Nos. 03-1821, 04-1255

In the
United States Court of Appeals
For the Fourth Circuit

RICHMOND MEDICAL CENTER FOR WOMEN, and
WILLIAM G. FITZHUGH, M.D.,

Plaintiffs-Appellees,

v.

MICHAEL N. HERRING, in his official capacity as Commonwealth's Attorney for the City of Richmond, and WADE A. KIZER, in his official capacity as Commonwealth's Attorney for the County of Henrico,

Defendants-Appellants.

On Remand from the Supreme Court of the United States

PETITION FOR REHEARING AND REHEARING EN BANC

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June 2, 2008

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PETITION FOR REHEARING AND REHEARING EN BANC

Virginia Attorney General Robert F. McDonnell, on behalf of Michael N. Herring, in his official capacity as Commonwealth's Attorney for the City of Richmond, and Wade A. Kizer, in his official capacity as Commonwealth's Attorney for Henrico County (collectively "Virginia"), and pursuant Fed. R. App. P. 35 and 40 as well as 4th Cir. R. 35 and 40, petitions the Court for rehearing, and rehearing en banc of the decision entered by a panel of this Court on May 20, 2008.

INTRODUCTION

The panel concluded that Virginia's statute prohibiting partial birth infanticide, *Virginia Code* § 18.2-71.1 ("the Virginia Act"), is facially unconstitutional. In doing so, the panel: (1) entertained a facial challenge alleging overbreadth in the abortion context; (2) refused to construe the Virginia Act to avoid constitutional problems; and (3) enjoined applications of the Virginia Act that are constitutional. All three holdings are contrary to the decisions of the Supreme Court and this Court.

In counsel's judgment, the panel's decision: (1) involves questions of exceptional importance; and (2) conflicts with decisions of the

Supreme Court and of this Court. Either of these reasons, by itself, is sufficient to warrant rehearing.

First, the panel decision involves the following questions of exceptional importance:

1. In the abortion context, may federal courts entertain a facial challenge alleging overbreadth?

2. Assuming that federal courts may entertain facial challenges alleging overbreadth in the abortion context, does the Virginia Act apply to accidental intact D&Es?

3. Assuming that federal courts may entertain facial challenges alleging overbreadth in the abortion context and that the Virginia Act is unconstitutional in some applications, should this Court invalidate the Virginia Act in all applications?

Second, the decision conflicts with decisions of the Supreme Court and this Court in several respects. Specifically, the panel decision to entertain a facial challenge alleging overbreadth conflicts with the Supreme Court's decisions in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) and *Ayotte v. Planned Parenthood,* 546 U.S. 320 (2006) as well as this Court's decisions in *Greenville Women's Clinic v. Commissioner*, 317 F.3d 357, 362 (4th Cir. 2002) (*Greenville Women's Clinic II*); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 165 (4th Cir. 2000) (*Greenville Women's Clinic I*); and *Manning v. Hunt*, 119 F.3d 254, 268-69 (4th Cir. 1997). Moreover, the panel's construction of the Virginia Act

is inconsistent with *Gonzales'* mandate that abortion statutes are construed to avoid constitutional problems. *Gonzales*, 127 S. Ct. at 1631. Finally, the panel's remedy—invalidating all applications of the Virginia Act—directly contradicts *Ayotte's* limitations on the remedial powers of federal courts. *Ayotte*, 546 U.S. at 330-31.

ARGUMENT

I. REHEARING SHOULD BE GRANTED TO DETERMINE WHETHER, IN THE ABORTION CONTEXT, FEDERAL COURTS SHOULD ENTERTAIN FACIAL CHALLENGES ALLEGING OVERBREADTH.

Unlike an as-applied challenge where the litigant simply asks that a law be declared unconstitutional in the circumstances presently before the court, *Ulster County Court v. Allen,* 442 U.S. 140, 154-55 (1979), a facial challenge asks that the law be declared "invalid *in toto*" and, thus, "incapable of any valid application." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 494 n.5 (1982). As the United States Supreme Court recently explained:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the

> necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"

Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1191 (2008) (citations omitted).[1] Indeed, facial challenges "are fundamentally at odds with the function of the … courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision." *Younger v. Harris,* 401 U.S. 37, 52 (1971). "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." *Gonzales*, 127 S. Ct. at 1639.

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[1] Moreover, the Supreme Court has been hesitant to invalidate a statute on its face until "state courts [have] the opportunity to construe [the statute] to avoid constitutional infirmities." *New York v. Ferber*, 458 U.S. 747, 768 (1982). As the Virginia Act has never been enforced against any person much less construed by Virginia's courts, facial invalidation is particularly inappropriate.

Nevertheless, federal courts may entertain facial challenges in two contexts. First, a litigant may claim "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987).[2] Second, in some First Amendment contexts, litigants may bring facial challenges alleging overbreadth.[3] *Virginia v. Hicks,* 539 U.S. 113, 118-19 (2003).

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[2] Dr. Fitzhugh does not—and cannot—dispute that the Virginia Act satisfies the *Salerno* standard. In other words, there are circumstances where the Virginia Act may be constitutionally applied.

[3] To be sure, the Supreme Court has suggested in dicta that it would allow facial challenges alleging overbreadth in contexts other than the First Amendment free speech context. *Sabri v. United States*, 541 U.S. 600, 609-10 (2004) ("[W]e have recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence."). Yet, a careful examination of the cases listed in *Sabri* indicates that they did not involve "overbreadth" in the traditional sense, but instead involved statutes that were invalid in all of their applications under the relevant standards for evaluating the *merits* of the underlying constitutional claims. For example, in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), the Supreme Court held that a statute that prohibited members of communist organizations from obtaining passports was not narrowly tailored and therefore infringed on right to travel. *Id.* at 505-14. Similarly, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that a statute that "appear[ed] . . . to attempt a substantive change in constitutional protections" did not satisfy the congruence and proportionality test for enforcement legislation under Section 5 of the Fourteenth Amendment. *Id.* at 529-36. None of the Supreme Court's cases has actually applied the strong medicine of the overbreadth doctrine outside the First Amendment free speech context.

In a facial challenge alleging overbreadth, the law is invalidated in *all* applications because it is unconstitutional in *many*, but not all applications.

Although the Supreme Court limits facial challenges alleging overbreadth to the First Amendment context, the panel held that, in the abortion context, federal courts might entertain facial challenges alleging overbreadth. *See Slip. Op.* at 27-29. This was error for two reasons.

First, the Supreme Court has cast serious doubt on the viability of facial challenges alleging overbreadth in the abortion context. The Court observed:

> these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. The Government has acknowledged that pre-enforcement, as-applied challenges to the Act can be maintained. *This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.*
>
> *The latitude given facial challenges in the First Amendment context is inapplicable here.* . . . 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. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *For this reason, "[a]s-applied challenges are the basic building blocks of constitutional adjudication."*

Gonzales, 127 S. Ct, at 1638 (emphasis added, citations omitted). In other words, the principles of judicial restraint require federal courts to adjudicate the constitutionality of abortion statutes on a case-by-case basis, not to make broad pronouncements regarding litigants and circumstances not before the court.[4]

Moreover, the Supreme Court has emphasized that if an abortion statute has *some* constitutional applications, it should not be invalidated in *all* applications unless that is what the legislature desires. *Ayotte,* 546 U.S. at 331. Because a federal court's remedial power is limited to enjoining only the unconstitutional applications of an abortion statute, it is difficult to see how the overbreadth doctrine

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[4] Even in the First Amendment context, the "strong medicine of the overbreadth doctrine" may not be available when the targets of the statute "are sufficiently capable of defending their own interests in court that they will not be significantly 'chilled.'" *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372, 2383 n.5 (2007). Because abortion providers are capable of defending their own interests, abortion providers should not be able to bring facial challenges alleging overbreadth in the abortion context.

could apply in the abortion context. By its very terms, the overbreadth doctrine invalidates a statute in *all* applications simply because it is unconstitutional in *some* applications.

Second, this Court has consistently refused to entertain facial challenges alleging overbreadth in the abortion context.[5] *See Greenville Women's Clinic II,* 317 F.3d at 362-63; *Greenville Women's Clinic I,* 222 F.3d at 164-65; *Manning,* 119 F.3d at 268-69. Because a panel of this Court may not overrule a decision of this Court, *McMellon v. United States*, 387 F.3d 329, 332-33 (4th Cir. 2004), the panel should have

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[5] The Circuits are divided on the question of whether the federal courts may allow facial challenges alleging overbreadth to abortion statutes. The Fifth Circuit has held that such challenges are not permitted. *See Barnes v. Moore,* 970 F.2d 12, 14 n.2 (5th Cir. 1992) (per curiam). *See also Causeway Med. Suite v. Ieyoub,* 109 F.3d 1096, 1102-03 (5th Cir. 1997) (declining to reverse *Barnes*). However, other Circuits have concluded that facial challenges alleging overbreadth are permitted in the abortion context. *See Planned Parenthood v. Heed,* 319 F.3d 53, 58 (1st Cir. 2004), *rev'd on other grounds sub nom. Ayotte v. Planned Parenthood,* 546 U.S. 320 (2006); *Planned Parenthood v. Farmer,* 220 F.3d 127, 142-43 (3rd Cir. 2000); *Planned Parenthood. v. Lawall,* 180 F.3d 1022, 1025-26 (9th Cir. 1999), *amended on denial of reh'g,* 193 F.3d 1042 (9th Cir. 1999); *Women's Med. Prof. Corp. v. Voinovich,* 130 F.3d 187, 193-96 (6th Cir. 1997); *Jane L. v. Bangerter,* 102 F.3d 1112, 1116 (10th Cir. 1996); *Planned Parenthood v. Miller,* 63 F.3d 1452, 1456-58 (8th Cir. 1995). *Cf. A Woman's Choice-East Side Women's Clinic v. Newman,* 305 F.3d 684, 687 (7th Cir. 2002) (treating the *Salerno* standard as merely a "suggestion" in the abortion context).

refused to entertain the overbreadth challenge.

"As-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales,* 127 S. Ct. at 1639. As long as an abortion provider "faces a credible threat of prosecution," *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999), he may pursue a pre-enforcement *as-applied* challenge to the Virginia Act.[6] *See Gonzales,* 127 S. Ct. at 1639. "As the facial challenge in this case is built on a hypothetical case that is not contemplated by the Act and occurs only rarely, it should never have been heard." *Slip Op.* at 55 (Niemeyer, J., dissenting).

II. REHEARING SHOULD BE GRANTED TO DETERMINE IF VIRGINIA ACT APPLIES TO ACCIDENTAL INTACT D&Es.

If it was appropriate for the panel to entertain a facial challenge alleging overbreadth in the abortion context, rehearing should be granted to determine if the Virginia Act applies to accidental intact D&Es.

"The first step in overbreadth analysis is to construe the

[6] Based on his deposition testimony, Dr. Fitzhugh does not face a credible threat of prosecution. Because Dr. Fitzhugh concedes that he never dismembers any part of the infant that is outside of the body of the mother, J.A. at 279, Dr. Fitzhugh does not violate the Virginia Act.

challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 128 S. Ct. ____, ____, 2008 WL 2078503 at *5 (2008) "'[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[7] *Gonzales*, 127 S. Ct. at 1631 (citation omitted). This Court must "interpret statutes, if possible, in such fashion as to avoid grave constitutional questions." *Federal Election Comm'n v. Akins,* 524 U.S. 11, 32 (1998). If "an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such

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[7] This rule applies in the abortion context. As the Supreme Court explained:

> It is true this longstanding maxim of statutory interpretation has, in the past, fallen by the wayside when the Court confronted a statute regulating abortion. The Court at times employed an antagonistic "'canon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.'" *Casey* put this novel statutory approach to rest. *Stenberg* need not be interpreted to have revived it. We read that decision instead to stand for the uncontroversial proposition that the canon of constitutional avoidance does not apply if a statute is not "genuinely susceptible to two constructions."

Gonzales, 127 S. Ct. at 1631 (citations omitted).

problems." *INS v. St. Cyr,* 533 U.S. 289, 300 (2001). Moreover, because this is a criminal statute, the rule of lenity requires that it be construed in favor of potential criminal defendants, *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994),[8] and there is a presumption of a scienter requirement to separate innocent conduct from criminal conduct. *Staples v. United States*, 511 U.S. 600, 605-07 (1994). Indeed, because the absence of a scienter requirement would "raise serious constitutional doubts," this Court must "read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of [the Legislature]." *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 78 (1994).

As Judge Niemeyer notes in precise detail, when the Virginia Act is construed to avoid constitutional problems, the Virginia Act is substantively identical to the federal statute upheld in *Gonzales*. *Slip Op*. at 38-46 (Niemeyer, J., dissenting). The Virginia Act explicitly exempts the *standard* D&E procedure, *Virginia Code* § 18.2-71.1(B), and imposes criminal liability only if an abortion provider *knowingly*

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[8] Although *Ratzlaf* was interpreting federal criminal statutes, the rule of lenity is applied by the Virginia courts when interpreting Virginia criminal statutes. *See Welch v. Virginia*, 628 S.E.2d 340, 342 (Va. 2006).

engages in a violation of the Virginia Act. *Virginia Code* § 18.2-71.1(A). If an abortion provider *intends* to perform a *standard* D&E, but *accidentally* performs an *intact* D&E, then the abortion provider cannot *knowingly* violate the Act. *See Slip Op*. at 47-53 (Niemeyer, J., dissenting). The Supreme Court, in upholding the federal statute, explained:

> It is true that intent to cause a result may sometimes be inferred if a person "knows that that result is practically certain to follow from his conduct." Yet abortion doctors intending at the outset to perform a standard D&E procedure will not know that a prohibited abortion "is practically certain to follow from" their conduct.

Gonzales, 127 S. Ct. at 1632 (citations omitted). Thus the Virginia Act, like the federal statute upheld in *Gonzales*, does not apply to an accidental intact D&E. [9]

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[9] Despite the panel's emphasis on accidental intact D&Es, the existence of an accidental intact D&E is speculative. As the Supreme Court explained:

> The evidence also supports a legislative determination that *an intact delivery is almost always a conscious choice rather than a happenstance*. Doctors, for example, may remove the fetus in a manner that will increase the chances of an intact delivery. And intact D&E is usually described as involving some manner of serial dilation. Doctors who do not seek to obtain this serial dilation perform an intact D&E on far fewer occasions. *This evidence belies any claim that a*

However, contrary to the explicit command of *Gonzales*, the panel refused to construe the Virginia Act to avoid constitutional problems. Instead, the panel adopted a construction that actually invites constitutional difficulty. The panel misses one of the cardinal principles of judicial restraint—"where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems…" *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575 (1988). This is exactly what the Supreme Court did in *Gonzales* when it construed the federal statute as being inapplicable to an accidental intact D&E. *Gonzales*, 127 S. Ct. at 1631-32. It is exactly what Judge Niemeyer did in construing the Virginia Act. It is exactly what this Court should do on rehearing.

III. REHEARING SHOULD BE GRANTED TO DETERMINE THE PROPER REMEDY.

If the Virginia Act applies to accidental intact D&Es and if such

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> *standard D&E cannot be performed without intending or foreseeing an intact D&E.*

Gonzales, 127 S. Ct. at 1632 (emphasis added, citations omitted). *See also Slip Op.* at 47 (Niemeyer, J., dissenting).

an application is unconstitutional, rehearing should be granted to determine the proper remedy.

After concluding that the Virginia Act applies to *accidental* intact D&Es, the panel speculated that the Virginia Act might deter abortion providers from performing *standard* D&Es. *Slip Op*. at 30. While the panel correctly found that accidental intact D&Es occurred in "a small fraction of case," *id.* at 8, it nevertheless found that the remote threat of prosecution "effectively prohibits *all* D&E procedures, which comprise the overwhelming majority of second trimester abortions." *Id*. at 30. Therefore, the panel declared that the Virginia Act might never be enforced in any circumstance. *Id*. at 30-31. This was error.

If the Virginia Act is unconstitutional as applied to accidental intact D&Es, the solution to this problem is not to invalidate the statute in its entirety but merely to enjoin the application of the statute to that "small fraction of cases." Because, as the panel notes, only "a small fraction of cases" gives rise to the problem, the Virginia Act issue represents "the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications." *Ferber,* 458 U.S. at 773. Where "[o]nly a few applications of [a statute] would present a

constitutional problem," courts should not choose "the most blunt remedy" of invalidating a statute in its entirety. *Ayotte,* 546 U.S. at 330-31. Instead, in that circumstance, this Court should "issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application." *Id.* at 331.

CONCLUSION

For the reasons set forth above, the Petition for Rehearing and Rehearing *En Banc* should be **GRANTED.** If Rehearing is granted, Virginia requests supplemental briefing.

Respectfully submitted,

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June 2, 2008

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2008, I electronically filed the foregoing PETITION FOR REHEARING AND REHEARING EN BANC with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF Users:

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