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Richmond Medical Center for Women v. Herring

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RICHMOND MEDICAL CENTER FOR WOMEN V. HERRING

In 1973, the Supreme Court held for the first time in *Roe v. Wade*[1] that the constitutional right of privacy includes a woman's right to choose to terminate her pregnancy.[2] In this landmark decision, the Court prohibited state regulation of abortion prior to fetal viability.[3] At the same time, it sanctioned state regulation and even proscription of postviability abortion unless the abortion was necessary for the preservation and protection of maternal health.[4] Then, in its 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[5] the Supreme Court established the undue burden standard, declaring unconstitutional any law that "place[s] a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[6] In *Casey*, the Court invalidated a provision in a Pennsylvania law that required married women to notify their husbands prior to receiving an abortion.[7]

In 2000, the Court first addressed the partial-birth abortion procedure in *Stenberg v. Carhart* (*Carhart I*).[8] It held that a Nebraska statute banning partial-birth abortions must include a health exception "'where [the procedure] is necessary . . . for the preservation of the life or health of the mother.'"[9] Finally, and most recently, in *Gonzales v. Carhart* (*Carhart II*),[10] the Supreme Court found constitutional the Partial-Birth Abortion Ban Act of 2003 (the Federal Act),[11] which prohibits "[a]ny physician . . . [from] knowingly perform[ing] a partial-birth abortion and . . . kill[ing] a human fetus."[12] The Court reasoned that unlike the Nebraska statute in *Carhart I*, the Federal Act was sufficiently clear because it provided "anatomical landmark[s]" and included an overt act requirement.[13] The Court also recognized the government's interest in protecting the integrity of the medical profession by regulating this form of abortion.[14] These decisions represent some of the most controversial and widely followed jurisprudence in the country because of their influence upon the lives of women and families.[15]

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1. 410 U.S. 113 (1973).
2. *Id.* at 153.
3. *Id.* at 163.
4. *Id.* at 163–64.
5. 505 U.S. 833 (1992).
6. *Id.* at 878 (plurality opinion).
7. *Id.* at 895.
8. 530 U.S. 914 (2000).
9. *Id.* at 931 (quoting *Casey*, 505 U.S. at 879).
10. 550 U.S. 124 (2007).
11. *Id.* at 168 (discussing 18 U.S.C. § 1531 (Supp. V 2005)).
12. 18 U.S.C. § 1531 (2006).
13. *Carhart*, 550 U.S. at 149, 153.
14. *Id.* at 158.
15. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 820 (3d ed. 2006) ("Few decisions in Supreme Court history have provoked the intense controversy that has surrounded the abortion rulings.").

Last year in June 2009, in *Richmond Medical Center for Women v. Herring*,[16] the United States Court of Appeals for the Fourth Circuit expounded upon the standards created by these cases when it held that Virginia's Partial Birth Infanticide Act (the Virginia Act)[17] was not facially unconstitutional.[18] In *Richmond Medical Center*, a physician brought an action to declare the Virginia Act unconstitutional and to enjoin enforcement of the Act, claiming that it "failed to include an exception for the preservation of the mother's health" and impermissibly "'impose[d] an undue burden on the woman's ability to choose an abortion.'"[19] The physician presented a rare but potential scenario in which he believed that the Virginia Act would prove unconstitutional.[20] The court determined that the Virginia Act, which imposes criminal liability on "[a]ny person who knowingly performs partial birth infanticide and . . . kills a human infant,"[21] is similar in terms to but broader in scope than the Federal Act,[22] which applies to any physician who knowingly delivers a fetus past an anatomical landmark and performs an overt act that kills the fetus.[23] Nevertheless, it concluded that the Virginia Act is not overly broad so as to confuse physicians about permissible conduct and that its terms ensured against a "chilling effect" on a woman's right to choose an abortion.[24] Furthermore, the court reasoned that the plaintiff's "posited circumstance does not present a sufficiently frequent circumstance to render the Virginia Act wholly unconstitutional for all circumstances."[25]

In *Richmond Medical Center*, a medical center and its owner, Dr. William Fitzhugh, brought an action in federal district court after the Virginia Act was passed but before it became effective.[26] Specifically, Dr. Fitzhugh argued that the Virginia Act imposes criminal liability upon a doctor who intends to perform a *standard* D & E abortion procedure that accidentally becomes an *intact* D & E, a method prohibited by the Virginia Act.[27] The Virginia Act does not cover standard D & E procedures, which are "'the dilation and evacuation abortion procedure[s] involving dismemberment of the fetus prior to removal from the body of the mother.'"[28] In contrast, the Virginia Act prohibits the intact D & E procedure, in which the infant is "'completely or substantially expelled or extracted from [the body of the] mother'" prior to an act that results in its

16. 570 F.3d 165 (4th Cir. 2009).
17. VA. CODE ANN. § 18.2-71.1 (2009).
18. *Id.* at 169.
19. *Id.* at 168.
20. *See id.* at 170–71.
21. § 18.2-71.1(A).
22. *Richmond Med. Ctr.*, 570 F.3d at 177.
23. 18 U.S.C. § 1531 (2006).
24. *Richmond Med. Ctr.*, 570 F.3d at 169.
25. *Id.*
26. *Id.* at 168.
27. *Id.* at 171.
28. *Id.* at 169–70 (quoting VA. CODE ANN. § 18.2-71.1(B) (2009)).

death.[29] The Virginia Act states that an infant is "substantially expelled or extracted" when its "entire head is outside the body of the mother" or, in the case of a breech delivery, when its "trunk past the navel is outside the body of the mother."[30] Dr. Fitzhugh testified that, of the 225 second-trimester abortions he performs each year, "accidental emergence of the fetus occurs 10% of the time" and that the fetus emerges to the anatomical landmark described in the Virginia Act less than 50% of the time.[31] He claimed that the possibility of these rare situations unconstitutionally exposed all doctors who perform standard D & E procedures to prosecution under the Virginia Act.[32] Dr. Fitzhugh also insisted that, although the Virginia Act contains an exception to protect the mother's life, it does not allow a physician to protect against damage to the woman's health.[33]

The United States District Court for the Eastern District of Virginia had ruled that the Virginia Act was facially unconstitutional and had enjoined its enforcement.[34] Specifically, it held that the Virginia Act fails to contain a health exception and places an undue burden on a woman's right to choose an abortion because it prohibits previability D & E procedures and causes physicians who perform D & E procedures to fear prosecution.[35] A panel of the Fourth Circuit originally affirmed the decision of the district court,[36] and while the case was pending before the Supreme Court, the Court, in *Carhart II*, rejected similar challenges to the Federal Act.[37] In light of *Carhart II*, the Supreme Court remanded the case,[38] and both parties filed supplemental briefs adjusting their arguments. The Fourth Circuit again affirmed the holding for the plaintiffs,[39] and the government defendants moved for a rehearing en banc, which resulted in the court's current holding of constitutionality.[40]

Written by Judge Niemeyer and joined by Chief Judge Williams and Judges Wilkinson, Shedd, Duncan, and Agee, the majority opinion declared the Virginia Act constitutional for three main reasons:

> (1) Dr. Fitzhugh's posited circumstance does not present a sufficiently frequent circumstance to render the Virginia Act wholly unconstitutional for all circumstances; (2) the Virginia Act's scienter

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29. *Id.* (quoting § 18.2-71.1(A)–(C)).
30. § 18.2-71.1(D).
31. *Richmond Med. Ctr.*, 570 F.3d at 170.
32. *Id.* at 171.
33. *Id.* at 170.
34. Richmond Med. Ctr. for Women v. Hicks, 301 F. Supp. 2d 499, 517–18 (E.D. Va. 2004), *rev'd sub nom.* Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165 (4th Cir. 2009).
35. *Id.* at 513–15.
36. Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619, 629 (4th Cir. 2005), *vacated sub nom.* Herring v. Richmond Med. Ctr. for Women, 550 U.S. 901 (2007).
37. Gonzales v. Carhart, 550 U.S. 124, 168 (2007).
38. Herring v. Richmond Med. Ctr. for Women, 550 U.S. 901 (2007).
39. Richmond Med. Ctr. for Women v. Herring, 527 F.3d 128, 131 (4th Cir. 2008), *rev'd en banc*, 570 F.3d 165 (4th Cir. 2009).
40. Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165, 168–69 (4th Cir. 2009).

> language . . . provides sufficient notice to a reasonable doctor of what conduct is prohibited by the statute; and (3) the provisions for a safe harbor and affirmative defenses, as well as the requirement of "an overt act," ensure that the Virginia Act will not create a barrier to . . . a woman's right to have a standard D & E or her physician's ability to undertake that procedure without fear of criminal liability. [41]

The court first discussed the policy preference for avoiding facial challenges to statutes, emphasizing that, in the context of abortion, courts should hear these challenges only where the statute "'will operate as a substantial obstacle to a woman's choice to undergo an abortion' 'in a large fraction of the cases in which [the statute] is relevant.'"[42] Dr. Fitzhugh's claim failed to satisfy this standard because he could not demonstrate that the Virginia Act criminalizes the standard D & E procedures that accidentally become intact D & Es "'in a large fraction of the cases'" in which the Virginia Act applies.[43] Where an act operates constitutionally in some circumstances, it cannot be found facially unconstitutional.[44]

Second, the court explained that, despite the differences between the Virginia Act and the Federal Act, the former is sufficiently clear about the conduct it prohibits.[45] The scienter requirement in the Virginia Act does not attach to the delivery of the fetus but rather to the "'deliberate act' that kills 'a human infant who has been born alive.'"[46] Therefore, the physician's intent before beginning the D & E procedure is "not determinative of scienter for purposes of criminal liability."[47] In contrast, the Federal Act absolves physicians of criminal liability regardless of the outcome if they intend to perform a standard D & E procedure from the beginning of the procedure.[48] Still, the court held that the intent requirement of the Virginia Act "require[s] purpose, not mere knowledge, that a specific act—taken after emergence [of the fetal body] to the anatomical landmark—will result in fetal demise."[49]

Third, the court emphasized that the Virginia Act exempts a physician from liability when the mother's life is in danger, which almost always occurs in the event of a partial expulsion of a fetus.[50] When the mother's life is not in danger, the Virginia Act prohibits the doctor from completing the abortion by

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41. *Id.* at 169.
42. *Id.* at 171 (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992)).
43. *Id.* (quoting *Casey*, 505 U.S. at 895).
44. *Id.* at 173.
45. *Id.* at 175–76.
46. *Id.* at 176 (quoting VA. CODE ANN. § 18.2-71.1(B) (2009)).
47. *Id.*
48. *Id.* (citing Gonzales v. Carhart, 550 U.S. 124, 151 (2007)).
49. *Id.*
50. *Id.* at 177–78.

deliberately acting to kill the fetus.[51] In this rare situation, the State maintains its "recognized interest in the life of the fetus," and this interest "must be counterbalanced against the mother's right to an abortion."[52] Moreover, Judge Niemeyer wrote that "[t]he Virginia Act . . . makes a clear distinction between the acts necessary to deliver the fetus and the prohibited overt acts that destroy the fetus."[53] As a result, the court maintained that the Virginia Act neither creates a barrier to a woman's choice to have a standard D & E procedure nor impedes a doctor's ability to perform the procedure.[54]

In his separate concurring opinion, Judge Wilkinson asserted that a proper reconsideration of the Virginia Act requires a finding of constitutionality because of its similarity to the Federal Act upheld in *Carhart II*.[55] He wrote that "[t]he state's interest in protecting life" does not disappear simply because "the intact delivery of the [fetus] is unintentional."[56] Thus, "[t]he state may prohibit a deliberate and unconscionable act against the intact, partially born child, regardless of how the child got there."[57] Judge Wilkinson surmised that neither the framers of the Constitution nor the drafters of the Fourteenth Amendment intended to protect a "controversial method of abortion so unconnected to those struggles that led to the formation of this nation."[58] Also, in predicting future citizens' reaction to the decision, Judge Wilkinson opined that the next generation will reflect upon the practice of partial-birth abortion and "shudder."[59]

Judge Michael wrote a dissenting opinion, in which Judges Motz, Traxler, King, and Gregory joined. Judge Michael argued that the Virginia Act is unconstitutional for its imposition of criminal liability upon any doctor who begins a standard D & E that accidentally becomes an intact D & E.[60] He interpreted the *Carhart II* decision to rest upon the Federal Act's requirement of intent of the physician at the outset of the procedure; without this requirement, the Virginia Act provides no protection.[61] He further found a lack of protection in the majority's acclaimed affirmative defenses, which he criticized as "hollow" and without "any realistic or reliable option" for physicians who find themselves in the situation of an accidental intact D & E.[62] Focusing on the technicalities of the accidental intact D & E, Judge Michael insisted that "[o]nce a fetus emerges to [the] anatomical landmark" specified in the Virginia Act, the physician must

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51. *Id.* at 178.
52. *Id.*
53. *Id.*
54. *Id.* at 179.
55. *Id.* at 180 (Wilkinson, J., concurring) (citing Gonzales v. Carhart, 550 U.S. 124 (2007)).
56. *Id.* at 181.
57. *Id.*
58. *Id.*
59. *Id.* at 183.
60. *Id.* at 184 (Michael, J., dissenting).
61. *Id.* (discussing Gonzales v. Carhart, 550 U.S. 124, 148 (2007)).
62. *Id.*

still take steps to complete the full expulsion of the fetus from the mother.[63] These steps usually require either disarticulation of the fetal body or compression of the skull, both of which lead to fetal death.[64] Therefore, according to Judge Michael, the Virginia Act fails to distinguish between acts that complete the delivery and acts that cause fetal demise.[65] As a result, physicians expose themselves to criminal liability every time they set out to perform a standard D & E.[66] According to Judge Michael, this exposure will discourage doctors from performing the safest and most commonly used method of previability second-trimester abortion—a standard D & E—thereby creating an undue burden upon women's access to the procedure.[67]

The dissent also pointed out that the majority's analysis of the Virginia Act's life exception would actually allow doctors to avoid criminal liability any time doctors perform an intact D & E.[68] During an intact D & E, the fetus's "trunk [becomes] extracted 'past the anatomical landmark'" and the head becomes "lodged in the cervix," risking the mother's life and requiring the doctor to compress the fetal skull to save the mother's life.[69] As a result, the majority's interpretation of the life exception would permit the very conduct that the Virginia Act is supposed to criminalize, regardless of whether the conduct was intentional or unintentional.[70] The dissent concluded that "[t]his simply cannot be the purpose of the life exception."[71]

The Fourth Circuit's holding in *Richmond Medical Center for Women v. Herring* supports the congressional intent behind the partial-birth abortion ban in the Federal Act. Congressional findings state that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[72] Moreover, the Court in *Carhart II* explained that the purposes of the Federal Act are to avoid "'further coarsen[ing] society to the humanity of not only newborns, but all vulnerable and innocent human life'" and to protect the medical community's ethics and reputation.[73] Still, the policy underlying the protection of fetal life garners more weight in this decision than in *Carhart II* due to the statutory composition of the Virginia Act. While the Federal Act specifically requires that the person performing the abortion intend from the outset to deliver the fetus to an anatomical landmark for the purposes of

63. *Id.* at 186.
64. *Id.*
65. *Id.* at 191.
66. *Id.* at 190.
67. *Id.* at 184.
68. *Id.* at 193.
69. *Id.* (quoting Gonzales v. Carhart, 550 U.S. 124, 151 (2007)).
70. *Id.*
71. *Id.* at 194.
72. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1201 (codified in 18 U.S.C. § 1531 (2006)).
73. *Carhart*, 550 U.S. at 156–57 (quoting § 2(14)(N), 117 Stat. at 1206).

performing a fatal overt act, the Virginia Act remains silent on any such initial intent.[74] The Fourth Circuit in *Richmond Medical Center* acknowledges this crucial difference in wording, but it argues that it matters only in the rare situation in which a partial expulsion of the fetus has accidentally occurred and the mother's life is not in danger.[75] In such a circumstance, the court deems criminal liability acceptable for the very policy that supports partial-birth abortion bans—the protection of human life.[76] Therefore, through the omission of the intent requirement in the statute and the holding in *Richmond Medical Center*, the drafters of the Virginia Act and a majority of the judges of the Fourth Circuit have advanced a policy choice that protects fetal life and condemns partial-birth abortions.

The Virginia Act does not violate the *Casey* standard by imposing an undue burden upon women's access to abortion. Physicians use standard D & E procedures for over 75% of first- and second-trimester pregnancies, eliminating the majority of women who seek abortions from the scope of this decision.[77] Moreover, as the evidentiary record in this case shows, the likelihood is small that a standard D & E will accidentally become a prohibited intact D & E.[78] Still, when it does, the mother's life is "almost always" in danger, in which case the physician escapes criminal liability for taking steps necessary to deliver the fetus.[79] The dissent falls short in its examination of the life exception's purpose and fails to explain why or how the exception would not cover nearly all situations in which an accidental intact D & E occurs. Furthermore, the undue burden standard evolved from the invalidation of a spousal notification requirement.[80] Unlike this affirmative step that women were required to take before obtaining an abortion, the issue in *Richmond Medical Center* was the potential discouragement of physicians from undertaking a certain type of abortion procedure. The possibility of a chilling effect upon physician conduct simply does not constitute a substantial obstacle in the path of a woman seeking to exercise her right to an abortion.

Through its decision on the facial challenge in *Richmond Medical Center*, the Fourth Circuit recognized Virginia's interest in protecting fetal life. However, the Fourth Circuit left open whether subsequent as-applied challenges

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74. *Compare* 18 U.S.C. § 1531(b)(1)(A) (2006) ("[T]he term 'partial-birth abortion' means an abortion in which the person performing the abortion . . . deliberately and intentionally vaginally delivers a living fetus . . . *for the purpose of* performing an overt act that the person knows will kill the partially delivered living fetus . . . ." (emphasis added)), *with* VA. CODE ANN. § 18.2-71.1(B) (2009) ("'*[P]artial birth infanticide*' means any deliberate act that . . . is intended to kill a human infant who has been born alive, but who has not been completely extracted or expelled from its mother . . . .").

75. *Richmond Med. Ctr.*, 570 F.3d at 179.

76. *Id.* at 178.

77. *Id.* at 174–75.

78. *See id.* at 178.

79. *Id.*

80. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992).

will be successful. Due to the narrowness of the decision and the infrequent situations in which such an interpretation of the Virginia Act proves necessary, the holding most likely will not create drastic changes in the use or practice of abortion. Physicians who perform second-trimester abortions may find it necessary to educate their patients about the possibility of an accidental intact D & E and explain their need to avoid criminal liability by completing a full delivery of the live fetus in the event that such an incident occurs. This additional conversation is unlikely to alter a woman's ultimate decision to terminate her pregnancy. In the end, the decision of the court in *Richmond Medical Center* and this additional conversation that may result from it are certain to preserve the legal and moral precedent that disfavors partial-birth abortion.

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