No. 03-1821(L)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHMOND MEDICAL CENTER FOR WOMEN, et al.,

Plaintiffs-Appellees,

v.

MICHAEL N. HERRING, in his official capacity as Commonwealth Attorney for the City of Richmond, et al.,

Defendants-Appellants.

On Remand From The United States Supreme Court

AMICUS CURIAE BRIEF OF VIRGINIA DELEGATES ROBERT G. MARSHALL, KATHY J. BYRON, M. KIRKLAND COX, THOMAS D. GEAR, WILLIAM J. HOWELL, TIMOTHY D. HUGO, L. SCOTT LINGAMFELTER, SAMUEL A. NIXON, JR., BRENDA L. POGGE, AND R. LEE WARE, JR., AND VIRGINIA SENATOR JILL HOLTZMAN VOGEL, AND U.S. SENATOR TOM A. COBURN, M.D., IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE EASTERN DISTRICT OF VIRGINIA

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form need be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil or bankruptcy case, corporate defendants in a criminal case, and corporate amici curiae. Counsel has a continuing duty to update this information.

No. 03-1821L Caption: Richmond Medical Center v. Herring

Pursuant to FRAP 26.1 and Local Rule 26.1,

Delegate Robert G. Marshall who is amicus,
(name of party/amicus) (appellant/appellee/amicus)

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐ YES ☑ NO

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If yes, identify any trustee and the members of any creditors' committee:

/s/ Patrick M. McSweeney
(signature)

September 15, 2008
(date)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Delegate M. Kirkland Cox who is amicus,
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Delegate Thomas D. Gear (name of party/amicus) who is amicus (appellant/appellee/amicus),

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Delegate L.Scott Lingamfelter who is amicus,
(name of party/amicus) (appellant/appellee/amicus)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Delegate Samuel A. Nixon Jr. who is amicus,
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Delegate Brenda L. Pogge (name of party/amicus) who is amicus (appellant/appellee/amicus),

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Delegate R. Lee Ware, Jr. who is amicus,
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Senator Jill Holtzman Vogel (name of party/amicus) who is amicus (appellant/appellee/amicus),

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U.S. Senator Tom Coburn who is amicus,
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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae Delegates Robert G. Marshall (H.D.-13), Kathy J. Byron (H.D.-96), M. Kirkland Cox (H.D.-66), Thomas D. Gear (H.D.-91), William J. Howell (H.D.-28, Speaker of the House), Timothy D. Hugo (H.D.-40), L. Scott Lingamfelter (H.D.-31), Samuel A. Nixon, Jr. (H.D.-27), Brenda L. Pogge (H.D.-96), and R. Lee Ware, Jr. (H.D.-65), and Senator Jill Holtzman Vogel (D.-27) are members of the Virginia General Assembly. As legislators, *Amici* have significant state interests in protecting women and unborn children from the harms of abortion, protecting all innocent and vulnerable human life from inhumane treatment, and protecting the integrity and ethics of the medical profession. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1632-33 (2007). *Amici* also maintain an interest in seeing that constitutional laws promulgated by the State legislature are upheld and enforced. Furthermore, Delegate Marshall was the Chief Patron of VA. CODE ANN. § 18.2-71.1 and possesses a special interest in this matter.

Amicus Curiae Tom A. Coburn, M.D., is a United States Senator from Oklahoma who maintains that partial birth abortion ("D&X") prohibitions constitute a valid extension of State compelling interests. Oklahoma maintains a D&X prohibition which, to date, is in effect and has not been challenged in court.

[1] According to Fed. R. App. P. 29, Counsel for *Amici* has contacted the parties and has obtained consent to file this brief.

However, if the district court's errant decision is allowed to stand, the prohibition in Oklahoma as well as those in several other states[2] could be drastically and negatively impacted.

For the reasons expressed herein, *Amici* urge that the decision of the district court be reversed.

ARGUMENT

The Virginia Partial Birth Infanticide Act ("Act") was predicated upon significant—and Supreme Court-affirmed—state interests. As explained in *Gonzales v. Carhart*, Virginia's description of D&X demonstrates the State's rationale for its enactment. *Gonzales*, 127 S. Ct. at 1632-33. Specifically, Virginia's D&X ban demonstrates the State's substantial interests in protecting the woman and child, protecting not only unborn children but all vulnerable life from inhumane treatment, and protecting the integrity and ethics of the medical profession. *Id*. Yet in the district court's decision, the State's significant interests were ignored. Instead, a standard amounting to strict scrutiny was used to invalidate a reasonable, commonsense law aimed at protecting the State's well-established interests.

[2] These states include Indiana, Mississippi, Montana, North Dakota, Oklahoma, South Carolina, and Tennessee.

The decision of the district court must be reversed. Supreme Court precedent affirms that the Court favors the traditional standard for evaluating facial challenges; namely, that a law is unconstitutional only if invalid in all of its applications ["traditional facial standard"]. By failing to utilize the proper traditional facial standard, the district court ignored significant state interests and imposed a strict scrutiny standard explicitly rejected in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *See Casey*, 505 U.S. 833, 870-71, 875 (1992). Under the traditional facial standard, however, the Act must be upheld.

I. THE PROPER STANDARD UNDER *GONZALES*, *AYOTTE*, AND PRIOR SUPREME COURT PRECEDENT IS THE TRADITIONAL FACIAL STANDARD

Under the standard traditionally used by federal courts in evaluating facial challenges, a law is facially unconstitutional only when it is invalid in all of its applications. One specific exception has been carved out in the First Amendment overbreadth context, where facial challenges are given wider latitude.[3] That exception is not applicable in the abortion context or any other context. *Gonzales*, 127 S. Ct. at 1639.

In *Gonzales*, the Supreme Court explicitly differentiated abortion jurisprudence from jurisprudence in the First Amendment overbreadth context. *Id*. While the Court did not specifically resolve what standard of evaluating facial

[3] *See Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 634 (1980).

standards is applicable in the abortion context, it did state that the latitude given to First Amendment challenges is ***inapplicable in the abortion context***. *Id*. This is significant because this differentiation removes abortion jurisprudence from the ambit of overbreadth challenges and properly applies the traditional facial standard of evaluating non-First Amendment-related facial attacks.

The Supreme Court has a long history of applying the traditional facial standard. In *United States v. Salerno,* the Court articulated the following standard of review for facial challenges:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that ***no set of circumstances*** exists under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Salerno, 481 U.S. 739, 745 (1987) (emphasis added).[4]

Prior to *Salerno*, the phrase commonly used by the Supreme Court in explaining this standard was "invalid in all its applications." For example, in *Brockett v. Spokane Arcades, Inc.*, the Court stated, "we are unconvinced that the identified overbreadth is incurable and would taint ***all possible applications*** of the statute…." 472 U.S. 491, 504 (1985) (emphasis added). The Court concluded that

[4] A unanimous Supreme Court relied on *Salerno* in *Anderson v. Edwards*. 514 U.S. 143, 155 n.6 (1995).

there was "no satisfactory ground for striking the statute down in its entirety because of ***invalidity in all of its applications***." *Id*. at 505 (emphasis added).

In *Secretary of State of Maryland v. Joseph H. Munson Co., Inc*., the Court pervasively used the "in all its applications" language. 467 U.S. 947 (1984). The Court concluded that the flaw in the statute was not that it included some impermissible applications, but that "***in all its applications***" it operated on a fundamentally mistaken premise. *Id*. at 966 (emphasis added). The Court also noted that the doctrine of "overbreadth" has been used to describe "a challenge to a statute that ***in all its applications*** directly restrict[s] protected First Amendment activity." *Id*. at 966 n.13 (emphasis added).

That same year, the Court stated in *Members of City Council v. Taxpayers for Vincent* that there are two ways in which a statute may be considered facially invalid: "either because it is unconstitutional ***in every conceivable application***, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" 466 U.S. 789, 796 (1984) (emphasis added). The Court added that "a holding of facial invalidity expresses the conclusion that the statute could ***never be applied in a valid manner***." *Id*. at 797-98 (emphasis added). The Court also stated that its decisions have repeatedly employed facial invalidation where "***every application*** of the statute created an impermissible risk of suppression of ideas." *Id*. at 798 n.15 (emphasis added).

Likewise, in *Hoffman Estates v. The Flipside, Hoffman Estates, Inc*., the Court noted that a facial challenge in the context of overbreadth and vagueness meant that a statute was "***incapable of any valid application***." 455 U.S. 489, 494 n.5 (1982). Thus, to succeed, the complainant must demonstrate that a statute is impermissibly vague ***in all of its applications***. *Id*. at 497.[5]

The Supreme Court has also applied the traditional facial standard in upholding abortion regulations. *See Casey*, 505 U.S. at 885-87 (upholding Pennsylvania's 24-hour waiting period, despite its effect on "some women"); *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (applying *Salerno*); *Ohio v. Akron Ctr. for Reprod. Health* (*Akron II*), 497 U.S. 502, 514 (1990) ("[B]ecause appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.'") (quoting *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring)). This Court should do so in this case as well.

Since *Casey*, however, some courts have ignored the traditional facial standard in abortion related cases, choosing instead to invalidate entire laws if, in a large fraction of relevant cases, the law constitutes an undue burden on a woman's "right" to terminate her pregnancy. This is improper for at least two reasons.

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[5] *See also Younger v. Harris*, 401 U.S. 37, 52-53 (1971) (regarding facial challenges on First Amendment grounds, where Justice Black acknowledged extreme hesitation in entertaining facial challenges on *any* grounds).

First, it applies a facial challenge standard intended only for First Amendment overbreadth purposes. Second, it in effect imposes an improper strict scrutiny standard in abortion regulation cases.

This use of the "large fraction" standard by federal courts is also ironic because, even in *Casey* itself, the Court applied both the traditional facial standard as well as the "large fraction" standard. In upholding the parental consent and informed consent provisions at issue in *Casey*, the Court utilized a standard akin to the traditional facial standard and upheld a 24-hour reflection period despite its affect on "some women." *See Casey*, 505 U.S. at 885-87, 899. It was only in evaluating the statute's spousal involvement provision that the Court utilized the "large fraction" standard. *See id*. at 895.

Thus, *Casey* did not determine that the traditional facial standard does not apply in the abortion context. The *Casey* decision did not overrule or even address the viability of the traditional facial standard. Further, the *Casey* decision consisted of only a plurality—and certainly not the majority required to reconstrue a decades-old facial standard.

Further, *Gonzales* demonstrates that the category of "relevant cases" to be examined in the "large fraction" standard is broader than that which courts have been evaluating in recent years. In *Gonzales*, the "relevant cases" to be evaluated were not only those women who suffered from medical complications and might,

at some hypothetical time, require a D&X procedure. *Gonzales*, 127 S. Ct. at 1639. Instead, the "relevant cases" referred to *all instances* in which the doctor proposed to do the prohibited procedure.

Likewise, in the case at hand, the "relevant cases" refers not only to those "small fraction" of situations where a D&X is "accidentally" performed; instead, "relevant cases" refers to all cases of partial birth infanticide performed in the State of Virginia—both purposeful and accidental. Because the "accidental" D&X is—by the Plaintiffs' own admission—only a "small fraction" of these relevant cases, the Virginia statute cannot be invalidated through a facial challenge attack even under Casey's "large fraction" standard.

This conclusion is further bolstered by the Supreme Court's unanimous holding in *Ayotte v. Planned Parenthood,* as well as courts relying on *Gonzales* and *Ayotte*. The basic thrust of *Ayotte* was that if a statute was invalid in only a few applications, a court should craft a remedy to meet only those few applications. *See generally Ayotte*, 546 U.S. 320 (2006). Specifically, because "only a few applications" of New Hampshire's parental notice statute presented an alleged constitutional problem, the Court concluded that the lower courts should issue a declaratory judgment and enjoin only the statute's unconstitutional application. *Id*. at 331.

Likewise, in *Planned Parenthood of Kansas & Mid-Missouri v. Drummond*, the Western District of Missouri concluded that a facial attack on a new regulation requiring licensure of abortion clinics as ambulatory surgical centers would not likely succeed as applied to surgical abortions, because it was likely that *at least some* of the new standards, in *some* form, could improve the health and safety of *at least some* of the abortion clinics' patients. 2007 U.S. Dist. LEXIS 70808, *22 (W.D. Mo. Sept. 24, 2007).[6] *See also, e.g., Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008) (citing *Ayotte* for the proposition that even if a photo-identification requirement imposed an unjustified burden on some voters, the petitioners failed to demonstrate that the proper remedy would have been to invalidate the entire statute); *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 33 (1st Cir. 2008) (observing under *Gonzales* that it is the plaintiff's burden to show that a law has no constitutional application).

Thus, under *Gonzales*, *Ayotte*, and previous Supreme Court precedent, the proper standard to utilize in a facial challenge is whether or not the law is invalid

[6] In referencing the "large fraction" standard, the Western District of Missouri, like the Court in *Gonzales*, indicated that the "large fraction" included all relevant abortion clinics—not just those that might be impacted by a small number of new clinic regulations. *Drummond*, 2007 U.S. Dist. LEXIS 70808, at ** 15, 17. *See also Sundstrom v. Frank*, 2007 U.S. Dist. LEXIS 76597, *61 (E.D. Wis. Oct. 15, 2007) (indicating that the relevant population to be evaluated included all affected by a statute, and not just those affected in a particular way).

in all of its applications, and the district court improperly failed to utilize it.[7] This conclusion is reinforced by the fact that the traditional facial standard is necessary to protect the states' established significant interests as well as to avoid a strict scrutiny standard—a standard explicitly disapproved of in the abortion context.

II. THE TRADITIONAL FACIAL STANDARD IS NECESSARY TO PROTECT STATE INTERESTS AND AVOID STRICT SCRUTINY

The Supreme Court has repeatedly held that states have important, even compelling, interests in the protection of women and unborn children from the harms of abortion. As early as *Roe v. Wade*, the Court enunciated that "a State

[7] This conclusion is supported by at least six corollary rules of constitutional law: 1) No federal court has "jurisdiction to pronounce any statute…void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *United States v. Raines*, 362 U.S. 17, 21 (1960) (quoting *Liverpool, N.Y. & Philadelphia S.S. Co. v. Comm'r of Emigration*, 113 U.S. 33, 39 (1885)). 2) Federal courts should never "anticipate a question of constitutional law in advance of the necessity of deciding it." *Brockett*, 472 U.S. at 501 (quoting *Raines*, 362 U.S. at 21). 3) A federal court should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id*. 4) It is an "elementary principle" that a statute may be constitutional in part and unconstitutional in part and, if the constitutional part is independent of the unconstitutional part, the constitutional part may stand, while only the unconstitutional part is rejected. *Id.* at 502. 5) The "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Raines*, 362 U.S. at 21. 6) It is undesirable to consider every conceivable situation which might arise in applying complex and comprehensive legislation. *Id*. *See also Munson*, 467 U.S. at 955 (quoting *Raines*, 362 U.S. at 22) (stating that the rule frees courts from unnecessary pronouncements on constitutional issues as well as from premature interpretations of statutes).

may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." 410 U.S. 113, 153-54 (1973). In *Casey*, the Court affirmed the principle that states have "legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus." *Casey*, 505 U.S. at 846. In *Gonzales*, the Court stated that D&X bans further the government's objectives. *See, e.g.*, *Gonzales*, 127 U.S. at 1633.

In fact, the Court explained in *Gonzales* that D&X bans perform an important function in preserving the health and wellbeing of women undergoing abortion procedures. Noting that severe depression and loss of self esteem can follow abortion, the Court suggested that D&X prohibitions perform an important informed consent role. *Id*. at 1634. "The State has an interest in ensuring so grave a choice is well-informed." *Id*. Thus, the Court attributed to D&X prohibitions a significant state interest in protecting women by ensuring a well-informed decision.

Yet by allowing plaintiffs to challenge reasonable, commonsense abortion regulations using hypothetical fringe cases and then enjoining entire statutes based upon those hypothetical fringe cases and without regard for the states' well-established interests, the courts employ a strict scrutiny standard that is 1) contrary to the Court's holding in *Casey* and *Gonzales*, and 2) devastating to the states' Court-affirmed substantial interests in protecting women and unborn children. As

Casey demonstrated, courts were not properly evaluating the State's significant interests following *Roe*. *See Casey*, 505 U.S. at 870-71, 875. Utilization of the traditional facial standard is necessary to ensure that states' interests are properly weighed and that any remedies are crafted within proper bounds.

The Plaintiffs have failed to demonstrate or even allege that the Act is invalid in all its applications. The Plaintiffs allege only that it is invalid in a "small fraction" of cases where a D&X procedure may "accidentally" occur. A "small fraction" in no way amounts to invalidity in all circumstances.[8]

CONCLUSION

The judgment of the Eastern District of Virginia should be reversed.

Respectfully submitted,

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[8] The Supreme Court left open the opportunity for the plaintiffs in *Gonzales* to file as-applied challenges to the federal partial birth abortion ban. *See Gonzales*, 127 S. Ct. at 1639. To date, however, not a single challenge has been filed. This strongly indicates that the abortion industry cannot muster the evidence for even a single as-applied challenge.

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I hereby certify that on September 15, 2008, I caused the foregoing to be mailed by first-class mail and electronically filed with the Clerk of Court using the CM/ECF System, which will sent notice of such filing to the following registered CM/ECF users:

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