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Prohibiting Partial Birth Abortion but Keeping  
Constitutional Rights Intact

Kathleen Morris

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## Note

### ***RICHMOND MEDICAL CENTER FOR WOMEN v. HERRING:* PROHIBITING PARTIAL BIRTH ABORTION BUT KEEPING CONSTITUTIONAL RIGHTS INTACT**

KATHLEEN MORRIS\*

In *Richmond Medical Center for Women v. Herring* (*Richmond Medical Center V*),<sup>1</sup> the United States Court of Appeals for the Fourth Circuit held that Virginia's ban on partial birth abortion did not impose an undue burden on a woman's right to obtain an abortion and was thus constitutional.<sup>2</sup> The Virginia Partial Birth Infanticide Act<sup>3</sup> specifically prohibits only the intact dilation and evacuation procedure.<sup>4</sup> It further includes intent requirements and a life exception, which allow a physician to avoid liability in rare cases where an intended standard dilation and evacuation procedure inadvertently results in an intact partial delivery of the fetus.<sup>5</sup> The facial challenge of the Virginia Act was based on a speculative set of circumstances, insufficient to render the statute invalid.<sup>6</sup> Accordingly, the Fourth Circuit properly upheld the Virginia Act.

#### I. THE CASE

In 2003, the Virginia Legislature enacted the Partial Birth Infanticide Act ("Virginia Act").<sup>7</sup> The Virginia Act criminalizes partial birth infanticide ("partial birth abortion"),<sup>8</sup> where a deliberate act is intended to

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\* Kathleen Morris is a second-year student at the University of Maryland School of Law where she is a staff member for the *Maryland Law Review*. The author extends special thanks to Howard Gumnitzky, Notes and Comments Editor, Kerstin Miller, Senior Online Articles Editor, and Professor Jana Singer for their patience, guidance, and insight throughout the writing process. She would also like to thank her parents for their unwavering support and encouragement.

1. 570 F.3d 165 (4th Cir. 2009).

2. *Id.* at 169.

3. VA. CODE ANN. § 18.2-71.1 (2009).

4. *See infra* Part IV.A.

5. *See infra* Part IV.B.

6. *See infra* Part IV.C.

7. VA. CODE ANN. § 18.2-71.1; *Richmond Med. Ctr. for Women v. Hicks* (*Richmond Med. Ctr. II*), 409 F.3d 619, 622 (4th Cir. 2005), *vacated*, 550 U.S. 901 (2007).

8. The vast majority of abortions in the United States are performed during the first trimester. *Gonzales v. Carhart*, 550 U.S. 124, 134 (2007). After the second trimester, the most common procedure is standard dilation and evacuation ("standard D & E"), where the cervix is

and does kill a fetus “who has been born alive.”<sup>9</sup> The statute defines a fetus “who has been born alive” as one who is extracted from the body of its mother to certain proscribed anatomical landmarks,<sup>10</sup> and shows signs of life including “breath . . . beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.”<sup>11</sup> Under the Virginia Act, an individual who knowingly performs a partial birth abortion is guilty of a Class 4 felony, with a possible fine of up to \$100,000 and a prison sentence of up to ten years.<sup>12</sup>

In *Richmond Medical Center for Women v. Hicks* (*Richmond Medical Center I*),<sup>13</sup> William Fitzhugh, M.D., filed suit prior to the Virginia Act’s July 1, 2003, effective date, challenging the constitutionality of the Virginia Act on its face and seeking injunctive and declaratory relief.<sup>14</sup> Dr. Fitzhugh challenged the law on the basis that he practiced obstetrics and gynecology in Virginia, and in his practice he routinely performed abortions and assisted patients suffering incomplete miscarriages.<sup>15</sup> The District Court held that the Virginia Act was unconstitutional because it (1) failed to include a health exception,<sup>16</sup> (2) impermissibly burdened a woman’s right to choose to terminate her pregnancy,<sup>17</sup> (3) included a life exception that improperly required a physician to choose between the fetus’s life and the health of the mother by forcing “riskier” abortion methods,<sup>18</sup> (4) was so broad that it banned certain safe gynecological procedures without having a

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dilated and the fetus is removed in parts. *Id.* at 134–36; *Richmond Med. Ctr. for Women v. Hicks* (*Richmond Med. Ctr. I*), 301 F. Supp. 2d 499, 503 (E.D. Va. 2004), *aff’d*, *Richmond Med. Ctr. for Women v. Hicks* (*Richmond Med. Ctr. II*), 409 F.3d 619 (4th Cir. 2005), *vacated*, 550 U.S. 901 (2007). A related procedure, accounting for less than four percent of second trimester abortions, is intact dilation and evacuation (“intact D & E”), which involves greater cervical dilation and intact delivery of the fetus to a point where the physician can compress its skull with forceps, or pierce the skull so that the brain matter may be suctioned out. *Gonzales*, 550 U.S. at 137–40; *Richmond Med. Ctr. I*, 301 F. Supp. 2d at 506. The Fourth Circuit in *Richmond Medical Center for Women v. Herring* noted the relevance of the medical evidence and descriptions of procedures in *Gonzales v. Carhart*, where Dr. William Fitzhugh was also a plaintiff. *Richmond Med. Ctr. V*, 570 F.3d at 174.

9. VA. CODE ANN. § 18.2-71.1.

10. *Id.* In a head first delivery, the landmark is when the infant’s entire head is expelled from the mother; in a breech delivery, the landmark is when the torso past the navel is expelled. *Id.*

11. *Id.*

12. *Id.*; VA. CODE ANN. § 18.2-10.

13. 301 F. Supp. 2d 499.

14. *Id.* at 502–03, 512–13, 518.

15. *Id.* at 502–03.

16. *Id.* at 513.

17. *Id.* at 515.

18. *Id.*

requisite compelling state interest to do so,<sup>19</sup> and (5) was too vague to provide sufficient notice of prohibited conduct.<sup>20</sup>

On appeal in *Richmond Medical Center for Women v. Hicks (Richmond Medical Center II)*,<sup>21</sup> a divided bench of the Fourth Circuit affirmed the district court decision, with the majority and dissent differing on whether Supreme Court precedent requires all partial birth abortion bans to include a health exception.<sup>22</sup> The majority held that the Virginia Act was unconstitutional because it failed to include a sufficient exception for the mother's health, as required by the Supreme Court in *Stenberg v. Carhart*.<sup>23</sup> Judge Niemeyer wrote a dissenting opinion asserting that the majority incorrectly construed *Stenberg v. Carhart*<sup>24</sup> as creating a per se constitutional rule that any ban on partial birth abortion must include a specified health exception.<sup>25</sup> Judge Niemeyer asserted that the majority failed to adhere to the proper standard for a facial constitutional challenge, requiring the challenger to "establish that no set of circumstances exists under which the Act would be valid."<sup>26</sup>

The Supreme Court of the United States granted certiorari and, while the appeal was pending, the Court decided *Gonzales v. Carhart*,<sup>27</sup> holding that a federal statute regulating partial birth abortion was constitutional.<sup>28</sup> In *Herring v. Richmond Medical Center for Women (Richmond Medical Center III)*,<sup>29</sup> the Supreme Court vacated *Richmond Medical Center II*'s holding that the Virginia Act was unconstitutional and remanded the case to be reconsidered in light of *Gonzales*.<sup>30</sup>

In *Richmond Medical Center for Women v. Herring (Richmond Medical Center IV)*,<sup>31</sup> the Fourth Circuit affirmed its prior decision that the

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19. *Id.* at 516.

20. *Id.* at 516–17.

21. 409 F.3d 619 (4th Cir. 2005).

22. *Id.* at 620, 629.

23. *Id.* at 625–26 (citing *Stenberg v. Carhart*, 530 U.S. 914 (2000)). In holding that the lack of a health exception rendered the statute facially unconstitutional, the majority did not proceed to consider the district court's subsequent reasons for finding the Virginia Act unconstitutional. *Id.* at 629 n.2.

24. 530 U.S. 914.

25. *Richmond Med. Ctr. II*, 409 F.3d at 629–32 (Niemeyer, J., dissenting).

26. *Id.* at 634 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

27. 550 U.S. 124 (2007).

28. *Id.* at 127 (holding that a federal statute criminalizing partial birth abortion provided sufficient notice of prohibited conduct and did not impose an undue burden on a woman's right to an abortion).

29. 550 U.S. 901 (2007).

30. *Id.* at 901.

31. 527 F.3d 128 (4th Cir. 2008).

Virginia Act was unconstitutional, with the majority and dissent in direct opposition regarding whether the omission of an intent requirement was fatal to the Virginia Act.<sup>32</sup> The majority reasoned that the Virginia Act's failure to require intent or a distinct act<sup>33</sup> was a crucial distinction from the constitutional statute in *Gonzales*.<sup>34</sup> The majority stated that the Virginia Act functioned as an effective ban on the standard dilation and evacuation procedure and thus unconstitutionally hindered a woman's right to choose to terminate a pregnancy.<sup>35</sup> The dissent argued that the lack of a health exception was immaterial because the statute contained sufficient exceptions to protect physicians against inadvertent liability.<sup>36</sup> Furthermore, the dissent found that the majority's analysis of the facial challenge was inconsistent with the holding of *Gonzales*, as Dr. Fitzhugh's facial challenge was based only on hypothetical occurrences.<sup>37</sup>

After the Court in *Richmond Medical Center for Women IV* found the Virginia Act to be unconstitutional even in light of *Gonzales*, the Commonwealth moved for a rehearing en banc.<sup>38</sup> The Fourth Circuit reconsidered the case to determine whether the Virginia Act was unconstitutional because of its allegedly insufficient health exception and undue burden on a woman's right to choose abortion.<sup>39</sup>

## II. LEGAL BACKGROUND

Aborting unwanted or unhealthy pregnancies can be traced back to the ancient Persian Empire,<sup>40</sup> and while attitudes toward abortion have evolved throughout history, societies have struggled to reconcile the conflicting

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32. *Id.* at 131. The majority reasoned that the Virginia Act was an effective ban on standard D & E because it penalized physicians who, although intending to perform a standard D & E, inadvertently delivered the fetus and either performed an intact D & E or attempted to complete the delivery. *Id.* at 148.

33. During a standard D & E, the suction and other physical maternal factors can cause the fetus to become dismembered. *Id.* at 134. The majority reasoned that because the Act does not require a separate, distinct act intended to kill or dismember the fetus, a doctor who intends to perform a standard D & E but inadvertently delivers to a landmark could violate the Act if fetal dismemberment occurs through no fault of his own. *Id.*

34. *Id.* at 148.

35. *Id.* at 137–39.

36. *Id.* at 155–59 (Niemeyer, J., dissenting).

37. *Id.* at 163–66. The dissent stated that the Supreme Court had “rejected any facial challenge that was based on only ‘potential situation[s] that might develop.’” *Id.* at 150 (citing *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007)).

38. *Richmond Med. Ctr. for Women v. Herring* (*Richmond Med. Ctr. V*), 570 F.3d 165, 168 (4th Cir. 2009).

39. *Id.* at 168–69.

40. *Roe v. Wade*, 410 U.S. 113, 130 (1973).

lives and interests at stake.<sup>41</sup> In the United States, many states adopted laws banning abortion<sup>42</sup> until 1973, when the Supreme Court stated that while the State has an interest in the life of the fetus, the mother has a right to choose abortion prior to fetal viability.<sup>43</sup> The Court later refined this analysis, stating that the rights of the State and the mother must coexist in a shifting balance so that the mother is free to choose pre-viability abortion without undue interference from the State.<sup>44</sup> With the advent of newer abortion procedures, such as standard dilation and evacuation and intact dilation and evacuation, the Court continued to seek an appropriate balance between the State's interest in the life of the now partially born fetus and the mother's right to choose abortion.<sup>45</sup>

*A. Early Abortion Laws Prohibited Abortions but Varied Penalties Based on the "Quickening" Distinction*

Early English common law prohibited abortion but based sanctions on a distinction known as "quickening," the first cognizable movement of the fetus in utero, usually occurring at about sixteen to eighteen weeks.<sup>46</sup> Aborting a fetus prior to quickening was permitted, as the fetus was considered part of the mother and not an independent being capable of being a victim of homicide; aborting a fetus after the moment of quickening, however, was prohibited.<sup>47</sup> The quickening distinction carried over into early American abortion laws.<sup>48</sup> In 1828, New York passed a law that became the model for other contemporary abortion legislation.<sup>49</sup> The New York statute prohibited all abortions, but maintained the quickening distinction by making abortion of a pre-quickened fetus a misdemeanor and abortion of a post-quickened fetus a felony.<sup>50</sup> By the end of the 1950s, nearly all states prohibited abortion, except to save the mother's life, and the quickening distinction disappeared.<sup>51</sup> In the 1960s and 1970s, however, there was a trend toward liberalization, and approximately a third of the states adopted some form of the American Law Institute Model Penal Code

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41. *Id.* at 130–41.

42. *See infra* Part II.A.

43. *See infra* Part II.B.

44. *See infra* Part II.C.

45. *See infra* Part II.D.

46. *Roe*, 410 U.S. at 132.

47. *Id.* at 132–33.

48. *Id.* at 138.

49. *Id.* (describing the New York law (citation omitted)).

50. *Id.* It is also notable that the statute had a provision for "therapeutic abortion" to save the life of the mother. *Id.*

51. *Id.* at 139.

Section 230.3, allowing abortion if the mother's health would be gravely impaired by the continuation of the pregnancy.<sup>52</sup>

*B. The Supreme Court of the United States Recognizes a Woman's Right to Choose Pre-Viability Abortion, as Well as the State's Interest in the Life of the Developing Fetus*

In the United States, abortion law is defined by the need to balance the sometimes conflicting rights of a woman and the State. In 1973, the Supreme Court of the United States decided *Roe v. Wade*,<sup>53</sup> holding that abortion invokes important interests of both the individual woman and the State that must be balanced against one another with shifting weight as the pregnancy progresses.<sup>54</sup> Specifically, the Court identified the woman's right to choose abortion, as found within the Fourteenth Amendment's protection of personal liberty.<sup>55</sup> The Court also recognized the State's interests in protecting the life and health of the mother, the life of the developing fetus, and the ethics of the medical profession.<sup>56</sup> The Court explained that while a woman's constitutional right to choose an abortion is not absolute, a Texas statute prohibiting abortion except when necessary to save the life of the mother was unconstitutional.<sup>57</sup>

As the woman's right to privacy, including the choice of whether to abort a pregnancy, qualifies as a fundamental right, the State may regulate abortion when its intervention is narrowly tailored to promote a compelling governmental interest.<sup>58</sup> The Supreme Court held that in the abortion context, the State's coexisting interests become compelling at different times during the pregnancy.<sup>59</sup> The Court adopted the trimester framework,

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52. MODEL PENAL CODE § 230.3; *Roe*, 410 U.S. at 140.

53. 410 U.S. 113 (1973).

54. *Id.* at 153–54.

55. *Id.* at 152–153; U.S. CONST. amend. XIV, § 1. The Court noted that other fundamental rights within this personal liberty include child rearing and education, procreation, and family relationships. *Roe*, 410 U.S. at 152–53.

56. *Roe*, 410 U.S. at 149–50, 153–54.

57. *See id.* at 154, 162 (“We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation. . . . [W]e do not agree that . . . Texas may override the rights of the pregnant women that are at stake.”).

58. *Id.* at 155. Although not explicitly enumerated, the Court has held that a right to privacy is a fundamental right protected by the Fourteenth Amendment guarantee to liberty. *Id.* at 152. The protection is not unlimited, however, and the privacy right is considered fundamental only to the extent that it deals with “personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty.’” *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The Court concluded that the decision of whether to terminate one's pregnancy falls within the fundamental privacy right because of the tremendous impact the decision has on a woman's life. *Id.* at 153.

59. *Id.* at 162–63.

holding that the State's interest in protecting the health of the mother becomes compelling at the commencement of the pregnancy's second trimester,<sup>60</sup> and the State's interest in the life of the fetus becomes compelling at the point of viability.<sup>61</sup> Although the State's interests are present throughout the entire pregnancy, it is only when a particular interest becomes compelling that the State may act.<sup>62</sup> Accordingly, *Roe* stood for the following propositions: (1) during the first trimester of pregnancy, the State's interests were not strong enough to justify any regulation;<sup>63</sup> (2) at the end of the first trimester, the State may impose regulations that are narrowly tailored to protect and promote the health of the mother;<sup>64</sup> and (3) when the fetus becomes viable at the beginning of the third trimester, the State may act to protect its interest in the fetal life so long as it makes exceptions for the life and health of the mother.<sup>65</sup>

*C. The Supreme Court Refined the Framework and Emphasized that the State's Interests Coexist with the Mother's Rights from the Onset of the Pregnancy*

The trimester framework outlined in *Roe* was eventually replaced with a less rigid analysis evaluating the varying strengths of the maternal and fetal rights throughout the pregnancy. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>66</sup> the Supreme Court again considered the various rights implicated by abortion and discarded *Roe*'s trimester framework in favor of a more flexible "undue burden" standard to determine the point when one set of rights must yield to the other.<sup>67</sup>

While still upholding the crux of *Roe*, the *Casey* Court noted that many post-*Roe* decisions struck down nearly any State interference with first trimester abortions, thus seriously undervaluing the State's interest in the potential life at stake.<sup>68</sup> The Court placed significant emphasis on the

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60. *Id.* at 163. This determination was based on data showing that prior to that point, abortions were as safe for the mother as natural childbirth. *Id.* at 149.

61. *Id.* at 163–64.

62. *Id.* at 155.

63. *Id.* at 163.

64. *Id.*

65. *Id.* at 163–64.

66. 505 U.S. 833 (1992). In *Casey*, the Supreme Court considered a Pennsylvania statute imposing various regulations on abortions, including, among others, an informed consent provision and a parental consent requirement for minors seeking an abortion. *Id.* at 844.

67. *Id.* at 869–79.

68. *Id.* at 875.



State's rights, which are present from the outset of the pregnancy and become stronger as the pregnancy progresses and develops.<sup>69</sup>

To remedy this practical incongruity, the Court rejected the strict trimester framework of *Roe*,<sup>70</sup> and instead adopted a more flexible system where, prior to viability, a woman has a right to choose abortion without undue burden from State interference.<sup>71</sup> The Court noted that in light of the State's substantial interest in the life of the developing fetus, the State is justified in making certain regulations "[e]ven in the earliest stages of pregnancy."<sup>72</sup> Such regulation will not be invalidated simply because it makes the right to choose abortion more difficult or expensive; rather it is unconstitutional only if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>73</sup> The Court explained that the "undue burden" standard was appropriate because "[a]s our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."<sup>74</sup>

*D. The Court Strives to Continue Balancing the Coexisting Interests in Light of New Abortion Methods*

The balancing of rights was further complicated with the development of new methods allowing abortions to be performed later into the pregnancy. Particularly controversial methods were the standard dilation and evacuation ("standard D & E") procedure and the intact dilation and

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69. See *id.* at 869, 871 ("[I]t must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's important and legitimate interest in potential life. That portion of the decision in *Roe* has been given too little acknowledgement and implementation by the Court . . . ." (citation and internal quotation marks omitted)).

70. *Id.* at 878–79. The *Casey* Court stated that the trimester framework was not part of *Roe*'s "essential holding" and described the system as an "elaborate but rigid construct, [under which] almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake." *Id.* at 872–73 (citing *Roe*, 410 U.S. at 163–66).

71. *Id.* at 872–74.

72. *Id.* at 872. The Court specifically addressed State action designed to educate the mother about arguments for carrying the child to term, options available to her such as public assistance and adoption, and the lasting mental and emotional impact of abortion, as the Pennsylvania statute at issue included such provisions. *Id.* The Court went on to state that "the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." *Id.* (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989)).

73. *Id.* at 877.

74. *Id.* at 873.

evacuation (“intact D & E”) procedure.<sup>75</sup> Both procedures can be performed throughout the second trimester, both before and after viability.<sup>76</sup>

1. *Prohibiting Both the Standard and Intact Dilation and Evacuation Procedures Unduly Burdens a Woman’s Right to Choose Pre-Viability Abortion*

The Supreme Court in *Stenberg v. Carhart*<sup>77</sup> found that a Nebraska statute banning partial birth abortion imposed an undue burden on a woman’s right to choose abortion in the second trimester, and was thus unconstitutional.<sup>78</sup> The Nebraska statute prohibited “delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that . . . does kill the unborn child,” unless the procedure is medically necessary to save the life of the mother.<sup>79</sup> The Court held that the statute’s definition of partial birth abortion was broad enough to encompass both the intact and standard D & E procedures.<sup>80</sup> Because the statute could be interpreted to ban standard D & E, the most common method of second trimester abortion, the Court held that the statute imposed an undue burden on a woman’s right to choose abortion prior to viability.<sup>81</sup>

2. *The Court Held that Prohibition of Intact Dilation and Evacuation Alone Does Not Impose an Undue Burden on a Woman’s Right*

After *Stenberg*, the Court again considered a ban on partial birth abortion in *Gonzales v. Carhart*,<sup>82</sup> but held that the Partial-Birth Abortion

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75. The intact D & E procedure is sometimes referred to as “dilation and extraction,” the term used by the American Medical Association and the Court in *Stenberg v. Carhart*, 530 U.S. 914, 927 (2000), but this Note refers to the procedure as “intact dilation and evacuation” or “intact D & E,” as used in *Gonzales v. Carhart*, 550 U.S. 124, 137 (2007), and *Richmond Medical Center for Women v. Herring* (*Richmond Med. Ctr. V.*), 570 F.3d 165, 168 (4th Cir. 2009).

76. *See supra* note 8.

77. 530 U.S. 914.

78. *Id.* at 921.

79. *Id.* at 922; NEB. REV. STAT. ANN. §§ 28-326(9), 28-328(1) (LexisNexis 2010).

80. *Stenberg*, 530 U.S. at 938–40. Because the standard D & E procedure involves removing the fetus from the mother in parts, the Court reasoned that this could fall within the scope of the statute, as there was no definition of what constituted a “substantial portion” of a fetus. *Id.*

81. *Id.* at 938. The Court also held that the statute was unconstitutional in its failure to include a health exception. *Id.* The Court later held in *Gonzales v. Carhart* that a health exception is not always mandatory. 550 U.S. 124, 166–67 (2007).

82. 550 U.S. 124.

Ban Act of 2003 (“Federal Act”)<sup>83</sup> did not impose an undue burden and was thus constitutionally permissible.<sup>84</sup> When Congress passed the Federal Act, banning intentional performance of an intact D & E unless required to save the life of the mother, it responded to the Court’s decision in *Stenberg* by tailoring the Act’s definition of partial birth abortion to include only the intact D & E procedure.<sup>85</sup> The Federal Act defined partial birth abortion as occurring when a doctor:

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the [mother’s] body . . . or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the [mother’s] body . . . for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.<sup>86</sup>

The *Gonzales* Court explained that the Federal Act was not so broad as to constitute an undue burden because it excluded the standard D & E procedure from liability, and only prohibited the intact procedure.<sup>87</sup> Furthermore, the “relatively clear guidelines as to prohibited conduct” and “objective criteria,” including the requirement that the live fetus be intentionally vaginally delivered to a proscribed anatomical landmark<sup>88</sup> and that the doctor perform an “overt act, other than completion of delivery,” intended to kill the fetus,<sup>89</sup> adequately protected doctors from unintentional liability.<sup>90</sup> Thus, the Court explained that unlike the statute in *Stenberg*, the Federal Act did not impose an undue burden on a woman’s right to choose a second trimester pre-viability abortion because the Act did not prohibit the standard D & E procedure.<sup>91</sup>

Additionally, the Court held that the Federal Act was a constitutionally permissible and rationally related means to achieve Congress’s legitimate interests in protecting both the “dignity of human life,”<sup>92</sup> as well as the “integrity and ethics of the medical profession.”<sup>93</sup> As the Court

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83. 18 U.S.C. § 1531 (2006).

84. *Gonzales*, 550 U.S. at 147.

85. *Id.* at 141–42; *see also* 18 U.S.C. § 1531(a).

86. 18 U.S.C. § 1531(b).

87. *Gonzales*, 550 U.S. at 147.

88. *Id.* at 147–49 (citation and internal quotation marks omitted).

89. *Id.* at 148 (quoting 18 U.S.C. § 1531(b)(1)(B)).

90. *Id.*

91. *Id.* at 150.

92. *Id.* at 157.

93. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)).

emphasized in *Casey*, the State has interests from the beginning of the pregnancy, which must coexist with the right of a woman to choose pre-viability abortion.<sup>94</sup> Thus, “[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.”<sup>95</sup> The Court held that the ban on partial birth abortion was a constitutional exercise of the governmental power to draw boundaries for tolerable conduct and protect its important interests.<sup>96</sup>

### III. THE COURT’S REASONING

In *Richmond Medical Center for Women v. Herring* (*Richmond Medical Center V*),<sup>97</sup> the Fourth Circuit reversed its previous decision and held that the Virginia Act was constitutional both facially and as applied.<sup>98</sup>

Writing for the majority, Judge Niemeyer began by explaining that although there was no dispositive Supreme Court precedent regarding the specific burden borne by the individual asserting a facial constitutional challenge,<sup>99</sup> the discrepancy between alternative standards is immaterial, as Dr. Fitzhugh’s challenge did not survive even the most relaxed standard set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>100</sup>

Under *Casey*, for a statute to be facially unconstitutional, the plaintiff must show that the statute places a substantial burden on a woman’s right to choose abortion in a “large fraction” of the applicable circumstances.<sup>101</sup>

Judge Niemeyer explained that because the factual record showed that only very rarely does an intended standard D & E accidentally become an intact

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94. See *supra* note 72 and accompanying text.

95. *Gonzales*, 550 U.S. at 158.

96. *Id.*

97. 570 F.3d 165 (4th Cir. 2009).

98. *Id.* at 169.

99. The majority discussed three particular standards for a successful facial constitutional challenge. *Id.* at 173–74. The first standard (“*Salerno* standard”) requires a plaintiff to establish “that no set of circumstances exists under which the Act would be valid.” *Id.* at 174 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The second standard (“*Casey* standard”) makes no mention of *Salerno* and requires only that a plaintiff show that the statute functions as a “substantial obstacle to a woman’s choice to undergo an abortion” in a “large fraction of the cases” where the Act applies. *Id.* at 173 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992)). The third standard signals a return to the more stringent *Salerno* standard and states that a facial challenge will fail so long as a statute has a “plainly legitimate sweep.” *Id.* at 174 (quoting *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008)).

100. *Id.* at 174 (citing *Casey*, 505 U.S. 833).

101. *Id.* at 173; *Casey*, 505 U.S. at 895.

D & E prohibited by the Virginia Act, the statute is not facially invalid.<sup>102</sup> The court reiterated that in considering facial constitutional challenges, it is not required to consider every potential situation that may arise during partial birth abortion procedures, but rather must consider only the overall majority of situations.<sup>103</sup> Because Dr. Fitzhugh failed to show that the ban placed abortion providers at risk of unintentionally violating the law in the majority of situations, he failed to show that the Virginia Act was facially unconstitutional.<sup>104</sup>

The majority then explained that the Virginia Act gave sufficient notice of prohibited conduct because the prohibited act must be intended to kill a fetus that has already been born alive.<sup>105</sup> Although its scienter language differed from that of the previously upheld Federal Act,<sup>106</sup> the majority reasoned that because the Virginia Act focused on the deliberate act that intentionally kills a live-born infant who is partially or fully separated from its mother, the Act adequately identified the criminalized conduct.<sup>107</sup> While the Virginia Act imposed liability for intact D & E procedures regardless of the physician's initial intent, the Act was clear that the prohibited conduct was the intentional killing of an infant after it had been born alive.<sup>108</sup> The majority explained that in the event that a live fetus was only partially expelled from its mother's body and its head could not fully emerge, the doctor would not be liable for the infant's death under the Act's exception for the preservation of the mother's life.<sup>109</sup> In the rare instance where this situation would not be life threatening, the majority reasoned that the State may legitimately balance its interest in preserving the life of a newborn against the woman's right to abortion when her life is

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102. *Richmond Med. Ctr. V*, 570 F.3d at 174–75. The court further noted that even in the instances when an intended standard D & E procedure results in an intact D & E, the physician is not required to violate the Virginia Act by deliberately killing the fetus, but may simply remove it intact. *Id.* at 175. Additionally, in circumstances when the skull becomes lodged in the cervix, posing a threat to the mother's life, the physician may invoke the life exception and take necessary action to save the mother's life. *Id.*

103. *Id.*

104. *Id.*

105. See *infra* notes 107–109 and accompanying text.

106. The Federal Act evaluated in *Gonzales* prohibited only those procedures where the physician's initial intent was to perform an intact D & E, not those that accidentally resulted in an intact D & E despite the intent to perform a standard D & E. See *Gonzales v. Carhart*, 550 U.S. 124, 142 (2007) (quoting the Federal Act).

107. *Richmond Med. Ctr. V*, 570 F.3d at 176.

108. *Id.*

109. *Id.* at 178. The majority noted that while the infant's skull becomes lodged in the cervix in only ten percent of standard D & E procedures, the situation is nearly always life-threatening for the mother. *Id.* Thus, this situation would usually fit within the Act's life exception, which allows a physician to act in a way that, "in reasonable medical judgment, is necessary to prevent the death of the mother." *Id.*; VA. CODE ANN. § 18.2-71.1(E) (2009).

not in danger.<sup>110</sup> After concluding that the Virginia Act was not facially unconstitutional, the majority quickly disposed of the as-applied challenge of the Virginia Act because Dr. Fitzhugh had failed to posit any sufficiently concrete set of facts where the application of the Virginia Act was unconstitutional.<sup>111</sup>

In his concurrence, Judge Wilkinson wrote mainly about the societal and precedential significance of judicially condoning a procedure he finds unconscionable. He first explained that under *Gonzales*, the Virginia Act must be constitutional, regardless of its minor distinctions from the Federal Act.<sup>112</sup> The concurrence then took a different approach from that of the majority opinion and discussed the implications of finding the intact D & E procedure constitutional.<sup>113</sup> Judge Wilkinson concluded by reasoning that this case was not about the right to abortion in general, but about maintaining a line of humanity and not condoning a procedure that involves the killing of a partially born infant.<sup>114</sup>

Judge Michael authored the dissent, reasoning that the Virginia Act's fundamental shortcoming was that it did not require a physician to intend at the outset to perform an intact D & E.<sup>115</sup> The dissent averred that unlike the previously upheld Federal Act in *Gonzales*, this Act criminalized all intact D & E procedures, including those that only inadvertently result in the fetus emerging to a proscribed anatomical landmark.<sup>116</sup> Judge Michael explained that because a physician would be exposed to liability under the Virginia Act *any* time he or she set out to perform a standard D & E, the most common abortion method for second-trimester pregnancies, situations involving potential liability would be extremely frequent, and thus the statute was facially unconstitutional.<sup>117</sup> The dissent asserted that the lack of

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110. *Richmond Med. Ctr. V*, 570 F.3d at 178.

111. *Id.* at 179–80. The majority viewed Dr. Fitzhugh's testimony that each case and patient warrants different decisions for how the abortion procedure will be carried out as too speculative a scenario for an as-applied constitutional challenge. *Id.* at 180.

112. *Id.* at 180 (Wilkinson, J., concurring).

113. *Id.* at 181–83. Judge Wilkinson stated that this case was not about abortion in the broader context, but about the particular practice of partial birth abortion. *Id.* at 183. He further stated that by using sterile language such as “fetal demise” and “disarticulation,” the dissent avoided the reality of the procedure, which he described as “dismembering a partly born child and crushing its skull.” *Id.* at 182–83. He argued that such a total denial of protection for “[a] partially born child . . . among the weakest, most helpless beings in our midst” is utterly unacceptable for a civilized society. *Id.*

114. *Id.* at 182–83.

115. *Id.* at 184 (Michael, J., dissenting).

116. *Id.*

117. *Id.* This characterization of the frequency of the Virginia Act's relevance was in direct contrast to the majority's assertion that the potential for liability arises only in the infrequent cases

the intent requirement would make physicians unwilling to expose themselves to liability by performing standard D & E procedures, for fear that an intact D & E may result.<sup>118</sup> Thus, the dissent found the Virginia Act unconstitutional under *Gonzales* because it placed an impermissible burden on a woman's right to have an abortion.<sup>119</sup> The dissent further reasoned that the Virginia Act was unconstitutional because it exposed a physician to liability by failing to distinguish between the act of killing the fetus and acts necessary to complete the delivery.<sup>120</sup> Unconvinced by the majority's description of "affirmative defenses," the dissent found that the life exception was an insufficient shield from liability.<sup>121</sup> The dissent concluded its analysis by reasoning that the Virginia Act was also unconstitutional as-applied, by focusing on the impact on Dr. Fitzhugh.<sup>122</sup> Based on this analysis, the dissent concluded that the Virginia Act should be found unconstitutional both facially and as-applied because it presented an unconstitutionally significant obstacle for a woman seeking a second-trimester abortion.<sup>123</sup>

#### IV. ANALYSIS

The Fourth Circuit properly held that the Virginia Act was not unduly burdensome on a woman's right to choose a late-term but pre-viability abortion.<sup>124</sup> As established in American abortion jurisprudence, the State may exercise regulatory power to protect its interests both in the life of a

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where an intended standard D & E procedure accidentally becomes an intact D & E. *See id.* at 175 (majority opinion).

118. *Id.* at 187 (Michael, J., dissenting).

119. *Id.*

120. *Id.* at 192. The dissent noted that the Virginia Act defined an infant who had been born alive as one who had emerged to one of the specified anatomical landmarks—not just those infants who had been completely expelled from the mother's body. *Id.* Judge Michael explained that this definition was significant because a physician attempting to complete the delivery of the infant could unintentionally cause dismemberment, which is a ground for liability under the Virginia Act. *Id.*

121. *Id.* at 193–94. The life exception stated that the doctor may complete the D & E procedure to save the mother's life, but in doing so, must take all possible steps to preserve the life of the fetus. VA. CODE ANN. § 18.2-71.1(E) (2009). The dissent pointed out that the two requirements are in direct opposition because in order to complete the procedure, the doctor must compress the infant's skull. *Richmond Med. Ctr. V*, 570 F.3d at 193–94.

122. *Richmond Med. Ctr. V*, 570 F.3d at 197–98. The dissent pointed to Dr. Fitzhugh's description of the number of annual standard D & E procedures that he performed that accidentally became intact D & E procedures, finding this information to be sufficiently concrete to show how the statute would have an unconstitutional impact on him. *Id.* In contrast, the majority emphasized that Dr. Fitzhugh had failed to raise any specific circumstances where the Act would be unconstitutional. *Id.* at 180 (majority opinion).

123. *Id.* at 198 (Michael, J., dissenting).

124. *See id.* at 169 (majority opinion).

developing fetus as well as the ethical integrity of the medical profession,<sup>125</sup> so long as the regulation does not constitute a substantial obstacle to a woman's right to choose.<sup>126</sup> The Virginia Act prohibits only the infrequently used intact D & E procedure.<sup>127</sup> The Act gives sufficient notice of the prohibited conduct and ways to avoid liability, and therefore does not constitute a chilling effect on physicians willing to perform standard D & E procedures.<sup>128</sup> Furthermore, the asserted facial challenge of the Virginia Act was based on a set of circumstances too speculative to render the statute unconstitutional.<sup>129</sup> Accordingly, the Fourth Circuit properly upheld the Virginia Act as constitutional.

*A. The Majority Correctly Held the Virginia Act Was Not Unduly Burdensome Because the Legislature Is Permitted to Draw Certain Lines, and the Statute Specifically Prohibits Only the Intact Dilation and Evacuation Procedure*

Because the Virginia Act applies only to the intact D & E procedure and does not hinder the commonly used standard D & E procedure, the Fourth Circuit correctly held that the legislature is justified in setting such a boundary. Like the Federal Act upheld by the Supreme Court in *Gonzales v. Carhart*,<sup>130</sup> the Virginia Act “proscribes a particular manner of ending fetal life”<sup>131</sup> by delineating a clear and specific definition of partial birth abortion that prohibits only the intact D & E procedure.<sup>132</sup> This specificity

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125. See *supra* Part II.D.2.

126. See *supra* text accompanying note 71.

127. See *infra* Part IV.A.

128. See *infra* Part IV.B.

129. See *infra* Part IV.C.

130. 550 U.S. 124 (2007).

131. *Id.* at 134.

132. *Id.* at 153; see also *Richmond Med. Ctr. for Women v. Herring* (*Richmond Med. Ctr. V.*), 570 F.3d 165, 177 (4th Cir. 2009) (noting that the Virginia Act, although not identical to the Federal Act, was specific to prohibit only the intact D & E procedure). It is notable that while the Virginia Act included an exception to save the mother's life, it did not include a health exception. See VA. CODE ANN. § 18.2-71.1(E) (2009). Earlier decisions finding the Act unconstitutional heavily emphasized the absence of an exception to protect the mother in situations where her health, but not her life, was in danger. See *Richmond Med. Ctr. for Women v. Hicks* (*Richmond Med. Ctr. II*), 409 F.3d 619, 622–26 (4th Cir. 2005) (holding the Virginia Act unconstitutional in part because of its lack of a health exception); *Richmond Med. Ctr. for Women v. Hicks* (*Richmond Med. Ctr. I*), 301 F. Supp. 2d 499, 513–14 (E.D. Va. 2004) (finding the Virginia Act to be unconstitutional because it did not include a health exception). When the Supreme Court vacated and remanded the Fourth Circuit's 2005 *Richmond Medical Center II* decision to be reconsidered in light of *Gonzales*, which upheld a federal statute that lacked a health exception, the Virginia Act's omission of a health exception was no longer sufficient grounds to hold the statute unconstitutional. See *Gonzales*, 550 U.S. at 161–67 (holding that the omission of a health



is important because, as the Court held in *Stenberg v. Carhart*,<sup>133</sup> ambiguity where the statute could be construed to prohibit the standard D & E procedure, the most common method of late-term pre-viability abortion, would present an unconstitutional undue burden.<sup>134</sup> The Virginia Act defines a partial birth infanticide as a deliberate act that the physician intends to kill an infant who has emerged from his mother either past the navel or to the neck, depending on the fetal presentation, and which does kill such an infant.<sup>135</sup> In a standard D & E, the fetus is removed in parts from the uterus and is thus not delivered to one of the landmarks;<sup>136</sup> the Virginia Act's specification that the fetus must first reach one of the anatomical landmarks and then be killed by a deliberate act excludes physicians performing the standard D & E from accidental liability.<sup>137</sup>

In its prohibition of only the intact D & E procedure, the Virginia Act does not impede a woman's right to elect to undergo a standard D & E, the standard method used for abortion after the first trimester of pregnancy.<sup>138</sup> While the vast majority of abortions are performed in the early stages of pregnancy, approximately ninety-five percent of the relatively small number of abortions performed after the first trimester are completed by a standard D & E, and the remainder by intact D & E.<sup>139</sup> The Virginia Act prohibits only intact D & E procedures, and a woman is free to choose to undergo the more common standard D & E.<sup>140</sup>

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exception did not render the statute unconstitutional when congressional findings were that there may not be situations where an intact D & E would be beneficial to the mother's health).

133. 530 U.S. 914 (2000).

134. *Id.* at 939–40.

135. VA. CODE ANN. § 18.2-71.1(A)–(D).

136. *See supra* Part I.

137. *Richmond Med. Ctr. V*, 570 F.3d at 176–77.

138. *Id.* at 177.

139. *Id.* at 174; *Richmond Med. Ctr. for Women v. Herring (Richmond Med. Ctr. IV)*, 527 F.3d 128, 133 (4th Cir. 2008). These statistics, verified by the *Gonzales* Court, represent the general abortion practice. *Richmond Med. Ctr. V*, 570 F.3d at 174. Dr. Fitzhugh testified that in his practice, he performed roughly 4000 first-trimester abortions and 225 second-trimester abortions each year. *Id.* at 170. Of the second trimester procedures, only an estimated fifteen to twenty-five percent were intact D & Es. *Id.*

140. *Richmond Med. Ctr. V*, 570 F.3d at 169. The dissent asserts that because of the slight chance that a doctor intending to perform a standard D & E will inadvertently deliver a fetus to an anatomical landmark, he will risk liability for performing an intact D & E each time he performs the standard D & E procedure. *Id.* at 195 (Michael, J., dissenting). This assertion is erroneous because once the physician is faced with such an unintentional progression in the delivery, he can avoid liability by completing the delivery or by taking the necessary steps to save the mother's life if it is at risk. *Id.* at 178 (majority opinion). Accordingly, while it is true that intact D & Es are prohibited regardless of whether the physician initially intended to perform a standard D & E or not, the Act does not effectively prohibit the standard procedure by creating a high risk of liability for doctors who continue to perform it. *See infra* Part IV.B.

The Virginia legislature, in prohibiting only a narrow category of conduct, permissibly exercised its authority to establish a boundary for its constituents to delineate what conduct will be tolerated and what practices are intolerable. The Court has previously upheld legislatively determined boundaries where “practices that extinguish life” seemed too close to condemned actions.<sup>141</sup> In this case, the legislature designated the specified points where an infant is considered “partially delivered” as the line where killing an infant by intentionally compressing his skull is too similar to killing a fully delivered infant.<sup>142</sup> Accordingly, by enacting a statute that focuses on the specific act to be criminalized, but does not impede the right to lawful abortion, the Virginia legislature was justified in “draw[ing] a bright line that clearly distinguishes abortion and infanticide.”<sup>143</sup>

*B. The Majority Correctly Held that the Virginia Act Did Not Impose a Chilling Effect, Which Would Be Unduly Burdensome, Because the Intent Requirement Allows a Physician to Avoid Liability by Choosing to Complete the Delivery*

The Virginia Act, like the Federal Act upheld in *Gonzales*, requires that the physician deliberately perform an act that is intended to, and does, kill the fetus.<sup>144</sup> The statutes differ on when the intent is required; the Federal Act requires that the physician intend from the outset to deliver the fetus to an anatomical landmark in order to perform the fatal act,<sup>145</sup> while the Virginia Act requires only that once the fetus has been delivered to an anatomical landmark, the physician intend to perform the fatal act.<sup>146</sup> As the majority explained:

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141. See *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007) (upholding a federal act prohibiting partial birth abortion and explaining that protecting such conduct would “further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life”); *Washington v. Glucksberg*, 521 U.S. 702, 705–06 (1997) (holding that a legislative ban on assisted suicide was constitutional).

142. VA. CODE ANN. § 18.2-71.1(B) (2009).

143. *Gonzales*, 550 U.S. at 158 (alteration in original) (citation and internal quotation marks omitted); see also Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1206 (codified at 18 U.S.C. § 1531 note (2006)) (stating Congress’s conclusion that partial birth abortion is so similar to killing a newborn infant that it is “gruesome and inhumane” and “promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure”).

144. VA. CODE ANN. § 18.2-71.1(B); *Gonzales*, 550 U.S. at 148.

145. 18 U.S.C. § 1531(b)(1).

146. VA. CODE ANN. § 18.2-71.1(B). The dissent placed great emphasis on this distinction, asserting that because the *Gonzales* Court “based its decision to uphold the federal statute” on the intent at the outset requirement, the Virginia Act’s lack of such requirement rendered it unconstitutional. *Richmond Med. Ctr. for Women v. Herring* (*Richmond Med. Ctr. V*), 570 F.3d 165, 187 (4th Cir. 2009) (Michael, J., dissenting). The Court in *Gonzales*, however, did not place such weight on intent at the outset, and stated that because “scienter requirements alleviate

[T]he Virginia Act's scienter requirement targets the "deliberate act" that kills "a human infant who has been born alive." Whether the fetus is intentionally . . . or accidentally vaginally delivered [to an anatomical landmark] is of no consequence. The Virginia Act's scienter is measured only after partial delivery of the "human infant who has been born alive" and not at the commencement of the abortion procedure, as under [the Federal Act].<sup>147</sup>

Under the Virginia Act, at the point when the fetus reaches a proscribed landmark and is considered partially born, the physician faces a choice: He may attempt to achieve a full live birth by completing the delivery, thus avoiding liability, or he may complete the abortion by performing an intact D & E,<sup>148</sup> incurring liability under the Virginia Act.<sup>149</sup> While the Virginia Act does not preclude liability simply because a physician initially intended to perform a standard D & E, a physician who accidentally delivers the fetus to a proscribed landmark is not forced to violate the statute, but may avoid liability by attempting to complete the delivery.

The Virginia Act's intent requirement allows a physician to avoid liability even when an infant is accidentally delivered to a proscribed landmark, so it does not create a chilling effect on a woman's ability to undergo a standard D & E.<sup>150</sup> The dissent, however, reasoned that because attempting a live delivery at this stage of fetal development frequently results in the death of the infant, a physician will be unable to avoid liability even if he attempts to complete the delivery, and thus will be unwilling to risk liability by undertaking a standard D & E.<sup>151</sup> This assertion ignores the importance of the Virginia Act's scienter requirement, which functions to impose liability only for a "deliberate act . . . *intended to kill* a human infant who has been born alive [to a specified landmark]."<sup>152</sup> The dissent stated

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vagueness concerns," the intent requirements included in the Federal Act "buttressed" the conclusion that the Act was constitutional. *Gonzales*, 550 U.S. at 149.

147. *Richmond Med. Ctr. V*, 570 F.3d at 176 (majority opinion) (citation omitted). The exception to liability is when the physician inadvertently delivers the fetus to the proscribed anatomical landmark, the infant's skull becomes lodged in the cervix, and the mother's life is in danger. VA. CODE ANN. § 18.2-71.1(E); *Richmond Med. Ctr. V*, 570 F.3d at 175. In this circumstance, the physician may invoke the statute's life exception and perform an intact D & E to save the life of the mother. VA. CODE ANN. § 18.2-71.1(E); *Richmond Med. Ctr. V*, 570 F.3d at 175.

148. As the fetus at this point would have already delivered to one of the specified points, completing an intact D & E would entail the deliberate act to kill the fetus.

149. *Richmond Med. Ctr. V*, 570 F.3d at 177–78.

150. *Id.* at 175.

151. *Id.* at 184, 190 (Michael, J., dissenting).

152. VA. CODE ANN. § 18.2-71.1(B) (emphasis added).

that because a criminal defendant is deemed to have knowledge of something that is substantially certain to result from his acts, the likelihood that fetal disarticulation will occur during an attempted delivery would render a physician liable.<sup>153</sup> But the Act can also be read to require purpose, which would exclude from liability unsuccessful completion of delivery. As the Court has stated, “[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”<sup>154</sup> Attempting to complete the delivery does not constitute the requisite act intended to kill the infant, the crux of liability under the Virginia Act; accordingly, a physician will not incur liability if the infant perishes during the attempt to complete the delivery.<sup>155</sup> The Virginia Act, therefore, does not create a chilling effect on a woman’s right to obtain a standard D & E because a physician who sets out to perform a standard D & E but accidentally delivers the infant to a proscribed landmark may always avoid liability by attempting to complete the delivery.

*C. The Majority Correctly Upheld the Virginia Act Because the Life Exception Allows a Physician to Avoid Liability in an Accidental Intact Dilation and Evacuation, and Plaintiff’s Challenge Was Too Speculative to Render the Virginia Act Facially Unconstitutional*

The majority correctly held that the asserted facial challenge was too speculative and consequently insufficient to render the Virginia Act unconstitutional under even the most lenient standard for facial challenges. Although the record shows that an intact D & E is “almost always a conscious choice and almost never accidental,”<sup>156</sup> Dr. Fitzhugh’s facial challenge relied on the possibility that if an infant presented in breech position and emerged to the point where its skull became lodged in the mother’s cervix during an attempted standard D & E procedure, he would be unable to avoid liability.<sup>157</sup> The Virginia Act’s life exception allows a

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153. *Richmond Med. Ctr. V*, 570 F.3d at 194.

154. *Id.* at 177 (majority opinion) (alteration in original) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

155. *Id.* at 178.

156. *Id.* at 174 (citing *Gonzales v. Carhart*, 550 U.S. 124, 155 (2007)). The Court in *Gonzales* explained that to achieve an intact delivery, doctors ordinarily must engage in serial dilation. See *Gonzales*, 550 U.S. at 155 (noting that “[i]n order for intact removal to occur on a regular basis, Dr. Fitzhugh would have to dilate his patients with a second round of laminaria” and “[t]his evidence belies any claim that a standard D & E cannot be performed without intending or foreseeing an intact D & E”).

157. *Richmond Med. Ctr. V*, 570 F.3d at 170–71.

physician to avoid liability and thus the exceedingly rare posited situation is insufficient to render the Virginia Act facially unconstitutional.<sup>158</sup>

To invalidate the Virginia Act under the most relaxed standard for a facial challenge, the Act would have to impose liability for accidental intact D & Es “in a large fraction of the cases in which [it] is relevant.”<sup>159</sup> The record established that in Dr. Fitzhugh’s practice, only fifteen to twenty-five percent of abortions were performed after the first trimester of pregnancy,<sup>160</sup> and the fetus accidentally emerges in breech position to its skull in less than one-half of one percent of those abortions.<sup>161</sup> At this point, the mother’s life is ordinarily in danger,<sup>162</sup> triggering the life exception and allowing the physician to act within reasonable medical judgment to save the mother’s life without incurring liability.<sup>163</sup> Although the dissent claimed that should the mother’s life *not* be in danger, the physician would have no option at all to avoid liability, this contention is unfounded because the Virginia Act’s intent requirement precludes liability when the infant dies during the physician’s attempt to complete the delivery.<sup>164</sup> It is extremely rare for a standard D & E to inadvertently result in an intact breech delivery where the infant’s skull becomes lodged in the cervix.<sup>165</sup> In such a rare circumstance, the Virginia Act’s life exception precludes liability for a physician acting to save the life of the mother; accordingly, the Act is not an undue burden in a large fraction of cases, and thus was properly held to overcome the plaintiff’s facial challenge.<sup>166</sup>

The dissent’s rejection of this construction of the Virginia Act’s life exception fails to consider it in light of the overarching context of American abortion jurisprudence and the continual struggle to strike a proper balance between the State’s interest in the fetal life and the mother’s right to abortion.<sup>167</sup> The dissent posited that if the life exception could be invoked by a physician who could only save the mother’s life by deliberately

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158. The majority noted that because this situation is at best extremely unlikely, the mere “possibility of this rare circumstance certainly does not justify rendering invalid the Virginia Act for all other circumstances.” *Id.* at 179.

159. *Id.* at 174 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992)).

160. *See supra* note 139. The record in *Gonzales* showed that of 1.3 million annual abortions in the United States, only ten to fifteen percent occur after the first trimester. 550 U.S. at 134.

161. *Richmond Med. Ctr. V*, 570 F.3d at 175.

162. The majority affirmed Dr. Fitzhugh’s testimony that when the fetus emerges in a breech position and the skull becomes lodged in the cervix, the mother’s life is in danger. *Id.*

163. *Id.*; VA. CODE ANN. § 18.2-71.1(E) (2009).

164. *See supra* Part IV.B.

165. *See supra* text accompanying note 161.

166. *See supra* notes 159–163 and accompanying text.

167. *See Planned Parenthood of Se. Pa. v. Casey*, 550 U.S. 833, 869 (1992) (discussing the importance of the proper balance between the interests of the State and those of the woman).

causing fetal demise, the exception would “cancel out” the purpose of the Virginia Act itself.<sup>168</sup> On the contrary, by including a life exception in the Act, the legislature designated a specific situation where the balance shifts in favor of the State’s interest in the life of the fetus, while still respecting the mother’s rights, thus allowing the rights to coexist.<sup>169</sup>

Furthermore, assuming that a situation could arise where the infant’s skull became lodged in the cervix without endangering the mother’s life, the Virginia Act is still constitutional in a “‘large fraction’ of the cases” where it is relevant.<sup>170</sup> Although the dissent reasoned that the Virginia Act was facially unconstitutional because the risk of this chain of events is always a possibility, the court is not bound to judge constitutionality against every imaginable situation.<sup>171</sup> The dissent circumvented the patent infrequency of this situation by reframing the inquiry: Instead of considering how often the situation will actually occur, the dissent focused on when the *risk* of such occurrence existed.<sup>172</sup> By focusing on the slight risk in every case that a doctor could incur liability (albeit from his own choices), Judge Michael erroneously concluded that the Act presented an undue burden in every case and was facially unconstitutional.<sup>173</sup> This reasoning ignores the principle that simply because a certain set of circumstances *may* conceivably arise, a court need not invalidate a statute.<sup>174</sup> The Supreme Court has stated, “It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop.”<sup>175</sup> Accordingly, because courts are not bound to consider every possibility, however unlikely, the majority properly held that the Virginia Act could survive the facial challenge because it is constitutional in a “large fraction” of the cases where the law is relevant.<sup>176</sup>

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168. *Richmond Med. Ctr. V*, 570 F.3d at 193–94 (Michael, J., dissenting).

169. *Id.* at 178 (majority opinion).

170. *Id.* at 175.

171. *See infra* text accompanying note 175.

172. *Richmond Med. Ctr. V*, 570 F.3d at 195 (Michael, J., dissenting).

173. *See id.* (“The record here establishes that the Virginia Act threatens criminal liability—and thus imposes a burden—in every case that calls for a standard D & E. That is 100 percent of those cases, more than sufficient to sustain a facial challenge.”).

174. *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)).

175. *Id.* (citing *Raines*, 362 U.S. at 21).

176. *See supra* notes 172–175 and accompanying text.

## V. CONCLUSION

The Fourth Circuit in *Richmond Medical Center for Women v. Herring* (*Richmond Medical Center V*) correctly upheld the Virginia Act.<sup>177</sup> The Virginia Act was a permissible legislative boundary because it specifically prohibited only the infrequently used intact D & E procedure.<sup>178</sup> Furthermore, both the intent requirement and the life exception provide sufficient avenues for physicians to avoid liability under the Act.<sup>179</sup> Finally, the rare circumstance in which a physician could potentially be unable to avoid liability is too speculative to render the statute facially unconstitutional.<sup>180</sup>

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177. *Richmond Med. Ctr. V*, 570 F.3d at 169 (majority opinion).

178. *See supra* Part IV.A.

179. *See supra* Part IV.B–C.

180. *See supra* Part IV.C.