to Intervene and for Appointment of Guardian was joined by Doctor Jasper F. Williams, and David K. Campbell. Doctor Williams, a physician engaged in private practice in Illinois, in the alternative sought appointment as guardian *ad litem* for unborn children subject to abortion. We are advised that Doctor Williams died on April 15, 1985, after the filing of the notice of appeal to this Court. No one has been substituted for him. Mr. Campbell, who sought intervention as the spouse of a woman of childbearing age, did not file or join a notice of appeal to this Court.

[5] Diamond claimed that under the Abortion Law as a whole fewer abortions would be performed, and that those performed in accordance with the

Over appellees' objection, the District Court granted Diamond's motion to intervene.[6] The District Court did not indicate whether the intervention was permissive or as of right and it did not describe how Diamond's interests in the litigation satisfied the requirements of Fed. R. Civ. Proc. 24 for intervenor status. The court denied the guardianship motion.

On November 16, the District Court entered a preliminary injunction against a number of sections of the Abortion Law, including §§ 6(1) and 6(4).[7] These sections prescribe the standard of care that must be exercised by a physician in performing an abortion of a viable fetus,[8] and of a possibly

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Abortion Law would be designed to preserve the life of aborted fetuses, resulting in more live births. Diamond also rested his motion for intervention on § 13 of the Abortion Law, which provides that a physician who refuses to perform abortions based on conscientious objections will not be subject to liability. He relied, furthermore, on § 11(a), to the effect that violations of the Abortion Law constitute unprofessional conduct, and on § 3.3, which provides for parental consultation.

[6] Although the Motion to Intervene was on behalf of Doctor Diamond, Doctor Williams, and Mr. Campbell, see n. 4, *supra*, the District Court granted leave to intervene to Americans United for Life Legal Defense Fund, counsel for the intervenors below and for Diamond before this Court.

[7] The preliminary injunction also applied to the following sections: § 2(2) (defining "viability"); § 3.3 (parental consultation); § 3.4 (spousal consultation); § 3.5(2), in part (the portion requiring that the patient be told, *inter alia*, that "The State of Illinois wants you to know that in its view the child you are carrying is a living human being whose life should be preserved. Illinois strongly encourages you not to have an abortion but to go through to childbirth"); § 4 (abortion subsequent to first trimester); §§ 5(1), (2), and (3) (definition of "viability"); § 9 (prohibition of saline amniocentesis after first trimester); § 10(i) (certification as to nonviability or as to medical indicators for abortion when fetus was viable); § 10(j) (reporting requirements for saline amniocentesis); § 10(*l*), in part (the reporting requirement as to the basis for a judgment concerning the existence of a medical emergency); and § 12, in part (the third sentence, prohibiting experimentation with or exploitation of fetal tissue).

[8] 6(1) then provided:

viable fetus.[9] A violator of § 6(1) is subject to a term of imprisonment of between three and seven years and a fine not exceeding $10,000. Ill. Rev. Stat., ch. 38, ¶¶ 1005–8–1(5) and 1005–9–1(1) (1983). A violator of § 6(4) is subject to a term of imprisonment of between two and five years and a fine not exceeding $10,000. Ill. Rev. Stat., ch. 38, ¶¶ 1005–8–1(6) and 1005–9–1(1) (1983).

"No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable before or after birth commits a Class 2 felony if the death of a viable fetus or infant results from such failure." Ill. Rev. Stat., ch. 38, ¶ 81–26 (1983).

On June 30, 1984, the Illinois Legislature amended § 6(1), overriding another veto of the Governor. 1984 Ill. Laws, Pub. Act 83–1128, § 1. The Court of Appeals addressed the constitutionality of § 6(1) as it appeared prior to the 1984 amendment. See *Charles* v. *Daley*, 749 F. 2d 452, 455 (CA7 1984).

[9] Section 6(4) then provided:

"No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted 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. Any physician or person assisting in such pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus, before or after birth, is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such failure." Ill. Rev. Stat., ch. 38, ¶ 81–26 (1983).

Section 6(4) was amended by the 1984 statute cited in n. 8, *supra*, but the Court of Appeals assessed its constitutionality on the version quoted above. See *Charles* v. *Daley*, 749 F. 2d, at 455.

The plaintiffs appealed the denial of the preliminary injunction as to § 2(10), which defines the term "abortifacient,"[10] and as to § 11(d), which requires a physician who prescribes an abortifacient to tell the patient what it is.[11] A violator of § 11(d) is subject to a term of imprisonment of not more than 30 days, and a fine not exceeding $500. Ill. Rev. Stat., ch. 38, ¶¶ 1005–8–3(1) and 1005–9–1(3) (1983). No cross-appeal was taken. The Court of Appeals for the Seventh Circuit instructed the District Court to enter a preliminary injunction as to §§ 2(10) and 11(d), because these statutory provisions forced physicians "to act as the mouthpiece for the State's theory of life." *Charles* v. *Carey*, 627 F. 2d 772, 789 (1980).[12]

On remand, the District Court permanently enjoined, among others, §§ 6(4), 2(10), and 11(d). *Charles* v. *Carey*, 579 F. Supp. 464 (ND Ill. 1983).[13] On appeal and cross-

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[10] Section 2(10) provides:

"'Abortifacient' means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed." Ill. Rev. Stat., ch. 38, ¶ 81–22 (1983).

[11] Section 11(d) provides in relevant part:

"Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor." Ill. Rev. Stat., ch. 38, ¶ 81–31 (1983).

[12] The Court of Appeals instructed the District Court also to enter a preliminary injunction against the following sections: § 3.2(A)(1)(a)(iii); § 3.5(2); § 6(6); § 3.2(A)(1)(a) (defining the terms "by the physician who is to perform the abortion" and "the woman is provided at least 24 hours before the abortion"); § 3.2(A)(1)(b) (defining the term "from the physician at least 24 hours before the abortion is to be performed"); § 3.2(B)(1) (waiver of waiting period); § 10(k) (reporting requirement for waiver of the waiting period); § 3.2(A)(1)(a) (defining the term "with a true copy of her pregnancy test results"); and § 6(2). See 627 F. 2d, at 792, and n. 36.

[13] Other sections of the Abortion Law had been preliminarily enjoined

appeal, the Court of Appeals affirmed the entry of the permanent injunction as to the three sections, and also permanently enjoined § 6(1). 749 F. 2d 452 (CA7 1984). The State did not appeal the grant of the permanent injunction. Diamond, however, filed a notice of appeal to this Court and a jurisdictional statement. As we have indicated, see n. 4, *supra*, Doctor Diamond is the sole appellant here. We noted probable jurisdiction. 471 U. S. —— (1985).

The State, through the office of its Attorney General, subsequently filed with this Court a "letter of interest," invoking our Rule 10.4, which provides: "All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this Court . . . ." In that letter Illinois stated:

> "Although not an appellant, the Office of the Attorney General . . . is a party in the United States Supreme Court and is designated an appellee. The Illinois Attorney General's interest in this proceeding is identical to that advanced by it in the lower courts and is essentially co-terminous with the position on the issues set forth by the appellants." Letter dated July 15, 1985, to the Clerk of the Court from the Director of Advocacy, Office of the Attorney General of Illinois. See App. to Reply Brief for Appellants A–1.

Illinois' absence as an appellant requires that we examine our jurisdiction to entertain this appeal.

II

Article III of the Constitution limits the power of federal courts to deciding "cases" and "controversies." This requirement ensures the presence of the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitu-

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under a separate opinion by the District Court following remand. See *Charles* v. *Carey*, 579 F. Supp. 377 (ND Ill. 1983).

tional questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements. This Court consistently has required, in addition, that the party seeking judicial resolution of a dispute "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979); see also *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975).

The nature of the injury is central to the Art. III inquiry, because standing also reflects a due regard for the autonomy of those most likely to be affected by a judicial decision. "The exercise of judicial power . . . can so profoundly affect the lives, liberty, and property of those to whom it extends," *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U. S. 464, 473 (1982), that the decision to seek review must be placed "in the hands of those who have a direct stake in the outcome." *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1972). It is not to be placed in the hands of "concerned bystanders," who will use it simply as a "vehicle for the vindication of value interests." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973).

III

Had the State of Illinois invoked this Court's appellate jurisdiction under 28 U. S. C. § 1254(2) and sought review of the Court of Appeals' decision, the "case" or "controversy" requirement would have been met, for a State has standing to defend the constitutionality of its statute. Diamond argues that Illinois' "letter of interest" demonstrates the State's continued concern with the enforcement of its Abortion Law, and renders the State the functional equivalent of an appellant. Accordingly, Diamond asserts, there is no jurisdictional problem in the case. This claim must be rejected.

It is true that, as a party below, the State remains a party here under our Rule 10.4.[14] But status as a "party" does not equate with status as an appellant. To appear before the Court as an appellant, a party must file a notice of appeal, the statutory prerequisite to invoking this Court's jurisdiction. See 28 U. S. C. § 2101(c).[15] Illinois' mere expression of interest is insufficient to bring the State into the suit as an appellant. By not appealing the judgment below, the State indicated its acceptance of that decision, and its lack of interest in defending its own statute.[16] The State's general interest may be adverse to the interests of appellees, but its failure to invoke our jurisdiction leaves the Court without a "case" or "controversy" between appellees and the State of Illinois. Cf. *Princeton University* v. *Schmid*, 455 U. S. 100 (1982).

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[14] The purpose of the Rule is to provide a means for a party below, who was not notified that this Court's review has been sought by another party, to make its interests known to the Court. Frequently, an appellant would seek review as to only one party below, permitting the judgment to stand as to others. See R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice, § 6–20 (6th ed. 1986), and § 6.35 (3d ed. 1962) (describing evolution of the Rule). This Court's Rule 10.4 therefore avoids the adjudication of rights in a party's absence, but it does not provide a means to obtain review when there has been no filing by that party of a notice of appeal.

[15] 28 U. S. C. § 2101(c) provides: "Any other appeal or any writ of certiorari intended to bring any judgment before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

[16] The State's reasons for abandoning this suit are not articulated in the record. We have noted above, however, that, during the pendency of this case before the Court of Appeals, Illinois again amended its Abortion Law. 1984 Ill. Laws, Pub. Act 83–1128. At the time of the Court of Appeals' decision, which was based on the pre-amendment version of the Abortion Law, the amended sections were subject to a temporary restraining order. See *Keith* v. *Daley*, No. 84 C 5602 (ND Ill. 1984). The Court of Appeals declined to assess the constitutionality of the 1984 amendments and rejected challenges of mootness based on those amendments. *Charles* v. *Daley*, 749 F. 2d, at 455, 457–458. The State's inaction may well be due to its concern with the amended, not the earlier, form of the statutes under attack.

Had the State sought review, this Court's Rule 10.4 makes clear that Diamond, as an intervening defendant below, also would be entitled to seek review, enabling him to file a brief on the merits, and to seek leave to argue orally. But this ability to ride "piggyback" on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join.

IV

A

Diamond claims that his interests in enforcement permit him to defend the Abortion Law, despite Illinois' acquiescence in the Court of Appeals' ruling of unconstitutionality. This claim also must fail. Doctor Diamond attempts to equate his position with that of appellees, the physicians who instituted this suit in the District Court. Appellees, however, had standing to bring suit against the state officials who were charged with enforcing the Abortion Law because appellees faced possible criminal prosecution. See, *e. g.*, *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973). The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic "case" or "controversy" within the meaning of Art. III.

The conflict presented by Diamond is different. Were the Abortion Law to be held constitutional, Diamond could not compel the State to enforce it against appellees because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973); see *Leeke* v. *Timmerman*, 454 U. S. 83 (1981); *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883 (1984). See also *Younger* v. *Harris*, 401 U. S. 37, 42 (1971); *Bailey* v. *Patterson*, 369 U. S. 31, 33 (1962). Cf. *Allen* v. *Wright*, 468 U. S. ——, —— (slip op. 16) (1984) ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court").

The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made. The State's acquiescence in the Court of Appeals' determination of unconstitutionality serves to deprive the State of the power to prosecute anyone for violating the Abortion Law. Diamond's attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with Diamond's interests. But "the power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U. S. 592, 601 (1982). Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" identified in *Sierra Club* v. *Morton*, 405 U. S., at 740, in defending the standards embodied in that code.

B

Even if there were circumstances in which a private party would have standing to defend the constitutionality of a challenged statute,[17] this is not one of them. Diamond is not able to assert an injury in fact. A physician has standing to challenge an abortion law that poses for him a threat of criminal prosecution. *Doe* v. *Bolton*, 410 U. S., at 188; see *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 62 (1976). In addition, a physician who demonstrates that abortion funding regulations have a direct financial impact on his practice may assert the constitutional rights of other individuals who are unable to assert those rights themselves. See *Singleton* v. *Wulff*, 428 U. S. 106 (1975). Diamond attempts to assert an equivalent interest based upon his personal sta-

[17] The Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41, n. 22 (1976).

tus as a doctor, a father, and a protector of the unborn. We must reject Diamond's claims that his personal and professional interests confer standing.

Diamond, who is a pediatrician, claims that if the Abortion Law were enforced, he would gain patients; fewer abortions would be performed and those that would be performed would result in more live births, because the law requires a physician to attempt to preserve the life of the aborted fetus. By implication, therefore, the pool of potential fee-paying patients would be enlarged. The possibilities that such fetuses would survive and then find their way as patients to Diamond are speculative, and "unadorned speculation will not suffice to invoke the federal judicial power." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 44. Diamond's situation, based on speculation and hoped-for fees is far different from that of the physicians in *Wulff*, *supra*, where actual fees were limited by the challenged Missouri statute.

Diamond also alleges that, as a physician, he has standing to litigate the standards of medical practice that ought to be applied to the performance of abortions.[18] Although Diamond's allegation may be cloaked in the nomenclature of a special professional interest, it is simply the expression of a desire that the Illinois Abortion Law as written be obeyed. Article III requires more than simply a desire to vindicate value interests. See *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973). It requires an "injury in fact" that distinguishes "a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *Id.*, at 689, n. 14. Diamond has an interest, but no direct stake, in the abortion process. This "abstract concern . . . does not substitute for the concrete in-

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[18] Diamond's purported interest appears to rest on § 11(a) of the Abortion Law, which provides that the requirements of that law constitute the standards of conduct for the medical profession. Since that provision is neither before the Court nor integrally related to any of the sections at issue in this proceeding, it cannot confer standing on Diamond.

jury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 40. Similarly, Diamond's claim of conscientious objection to abortion does not provide a judicially cognizable interest.

Doctor Diamond also asserts that he has standing as the father of a daughter of childbearing years. First, to the extent that Diamond's claim derives from § 3(3) of the Abortion Law, the parental notification section, he lacks standing to continue this litigation, for it does not address the validity of that provision. Second, to the extent that he claims an interest in ensuring that his daughter is not prescribed an abortifacient without prior information—a concern ostensibly triggered by the invalidation of §§ 2(10) and 11(d)—he has failed to show that he is a proper person to advance this claim on her behalf. Diamond has not shown either that his daughter is currently a minor or that she is otherwise incapable of asserting her own rights. Diamond's failure to adduce factual support renders him incapable of maintaining this appeal in his capacity as a parent. See *Bender* v. *Williamsport Area School Dist.*, —— U. S. ——, —— (1986) (slip op. 14).

Nor can Diamond assert any constitutional rights of the unborn fetus.[19] Only the State may invoke regulatory measures to protect that interest and only the State may invoke the power of the courts when those regulatory measures are subject to challenge.

V

Finally, Diamond asserts that he has standing based on two interests that relate not to the Abortion Law, but to his involvement in this litigation. Neither interest suffices.

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[19] Diamond claims that he is asserting the rights of his prospective patients, who survive abortion, to be born with as few handicapping conditions as possible. Diamond asserted this claim before the District Court as a basis for appointment as guardian *ad litem* for unborn fetuses. That claim was rejected by the District Court.

A

Diamond's status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on this appeal. Although intervenors are considered parties entitled, among other things, to seek review by this Court, *Mine Workers* v. *Eagle-Picher Co.*, 325 U. S. 335, 338 (1945), an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III. See *id.*, at 339. See also *Bryant* v. *Yellen*, 447 U. S. 352, 368 (1980).

This Court has recognized that certain public concerns may constitute an adequate "interest" within the meaning of Fed. Rule Civ. Proc. 24(a)(2), see *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129, 135 (1967), and has held that an interest under Rule 24(a)(2), which provides for intervention as of right,[20] requires a "significantly protectable interest." See *Donaldson* v. *United States*, 400 U. S. 517, 531 (1971). However, the precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals.[21] We need not decide today whether

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[20] Fed. Rule Civ. Proc. 24(a)(2) provides for intervention

"(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[21] The Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing. Compare *United States* v. *39.36 Acres of Land*, 754 F. 2d 855, 859 (CA7 1985), petn. for cert. pending *sub nom. Save the Dunes Council, Inc.* v. *United States*, No. 85–426 (intervention requires an interest in excess of that required for standing), with *Southern Christian Leadership Conference* v. *Kelley*, 241 U. S. App. D. C. 340, 747 F. 2d 777 (1984) (equating interest necessary to intervene with interests necessary to confer stand-

a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III. To continue this suit in the absence of Illinois, Diamond himself must satisfy the requirements of Art. III. The interests Diamond asserted before the District Court in seeking to intervene plainly are insufficient to confer standing on him to continue this suit now.

B

At oral argument, Diamond stated that the District Court has assessed attorney's fees against him and the State, jointly and severally. This fee award, Diamond asserted, provided the requisite standing to litigate this case:

> "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." Tr. of Oral Arg. 4.

Diamond is claiming that an award of fees entered after a decision on the merits by the District Court and the Court of Appeals, and after probable jurisdiction had been noted by this Court, gives him a direct stake in the enforcement of the Illinois Abortion Law. In short, because Diamond stands to lose the amount of the fee unless the State's regulations concerning abortion are reinstated, he claims he has been injured by the invalidation of those regulations.[22]

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ing), and *United States* v. *American Tel. & Tel. Co.*, 206 U. S. App. D. C. 317, 642 F. 2d 1285 (1980) (intervention is proper only if the would-be intervenor has an interest in the outcome of the suit different from that of the public as a whole) with *Sagebush Rebellion, Inc.* v. *Watt*, 713 F. 2d 525 (CA9 1983) (resolving intervention questions without reference to standing doctrine) and *Planned Parenthood of Minnesota, Inc.* v. *Citizens for Community Action*, 558 F. 2d 861 (CA8 1977) (same).

[22] While not determinative of the standing claim in this case, Diamond responded to the fee award by filing a motion to dismiss him from the litigation and name Americans United for Life, Inc., as the sole intervenor. See n. 6, *supra*. In the alternative, Diamond asked the District Court to

But *Valley Forge Christian College*, 454 U. S., at 472, makes clear that Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue:

> "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38, 41 (1976)."

Any liability for fees is, of course, a consequence of Diamond's decision to intervene, but it cannot fairly be traced to the Illinois Abortion Law. The fee award is wholly unrelated to the subject matter of the litigation, and bears no relation to the statute whose constitutionality is at issue here. It is true that, were the Court to resolve the case on the merits against appellees, appellees would no longer be "prevailing parties" entitled to an award of fees under 42 U. S. C. § 1988. But the mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Art. III.

VI

The State of Illinois, by failing to appeal, has indicated no direct interest in upholding the four sections of the Abortion Law at issue here. Diamond has stepped in, attempting to

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clarify the original intervention order by stating that "AUL is an intervening defendant for all purposes, including the assessment of attorney's fees." The motion further stated that "AUL is the real party in interest." In assessing fees against appellant Diamond, the District Court stated that "the State defendants and intervenors played at least equal roles in defending the abortion statute." *Charles* v. *Daley*, No. 79–C–4541 (ND Ill. Apr. 22, 1985).

maintain the litigation abandoned by the State in which he resides. Because he lacks any judicially cognizable interest in the Abortion Law, his appeal is dismissed for want of jurisdiction.

It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 15, 1986

84-1379 - Diamond and Williams v. Charles

Dear Harry,

Please note at the foot of your opinion that I concur in the judgment.

Sincerely yours,

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 16, 1986

Re: No. 84-1379 Diamond v. Charles

Dear Sandra,

Please join me in your opinion concurring in part and concurring in the judgment.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 24, 1986

Re: No. 84-1379 - Diamond v. Charles

Dear Sandra,

I join your draft of April 16, 1986.

Regards,

WEB

Justice O'Connor

Copies to the Conference

84-1379 Diamond v. Charles (Cabell)

HAB for the Court 11/20/85
1st draft 2/14/86
2nd draft 3/13/86
3rd draft 4/25/86
Joined by TM 2/14/86
WJB 2/18/86
JPS 2/18/86
LFP 2/25/86

SOC concurring in part and concurring in the judgment
1st draft 4/10/86
2nd draft 4/16/86
3rd draft 4/25/86
Joined by WHR 4/16/86
CJ 4/24/86

BRW concurs in the judgment 4/15/86
SOC will write separately 2/25/86