We should say, at least, that the important constitutional right to life should not be less protected than the constitutional right to free speech. Probably, it should receive even greater protection. Yet an examination of the free speech cases indicates that the right to free speech is a highly protected constitutional right. In the earlier cases, the doctrine emerged that "the holding of meetings for peaceable political action cannot be proscribed". De Jonge v. Oregon, 299 U.S. 353, 365 (1937). The right of free speech in this context was an absolute right against government. Even in the context of speech advocating the overthrow of government by unlawful force, Justices Brandeis and Holmes articulated the test of the protection of such speech that was to be given effect in a broad spectrum of cases involving speech:

> "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. ...the issue (is) whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was so substantial as to justify the stringent restriction interposed by the legislature." Whitney v. California, 274 U.S. 357, 378-379 (1927).

In more recent decades, the degree of the constitutional protection of speech has brought even more stringent standards for its protection by the courts in many contexts. Mr. Justice Black insisted that there is an absolute prohibition against the government awarding damages to a public official in his suit against critics of his official conduct. New York Times v. Sullivan, 376 U.S. 254, 293 (1964). With respect to advocacy of possibly violent political action at a meeting of the Ku Klux Klan, Mr. Justice Douglas took the position that the "clear and present danger" test does not sufficiently protect speech and

"is not reconciliable with the First Amendment in days of peace. ...I see no place in the regime of the First Amendment for any 'clear and present danger test', whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it." Brandenburg v. Ohio, 395 U.S. 444, 452, 454 (1969) (dissenting opinion, Mr. Justice Black, concurring).

If there ever was a constitutional right that was entitled to be treated as an "absolute" one, it is the right to life of an innocent person, and especially that of an unborn child. There is good precedent for so holding drawn from the cases protecting the lesser, although highly important, constitutional rights of free speech, freedom of religion, and freedom from law respecting establishment of religion. But at the very least, that protection should not be less than the highest protection accorded under the decided cases to these important rights. In light of these cases no decision can possibly pass constitutional muster under the Due Process Clause of the Fifth Amendment, considered in its substantive aspects, if that decision authorizes the performance of abortions without a consideration of the crucially important interests and rights of the unborn child, without a direction for a response to those interests, and without a requirement that the most compelling and vital interests of government be involved and that the abortion be necessary to accomplish those interests where no reasonable alternative is available.

CONCLUSION

For the reasons stated in this brief and in the brief of the appellee, amicus respectfully urges that thi Court reverse the judgment of the three-judge court below insofar as it held unconstitutional the Texas law of abor tion and affirm the judgment of that court insofar as it denied injunctive relief. But if this Court affirms the judgment of the three-judge court below insofar as it hel unconstitutional the Texas law of abortion, amicus respectfully urges, in the alternative, that this Court provide substantive standards for guiding decision concerning performance of abortions so as to protect the constitutional right to life of the unborn child and provide or direct the resort to a competent tribunal for a hearing i accordance with procedural due process before an abortion going beyond the Texas law of abortion is permitted to be performed.

Respectfully submitted,

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