

No. 03-1821

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In the United States Court of Appeals  
For the Fourth Circuit

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RICHMOND MEDICAL CENTER FOR WOMEN, WILLIAM G. FITZHUGH, M.D.,  
*Plaintiffs-Appellees,*

v.

DAVID M. HICKS, COMMONWEALTH'S ATTORNEY FOR THE  
CITY OF RICHMOND AND WADE A. KIZER  
COMMONWEALTH'S ATTORNEY FOR THE COUNTY OF HENRICO  
*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the Eastern District of Virginia

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**Brief of Amicus Curiae Horatio R. Storer Foundation, Inc.  
Supporting Appellants in Requesting Reversal**

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**[insert court's corporate disclosure form here]**

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## **Identity, Interest & Authority to File**

Horatio R. Storer Foundation, Inc., is a nonprofit (IRC § 501(c)(3)) Oklahoma corporation organized to provide the public with educational materials on fetal development, abortion, persons with disabilities, and euthanasia; to educate the general public to respect all human life; and to provide positive alternatives to the solution of social, emotional, medical, and personal problems of women. The Foundation's present interest is the protection of infants, women, the medical profession, and the public from the effects of the harmful actions proscribed by the challenged Act. Authority to file is based on consent of all parties. Fed. R. Civ. P. 29 (consent letters provided to Clerk).

## **Argument**

In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Supreme Court struck down the Nebraska partial-birth abortion ban on the grounds that (1) it banned the D&E abortion procedure and (2) lacked a health exception. This amicus curiae brief demonstrates that (1) based on *Stenberg*, the Act banning “partial birth infanticide,” Va. Code Ann. § 18.2-17.1 (“Act”), does not prohibit D&E abortions, (2) the heightened state interest in the “human infant” recognized in the Act justifies the legislature’s approach to a life and health exception, and (3) the Act does not prevent a physician from completing a miscarriage.

### **I. The Act Does Not Ban D&E Abortions.**

The district court decided that the Act prohibits D&E abortions:

Like the Nebraska statute, the Act also places an undue burden on a woman’s ability to chose a D&E abortion and therefore unduly

burdens “the right to choose abortions itself.” Based on the Court’s findings of fact, *see supra*, FF PP 1-3, 4, 7, 46-54, and on the law as set forth in *Carhart*, the Act imposes an impermissible undue burden on the right to choose an abortion. *See Carhart*, 530 U.S. at 945-46.

*Richmond Medical Center for Women v. Hicks*, 301 F. Supp. 2d 499, 515 (2004).

The district court also found that Dr. Fitzhugh said he did not understand the language of the Act’s exception for D&Es, 301 F. Supp. 2d at 508 (Finding 50), and consequently found it void for vagueness. *Id.* at 517.

The following discussion will demonstrate that the Act does not encompass D&Es because (A) Virginia employed language already approved by the United States Supreme Court for its express exception for D&Es, (B) the Court-approved language is not vague, and (C) the court’s findings of fact don’t make the Act reach D&Es.

**A. The Act Does Not Ban D&Es Because It Contains a Supreme-Court-Approved Express Exception for D&Es.**

While the district court noted that the Act sets out express exceptions for suction curettage, suction aspiration, and dilation and evacuation (D&E) abortions, it ignored the plain implication of that finding. *Id.* (Finding 4, quoting and citing Va. Code Ann. § 18.2-71.1(B)). Virginia has complied precisely with what both the *Stenberg* majority opinion and Justice O’Connor in concurrence said must be done to assure that the Act does not prohibit D&E abortions. Therefore, the district court was wrong in deciding that the Act reaches the D&E procedure and that *Stenberg* requires such a finding – *Stenberg* requires the opposite.

The *Stenberg* majority opinion said that the language of Nebraska’s partial-birth abortion ban swept in the D&E procedure

– though it would have been a simple matter, for example, to provide an exception for the performance of D&E and other abortion procedures. *E.g., Kan. Stat. Ann. § 65-6721(b)(1) (Supp. 1999).*

530 U.S. at 939 (emphasis added). That is exactly what Virginia did in the Act, not only creating an express exception for the D&E procedure, but using the exact language that the majority cited approvingly, i.e., the very language of the Kansas statute cited.

Justice O’Connor, the controlling<sup>1</sup> swing vote in *Stenberg*, went further. She stated that a ban “that only proscribed the D&X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional . . . .” 530 U.S. at 951. And as to the whether the Nebraska ban included the D&E procedure, she said that

some other States have enacted statutes more narrowly tailored to proscribing the D&X procedure alone. Some of those statutes have done so by specifically excluding from their coverage the most common methods of abortion, such as the D&E and vacuum abortion procedures. For example, the Kansas statute states that its ban does not apply to the “(A) suction curettage abortion procedure; (B) suction aspiration abortion procedure; or (C) dilation and evacua-

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<sup>1</sup>Because Justice O’Connor joined the *Stenberg* majority opinion, *Stenberg* does not present the sort of fragmented decision the Court described in *Marks v. United States*, 430 U.S. 188, 193 (1977), in which the Court stated the rule that where there is no majority opinion the lowest-common-denominator rationale employed by the various Justices to decide an issue governs the case and becomes the precedent. But Justice O’Connor made it clear that her majority opinion vote extended only to striking down the Nebraska law because it reached D&Es and lacked a health exception and that a Kansas-style exception for the D&E procedure would remove it from coverage of a statute. Most importantly, Justice O’Connor made it clear that states are constitutionally permitted to ban the sort of intact extraction procedures commonly known as partial-birth abortion, dilation and extraction, or D&X (described and equated in *Stenberg*) that are encompassed by Virginia’s Act. *Stenberg*, 530 U.S. at 951. Consequently, all post-*Stenberg* legislation and litigation in this area is drafted for this “audience of one,” making Justice O’Connor’s opinion truly controlling.

*tion abortion procedure involving dismemberment of the fetus prior to removal from the body of the pregnant woman.” Kan. Stat. Ann. § 65-6721(b)(2) (Supp. 1998).*

530 U.S. at 950 (emphasis added). Justice O’Connor gave further examples from Utah and Montana and concluded that such language was sufficient to fix the constitutional problem with banning D&E abortions: “By restricting their prohibitions to the D&X procedure exclusively, the Kansas, Utah, and Montana statutes *avoid a principal defect* of the Nebraska law.” *Id.* (emphasis added).

Virginia relied on these statements of the *Stenberg* majority and Justice O’Connor, incorporating the language that the majority cited, and Justice O’Connor quoted, into the Act. This in itself should be enough, as the Supreme Court said, to remove the D&E procedure from the scope of the ban, especially in light of the fact that the district court in the present case expressly found that “[t]he steps taken by a physician performing a D&E are substantially the same today as they were when the Supreme Court decided *Carhart*.” 301 F. Supp. 2d 499, 503 (2004) (Finding of Fact 27).

Tellingly, the district court nowhere in its opinion acknowledges or discusses the fact that the Supreme Court approved the Kansas statutory language providing an exception for D&Es that the Virginia legislature employed. This is so despite the facts that (1) it was the lead argument employed by Defendants-Appellants before the district court, *see Memorandum of Law in Opposition to Plaintiffs’ Motion for Summary Judgment* at 1-2 (“The bold provision [providing exceptions] is the very language used in the Kansas statute that the *Stenberg* majority approved.”), and (2) the district court discussed and found vague the very

language from the Kansas statute.

**B. The Supreme Court’s Pre-Approved D&E Exception Language Is Not Vague.**

If the Supreme Court has already approved exception language for D&Es in *Stenberg*, and D&Es are substantially the same now as when they were described in *Stenberg*, it is too late to be arguing that such approved language is unconstitutionally vague. But even if such a claim were arguably not foreclosed by the High Court’s imprimatur on the language employed, the district court had a duty to show the Virginia legislature the respect due in “our federalism” by resolving any doubts in Virginia’s favor, rather than striving to find fault.

By doing what it had been told would “avoid a principal defect in the Nebraska law,” 530 U.S. at 950 (O’Connor, J., concurring), Virginia plainly revealed a legislative intent to exclude the D&E procedure from the Act. This clear intent must govern the understanding of the Act and, in the event of any allegedly ambiguous language, it must govern the duty of the courts in this case to provide a construction that does not include the D&E procedure.

The district court gave no hint that it recognized its duty to construe the Act to avoid unconstitutionality, although such a duty has long been a fixture in the law, perhaps best articulated by Justice Brandeis in his famous concurrence to *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (joined by Stone, Roberts, and Cardozo, JJ.). Justice Brandeis declared that ““when the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a

construction of the statute is fairly possible by which the question may be avoided.” *Id.* at 348 (citations omitted). This principle applies to acts of state legislatures as well, including those touching on abortion. *See, e.g., United States v. Vuitch*, 402 U.S. 62, 71-72 (1971); *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973); *Planned Parenthood Assn. of Kansas City v. Ashcroft*, 462 U.S. 476, 493 (1983); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 885 (1992). And vagueness principles have long provided that “if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise.” *United States v. Harriss*, 347 U.S. 612, 618 (1954).

But instead of seeking to resolve any alleged ambiguities in favor of the constitutionality of the Act, the district court sought to expand the Act to encompass D&E procedures. And instead of affording a measure of deference<sup>2</sup> to the Commonwealth, as it ought to have done, the district court acted as if the old days of strict scrutiny in abortion law were yet in effect so that there must be a presumption of unconstitutionality. But this is no longer the law. In *Casey*, 505 U.S. 833, the Supreme Court laid out a new regime for determining the constitutionality of abortion regulations, which eliminated strict scrutiny (and with it any

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<sup>2</sup>The United States Court of Appeals for the Sixth Circuit recently upheld an Ohio statute banning the partial-birth abortion procedure. *Women’s Medical Professional Corporation v. Taft*, 353 F.3d 436 (2003). The Sixth Circuit states well the requirement of a degree of deference required in post-strict-scrutiny abortion jurisprudence and the important interests that undergird the states’ efforts to regulate in this area. *Id.* at 443-44. While the present limited space prevents recounting in detail the excellent analysis of the *Taft* opinion, your amicus commends the opinion to this Court as an example of an appropriate post-*Casey* analysis properly applying neutral principles of jurisprudence in this area.

presumption of unconstitutionality), *id.* at 871-77, and rebalanced the interests to require to require greater recognition of the rights of the fetus throughout pregnancy. *Id.* at 876. This and other state interests involved in the present case are discussed further in Part II, *infra*. It is enough for now to note that the Supreme Court said that *Stenberg* was a “straightforward application” of *Casey*, 530 U.S. at 938, so that *Casey*’s prescribed deference to, and respect for, legislative efforts to balance interests in this area remains applicable.<sup>3</sup>

Consequently, when Dr. Fitzhugh said that he considered the Act vague because he did not understand “what ‘dismemberment’ encompasses” in the D&E exception, 301 F. Supp. 2d at 508 (Finding 50), the district court should have rejected such a claim on the bases that (a) the Supreme Court had already approved the language of the D&E exception, and (b) the language was not vague because “dismember” is not a vague term (the district court itself used the term in Finding 49, *id.*) and means the same as disarticulate. *See Stenberg*, 530 U.S. at 925-26 (describing disarticulation).<sup>4</sup>

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<sup>3</sup>While there is inadequate space in the present brief to discuss the district court’s treatment of the Commonwealth’s experts and evidence, and the Commonwealth has ably done that itself, it should be noted in a discussion of the deference and respect due to Virginia that the district court’s approach seems lacking in these qualities with respect to its treatment of the Commonwealth’s experts and evidence. Again, the Sixth Circuit’s opinion in *Taft* offers a superior approach in this regard. *See, Taft*, 353 F.3d at 436.

<sup>4</sup>For the same reasons, the district court should have rejected, rather than embraced, Dr. Fitzhugh’s complaint that he “does not know whether ‘prior to the removal from the body of the mother’ means prior to the removal of the entire fetus or only a part thereof.” The Supreme Court had no trouble understanding that a D&E abortion is done by “dismemberment of the fetus prior to removal from the body of the mother.” *Stenberg*, 530 U.S. at 939. This pre-approved language was intended to except from the Act an identifiable *procedure*, so the interpretive

When Dr. Fitzhugh complained that “he is unsure whether, if a finger disjoins from the fetus, the abortion . . . falls under the exception to the Act,” 301 F. Supp. 2d at 508 (Finding 50), the district court should at a minimum have rejected the vagueness claim as a “marginal case,” *Harriss*, 347 U.S. at 618. But the court could have resolved the matter by saying that the answer depended on what procedure was being employed. If Dr. Fitzhugh was in the process of removing the fetus from the uterus by disarticulating pieces and pulling them from the mother’s body, then the D&E exception applied, whether or not the finger was the first body part he dismembered. But if Dr. Fitzhugh first found and disjoined a digit so that he could perform a typical D&X procedure (*see Stenberg*, 530 U.S. at 927-28), but claim it was not a D&X because the fetus had been partly disjoined, he would have violated the Act because the infant would still have retained sufficient biological integrity to be a living human organism, i.e., “a human infant”; it would have been extracted past the navel (and up to the aftercoming head); and he would have performed a “deliberate act” (skull puncture and suction) “intended to kill” and killing the living “human infant.”

In sum, these provisions of the Act are not vague under the Supreme Court’s mandated principles of adjudication.<sup>5</sup>

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question to Dr. Fitzhugh is whether he is doing a D&E (excepted) or a D&X (not excepted). As noted, *Stenberg* contains descriptions of the two procedures that Dr. Fitzhugh may review if he has difficulty in distinguishing them. Dr. Fitzhugh’s purported perplexity results from asking the wrong question. This provision is not vague.

<sup>5</sup>While space prevents full development of the arguments in response to the district court’s finding that certain other terms are vague, 301 F. Supp. 2d at 516-17, the other terms complained of are of lesser import but equally resolveable.

**C. The District Court’s New Findings of Fact Don’t Make the Act Encompass D&Es.**

Having failed to acknowledge both that Virginia has excepted the D&E procedure from the Act by adopting Supreme-Court-approved language to do so and the implications of the legislature’s intent to exempt D&Es by adopting its exception, the district court next set about finding facts apparently designed to demonstrate that the definition of “partial birth infanticide” and the exception for D&Es actually prohibit D&Es. This is erroneous.

The district court said it relied on Findings of Fact 1-3 (Act definitions), 4 (the exception for D&E and other procedures), 7 (the life of the mother exception), and 46-54 (how the Act purportedly impacts Dr. Fitzhugh’s practice). 301 F. Supp. at 515. Close examination of the facts the court cites about Dr. Fitzhugh reveals that the D&E question focuses primarily on Findings of Fact 48 and 49.<sup>6</sup>

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While the district court cited several cases on vagueness, it neglected any about its duty to construe the Act in a constitutionally favorable manner. If the courts in this case adhere to the following instruction from the Supreme Court, these allegedly vague terms can be readily found constitutionally definite:

if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under *a duty to give the statute that construction.*

*United States v. Harriss*, 347 U.S. at 618 (emphasis added) (citation omitted). The district court erroneously ignored this duty, which can readily resolve the alleged difficulties.

<sup>6</sup>Finding 50 has to do with vagueness and already been dealt with. Findings 51-52 deal with so-called intact D&Es, which the Supreme Court has equated with the D&X procedure. *Stenberg*, 530 U.S. at 928 (“intact D&E and D&X are sufficiently similar for us to use the terms interchangeably”). Whether the Act

But there are some earlier findings of facts apparently designed to set up Findings 48 and 49. One purported “fact” (Finding 24) has to do with Dr. Fitzhugh’s assertion that, while (1) some of his abortion patients who have been prepared for a D&E procedure have the cervical os “further inside [the] body than [the] vagina,” (2) some others have “the cervical os in line with the vaginal introitus” and (3) some have the os “further outside the woman’s body than the vaginal introitus.” 301 F. Supp. 2d at 504. While Finding 24 declares that “this situation occurs with one-third of his patients,” the antecedent of “this situation” is unclear because the court has just described three situations and does not specify to which the one-third finding applies. So the number itself is meaningless. In any event, the finding of so many women in this condition seems doubtful even as applied to the latter two categories described in light of other evidence before the court (some of which was erroneously stricken) and in light of the fact that such a situation never was mentioned in the evidence set forth in *Stenberg*.

But even if all women prepared by Dr. Fitzhugh for D&Es were as described in the last two situations mentioned, that fact is meaningless. The Act would still not encompass D&Es done in such situations. The assertion, and the finding, of the purported fact that for some women “outside the cervix” means “outside the body”

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restricts intact D&Es, which defendants-appellants have conceded (Finding 52), consequently has nothing to do with whether the Act provides an exception for D&Es, which the exception language approved by the Supreme Court defines as “involving dismemberment of the fetus prior to removal from the body of the mother,” *supra*. As noted already, swing-vote Justice O’Connor says that the intact D&E/D&X may be banned, provided two exceptions are met, the currently relevant one being that there be an exception for the non-intact D&E procedure. So any findings about the intact D&Es are irrelevant and require no further discussion.

is simply an effort to bypass the Supreme Court's instruction about how to eliminate D&E procedures from the scope of the Act (which Virginia has obeyed). This "fact" is advanced in an effort to set up Finding of Fact 27, namely that "the disarticulation during a D&E . . . occur[s] outside of the uterus," i.e., "outside the body" for some women. 301 F. Supp. 2d at 504-05.

But this latter assertion is neither accurate nor supported by the case that supposedly proves it. Close examination is required here because the language the district court uses is imprecise. The court said that Dr. Fitzhugh in doing D&Es first employs "a suction tube . . . to remove the amniotic fluid" after which "part of the fetus, such as an arm, leg, or the umbilical cord" may "prolapse (or emerge) out of the uterus and into the vagina or outside the vagina." *Id.* at 540. With forceps, Dr. Fitzhugh will "grasp the part that has prolapsed, or, if none has prolapsed, he will insert the forceps into the uterus and grasp a part there." *Id.* Then, the court said, "[t]he traction of the fetus against the cervix caused by this pulling causes the part of the fetus in the vagina to break off from the rest of the fetus." *Id.*

Now the question is, where does the break or tear occur? In the uterus? In the vagina? Or outside the mother's body? The district court said that the same court in a prior case had already established that "it is not uncommon for the disarticulation during a D&E to occur outside of the uterus, several centimeters outside the cervical os." 503 F. Supp. 2d at 505 (citing *Richmond Medical Center for Women v. Gilmore*, 55 F. Supp. 2d 441, 472 (1999)). But the page of *Gilmore* cited says nothing about where the break or tear occurs. The question in *Gilmore*

was about whether there was likely to be more than “incidental protrusion” of some part of the fetus from the cervical os,” 55 F. Supp. 2d at 471, and the *Gilmore* district court concluded that “[p]articularly at later gestations, the physician intends to bring as much of the fetus as dilation will allow out of the uterus and through the cervix, rather than disassembling the fetus in utero and removing parts piece by piece.” *Id.* at 472. This says nothing as to where the disarticulation, i.e., the actual breaking or tearing, occurs when a part of the infant is grasped with forceps and pulled against the resistance of the internal ring of the cervical os. The answer and evidence were put before the district court in the present case by Defendants-Appellants as follows:

sometimes the fetus will come out completely intact. (Fitzhugh Dep. at 80:3-82-14.) Usually, however, the upper extremities or other parts of the fetus will disarticulate at the interior cervical os. *Id.* In either case, Dr. Fitzhugh never dismembers any part of the fetus that is outside the mother. (Fitzhugh Dep. at 101:19-102.18.).

....

Dismemberment of the fetus during a D&E takes place at the inner cervical os as result of traction. (Fitzhugh Dep. at 74:17-75:4, 81:6-82:14 . . . ; Giles Expert Report at 3 . . . .

*Memorandum of Law in Opposition to Plaintiffs’ Motion for Summary Judgment* at 18-19. This evidence is in accord with the Supreme Court’s finding in *Stenberg* that the internal cervical os does the dismembering, i.e., the part grasped tears off at the point where the internal ring of the cervical os stops the rest of the fetal body from proceeding. *Stenberg*, 530 U.S. at 925-26.

Of course, the whole purpose of the district court’s effort to establish that (1) some women’s cervical os prepared for a D&E is at or outside the plane of the

vaginal introitus and (2) “it is not uncommon for the disarticulation during a D&E to occur outside of the uterus, several centimeters outside the cervical os,” 503 F. Supp. 2d at 505, is to try to demonstrate that the Supreme-Court-approved language that stated an exception for the “dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the pregnant woman,” *supra*, really doesn’t exclude D&Es. That effort fails on the true facts and attempts to reopen a matter already settled by Supreme Court. The effort must be rejected.

So when we get to the assertion in Finding 49 that “dismemberment . . . will generally occur . . . ‘outside the woman’s body,’” 503 F. Supp. 2d at 508, on which the district court relied in striking down the Act for not excepting D&Es, we find the situation already resolved by the analysis *supra* and the court in plain error factually and legally.

As to Finding 48, the district court asserts that when the fetus is nonviable the abortionist “always intends to remove the fetus from the woman” which “will result in fetal demise.” *Id.* This is true but meaningless because if the physician is doing an abortion that fits one of the three listed exceptions there is no violation. The second assertion is that some D&Es are intact, which may be true but is meaningless, for as discussed *supra* they then fall into the same analysis as the D&X procedure.

In sum, the arguments that the Act encompasses the D&E procedure fail on all points. The Act does not ban D&Es. The district court was in plain error on this issue.

## II. The Act Properly Recognizes the Heightened Interest in Protecting the “Human Infant” from “Infanticide.”

The district court decided that “the Act is unconstitutional because it fails to contain a health exception.” *Hicks*, 301 F. Supp. 2d at 513. For authority it cites the *Stenberg* decision. *Id.* But the district court ignored the fact that the Act deals with a situation that the Supreme Court declined to decide.

In *Stenberg*, Nebraska’s Attorney General asserted that the key term “substantial portion” should be construed to mean “the child up to the head.” 530 U.S. at 940. The Supreme Court said it could not “accept the . . . narrowing interpretation” because the attorney general’s construction was not binding under Nebraska law and because the lower courts had construed the term differently. *Id.* at 940-41. So the Court considered “substantial portion” to include lesser parts of the fetus “deliver[ed] into the vagina,” such as an arm or a leg, and decided the case on that basis. *Id.* at 944.

But the language the Court said it could not read into Nebraska’s ban, and so did not consider, is just the sort of language that Virginia incorporated into the express language of its Act, i.e., “in the case of a headfirst presentation, the infant’s entire head is outside the body of the mother, or, in the case of breech presentation, any part of the infant’s trunk past the navel is outside the body of the mother.” Va. Code Ann. § 18.2-71.1(D).

So this case considers what *Stenberg* did not reach. Virginia has decided that when an “infant” is this far out of the mother’s body it is no mere “fetus,” but rather a “human *infant*,” not partially born, but rather “*born alive*, but . . . not . . .

completely extracted or expelled from its mother.” Va. Code Ann. § 18.2-71.1(B) (emphasis added).

Consequently, this Act must be viewed in light of the heightened interest presented by the unique language it employs, which differs sharply from that used in the Nebraska partial-birth abortion ban in *Stenberg*. Thus, Virginia’s interest is higher than the interest asserted in Nebraska’s Act. Virginia encapsulates its asserted interest in the language of the activity it bans: “partial birth *infanticide*” of a “human *infant* who has been *born alive*.” Va. Code Ann. § 18.2-10 (emphasis added).

Virginia’s approach is reasonable, given the fact that the human infant is only inches from complete separation from its mother. If the plane of the vaginal introitus is the goal line at which there is no question that full recognition of personhood is achieved, Virginia has made the judgment that when a fetus breaks the goal line to the extent defined in the Act it is entitled to the heightened protection afforded by the Act. It is entitled to more protection than if a mere arm or leg were in the birth canal, the situation to which the Supreme Court confined itself in *Stenberg*.

The Act’s approach to a need for life or health exception is easily correct in a vertex, or head-first birth. Where the head is born first, there is nothing between the human infant and complete separation from its mother other than a gentle tug. Indeed, at the right angle, gravity alone could finish the separation. Neither further dilation nor cervical relaxation by any means is required to extract the body once the largest part, the head, has been extracted. Once the head is extracted, there is

no evidence that there is any situation where the mother's life or health would require killing the human infant rather than simply completing its extraction. We know that the head is the locus of the intellect, an indispensable part of the body, and that as the head is extracted, and then progressive parts of the trunk, increasingly more dispensable parts remain in the mother. At the end, there are nothing but feet and toes in the birth canal, and many humans live quite well without those. By logical extension, failing to recognize Virginia's powerful interest at this point in favor of recognizing some ephemeral claim of the need for a life or health exception would be to legally permit a situation where a human infant's foot is held in the birth canal while the child is examined to see if she is suitable before deciding whether she will be allowed to live. Virginia's approach to a life and health exception is clearly constitutional in all situations where the head is delivered first.

In a situation where the feet are delivered first, there is no reason to consider a life or health exception until it is determined that there is an extraction problem so that the human infant ends up in the situation described in the Act, i.e., "born alive, but . . . not . . . completely extracted or expelled from its mother." Va. Code Ann. § 18.2-71.1(B). The evidence found by the district court is that sometimes the human infant slides right out intact. 301 F. Supp. 2d at 505 (Finding 29). "This can occur when the cervix dilates to a greater extent than [Dr. Fitzhugh] had anticipated." *Id.* The Act is clearly constitutional in this application because there is no evidence of a life or health need to kill a child partially extracted when she just slides out intact. And, of course, if Dr. Fitzhugh can arrange adequate dilation to

permit intact live birth, why should he not be required to do that in all situations?

Where Dr. Fitzhugh has allowed himself to get in the situation where there is inadequate dilation to allow immediate passage of the aftercoming head, and he is delivering an intact fetus, the judgment of the Commonwealth is that this child is sufficiently over the goal-line of personhood that it qualifies as a “human infant” who is “born alive” and the state has sufficient interests in protecting it from “infanticide” to justify its life exception (which captures serious health situations anyway) and absence of a health exception. This is a wholly reasonable legislative judgment where there is a “human infant” involved, and it is a situation that has clearly not been reached and decided by the United States Supreme Court.

And Virginia’s interest in preventing infanticide is buttressed by other important state interests. As the Sixth Circuit recently noted in upholding an Ohio partial-birth abortion ban, there are powerful state interests at stake:

It bears emphasis, as an initial matter, that while we must protect the abortion right against unwarranted intrusion, we are not empowered to ignore or undervalue the governmental interests this statute embodies. An essential feature of the jointly authored opinion in *Casey* is the reaffirmation of the “substantial state interest in potential life throughout pregnancy.”

....

Along similar lines, although *Carhart* invalidates Nebraska’s partial-birth abortion ban, it does so only after acknowledging the legitimate relationship between the interest in protecting fetal life and the more subtle interests motivating the Nebraska legislature’s decision to ban partial birth abortions: that is, showing concern for fetal life; preventing cruelty to partially born infants; and preserving the medical profession. Likewise, in this case Ohio grounds its ban on three interests: preventing the unnecessary death of fetuses when they are substantially outside the mother’s body; maintaining a strong public policy against infanticide; and preventing unnecessary cruelty. These interests bear a striking resemblance to those implicitly accepted in *Carhart* and also reflect the long-recognized interests in

protecting what *Roe* called “potential life” and showing “concern for the life of the unborn,” *Casey*, 505 U.S. at 869.

*Taft*, 353 F.3d at 443-44 (citations omitted).<sup>7</sup>

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<sup>7</sup>The states have powerful interests even in human children that have not yet reached the stage that the Act considers. These interests are represented by a wide range of statutes. *See, e.g.*, James Bopp & Richard Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181, 246-83 (1989) (cataloging fetal rights in non-abortion contexts). For example, the following states recognize a cause of action for wrongful death of a fetus after viability: *Eich v. Gulf Shores*, 300 So.2d 354 (Ala. 1974); *Summerfield v. Superior Court*, 698 P.2d 712 (Ariz. 1985); *Aka v. Jefferson Hospital Ass’n, Inc.*, 42 S.W.3d 508 (Ark. 2001); *see also* Ark. Code Ann. § 16-62-102(a) (Bender 2003); *Espadero v. Feld*, 649 F. Supp. 1480 (D. Colo. 1986); *Rottman v. Krabloonik, Inc.*, 834 F. Supp. 1269 (D. Colo. 1993); *Gorke v. Leclerc*, 181 A.2d 448 (Conn. Super. Ct. 1962); *Luff v. Hawkins*, 551 A.2d 437, 438 n.1 (Del. Super. Ct. 1988); *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557 (Del. Super. Ct. 1956); *Porter v. Lassiter*, 87 S.E.2d 100 (Ga. Ct. App. 1955); *Wade v. United States*, 745 F. Supp. 1573 (D. Haw. 1990); *Volk v. Baldazo*, 651 P.2d 11, 13 (Idaho 1982); *Chrisafogeorgis v. Brandenburg*, 304 N.E.2d 88 (Ill. 1973); *Hale v. Manion*, 368 P.2d 1 (Kan. 1962); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Danos v. St. Pierre*, 402 So.2d 633 (La. 1981); *State ex rel. Odham v. Sherman*, 198 A.2d 71 (Md. 1964); *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1975); *O’Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971); *Jarvis v. Providence Hospital*, 444 N.W.2d 236, 238 (Mich. Ct. App. 1989); *Pehrson v. Kistner*, 222 N.W.2d 334, 336 (Minn. 1974); *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949); *Terrell v. Rankin*, 511 So.2d 126, 127 (Miss. 1987); *Rainey v. Horn*, 72 So.2d 434, 439-40 (Miss. 1954); *O’Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983); *Strzelczyk v. Jett*, 870 P.2d 730 (Mont. 1994); Neb. Rev. Stat. § 30-809 (Bender 2003); *White v. Yup*, 458 P.2d 617, 620-21 (Nev. 1969); *Polinquin v. MacDonald*, 135 A.2d 249 (N.H. 1957); *Salazar v. St. Vincent Hosp.*, 619 P.2d 826 (N.M. Ct. App. 1980); *DiDonato v. Wortman*, 358 S.E.2d 489 (N.C. 1987); *Hopkins v. McBane* 359 N.W.2d 862, 864 (N.D. 1985); *Werling v. Sandy*, 476 N.E.2d 1053 (Ohio 1985); *Evans v. Olson*, 550 P.2d 924, 927 (Okla. 1976); *Libbee v. Permanente Clinic*, 518 P.2d 636 (Or. 1974); *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985); *Presley v. Newport Hospital*, 365 A.2d 748 (R.I. 1976); *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964); *Farley v. Mount Mary Hospital Ass’n, Inc.*, 387 N.W.2d 42 (S.D. 1986); Tenn. Code Ann. § 20-5-106(c) (2003); Tex. Civ. Prac. & Rem. Code §§ 71.001, 77.003, 71.0055 (2004); *Vaillancourt v. Medical Center Hospital of Vermont, Inc.*, 425 A.2d 92, 94-95 (Vt. 1980); *Moen v. Hanson*, 537 P.2d 266 (Wash. 1975); *Farley v. Sartin*, 466 S.E.2d 522, 532 (W.Va. 1995); *Kwaterski v. State Farm Mut. Auto Ins. Co.*, 148 N.W.2d 107, 109 (Wis. 1967); *Greater Southeast Community Hospital v. Williams*, 482 A.2d 394, 396 & n.2 (D.C. Ct. App. 1984).

The following states also recognize a cause of action for wrongful birth of

### **III. The Act Does Not Proscribe Removing a Miscarriage and Is Not Vague.**

The District Court held the Act unconstitutional in part because the court said it prevented Dr. Fitzhugh from completing a miscarriage “for a woman who presents in his office mid-miscarriage.” *Hicks*, 301 F. Supp. 2d at 516. This referred to Finding 15, which posited a first and early-second trimester fetus in the vagina where the umbilical cord is “very short” and “the safest . . . way to complete such a miscarriage is to separate the umbilical cord in order to remove the fetus.” *Id.* at 503. The district court provided little analysis, but the concern would be that the exception for “completing delivery of a living human infant and severing the

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a fetus, but do so for a fetus at any stage of development: *Illinois*: 740 Ill. Comp. Stat. Ann. 180/2.2 (Bender 2004) (any time during pregnancy); *Smith v. Mercy Hosp. and Medical Center*, 560 N.E.2d 1164, 1173 (Ill. App. Ct. 1990) (noting that wrongful death action could be maintained on behalf of a non-viable, stillborn fetus); *Louisiana*: *Johnson v. Southern New Orleans Light & Traction Co.*, Docket 9048 (La. App. Or. Cir. Dec. 10, 1923) (rejecting viability standard for wrongful death of unborn child), *cited with approval* in *Danos v. St. Pierre*, 402 So.2d 633, 639 (La. 1981) (the holding in *Danos* was later codified as La. Civ. Code Ann. art. 26 (West 1999)); *Michigan*: Mich. Comp. Laws Ann. § 600.2922a (2004); *Missouri*: *Connor v. Monkem Co.*, 898 S.W.2d 89 (Mo. 1995), Mo. Ann. Stat. § 1.205 (2004); *Nebraska*: Neb. Rev. Stat. § 30-809 (Bender 2003); *South Dakota*: S.D. Codified Laws § 21-5-1 (2003), construed in *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D. 1996) (interpreting amendment to wrongful death statute to apply throughout pregnancy); *Texas*: Tex. Civ. Prac. & Rem. Code §§ 71.001, 77.003, 71.0055 (2004); *West Virginia*: *Farley v. Sartin*, 466 S.E.2d 522 (W.Va. 1995) (interpreting wrongful death statute to apply throughout pregnancy). *See also Porter v. Lassiter*, 87 S.E.2d 100 (Ga. App. 1955) (recognizing wrongful death actions for unborn children after “quickening”); *66 Federal Credit Union v. Tucker*, 853 So.2d 104 (Miss. 2003) (same).

Another example is the recently-enacted, federal “Unborn Victims of Violence Act of 2004,” also known as “Laci and Conner’s Law,” which recognizes that where a person assaults a woman and kills or injures her “unborn child” there is “a separate offense” for the harm done to the child. 108 P.L. 212, 118 Stat. 568 (April 1, 2004).

umbilical cord of an infant who has been completely delivered,” Va. Code Ann. § 18.2-71.1(B), would not apply and so cutting the cord, if the fetus was alive, might arguably be considered a “deliberate act that is intended to kill a human infant who has been born alive . . . .” *Id.*

An immediate problem with the court’s short-hand analysis is that Finding 15 says nothing about whether such a fetus is positioned with its “entire head . . . outside the body of the mother” or “its trunk past the navel . . . outside the body of the mother.” Va. Code Ann. § 18.2-71.1(D). Absent such a situation, the Act is inapplicable. In fact, the specific finding of fact is that the miscarried early-term fetus in “*in the woman’s vagina,*” with nothing protruding. *Id.* at 503. So there is no factual support for the holding. Dr. Fitzhugh has no standing to even challenge a situation to which the Act is inapplicable.

But even if there were a factual predicate for the court’s holding, the holding would be erroneous. As discussed *supra*, courts have a duty to show respect for state legislatures by construing statutes to avoid findings of unconstitutionality, or at a minimum to limit the scope of any declaration or injunction. Clearly prohibiting removal of a miscarried fetus would be unconstitutional, which no one would dispute. But it is equally obvious that the Commonwealth had no intention of banning this gynecological medical procedure in this Act. If the legislature took pains to exclude three types of abortion, it cannot reasonably be thought to have intended to ban completing a miscarriage. An obvious construction of the Act is that it simply does not apply to completing a miscarriage of such fetuses. If desired, the “intended to kill” language could be construed as not extending to such

a situation. Va. Code Ann. § 18.2-71.1(B). Alternatively, any declaration of unconstitutionality and injunction could be limited to the Act as applied to such miscarriage. Such a peripheral situation is no justification to strike the Act facially.

### **Conclusion**

For the reasons stated herein and by Appellants, the district court's grant of summary judgment should be reversed and the Act sustained against constitutional challenge.

Respectfully submitted,

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Date

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## Certificate of Service

On May 24, 2004, I filed eight copies of the foregoing brief with the clerk of this Court and served two copies by U.S. Mail on each of the following groups of counsel:

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