

Per Curiam

ANDERS, SOLICITOR OF RICHLAND COUNTY v.
FLOYDON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA

No. 77-1255. Decided March 5, 1979

Where it appears that the District Court's judgment enjoining a South Carolina prosecution in connection with the abortion of a 25-week-old fetus may have been based on an erroneous concept of "viability," the judgment is vacated and the case is remanded for further consideration in light of *Colautti v. Franklin*, 439 U. S. 379, and also for further consideration of abstention in view of the possible alternative constructions of the South Carolina criminal statutes.

440 F. Supp. 535, vacated and remanded.

PER CURIAM.

The motion of Legal Defense Fund for Unborn Children for leave to file a brief, as *amicus curiae*, is denied.

The motion of David Gaetano for leave to file a brief, as *amicus curiae*, is granted.

Appellee was indicted by a grand jury of Richland County, S. C., for criminal abortion and murder in connection with the abortion of a 25-week-old fetus. The District Court enjoined the prosecution, concluding that under *Roe v. Wade*, 410 U. S. 113 (1973), there was no possibility of obtaining a constitutionally binding conviction of appellee. 440 F. Supp. 535 (1977). Because the District Court may have reached this conclusion on the basis of an erroneous concept of "viability," which refers to potential, rather than actual, survival of the fetus outside the womb, *Colautti v. Franklin*, 439 U. S. 379, 388-389 (1979), the judgment is vacated and the case is remanded to the United States District Court for the District of South Carolina for further consideration in light of *Colautti*.

In addition, it is suggested, in view of the alternative constructions of the South Carolina criminal statutes that are

available, that the District Court give further consideration to the possibility of abstention, at least in part, in deference to the pendency of the state-court proceeding.

Vacated and remanded.

MR. JUSTICE STEWART dissents.