

**PUBLISHED**

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**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

RICHMOND MEDICAL CENTER FOR  
WOMEN; WILLIAM G. FITZHUGH,  
M.D., on behalf of themselves, their  
staffs, and their patients,  
*Plaintiffs-Appellees,*

v.

DAVID M. HICKS, in his official  
capacity as Commonwealth  
Attorney for the City of Richmond;  
WADE A. KIZER, in his official  
capacity as Commonwealth  
Attorney for the County of Henrico,  
*Defendants-Appellants.*

No. 03-1821

HORATIO R. STORER FOUNDATION,  
INCORPORATED,  
*Amicus Supporting Appellants,*

PHYSICIANS FOR REPRODUCTIVE  
CHOICE AND HEALTH; VANESSA E.  
CULLINS, Vice President for Medical  
Affairs, Planned Parenthood  
Federation of America; FORTY-TWO  
INDIVIDUAL PHYSICIANS,  
*Amici Supporting Appellees.*

RICHMOND MEDICAL CENTER FOR  
WOMEN; WILLIAM G. FITZHUGH,  
M.D., on behalf of themselves, their  
staffs, and their patients,  
*Plaintiffs-Appellees,*

v.

DAVID M. HICKS, in his official  
capacity as Commonwealth  
Attorney for the City of Richmond;  
WADE A. KIZER, in his official  
capacity as Commonwealth  
Attorney for the County of Henrico,  
*Defendants-Appellants.*

No. 04-1255

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HORATIO R. STORER FOUNDATION,  
INCORPORATED,  
*Amicus Supporting Appellants,*

PHYSICIANS FOR REPRODUCTIVE  
CHOICE AND HEALTH; VANESSA E.  
CULLINS, Vice President for Medical  
Affairs, Planned Parenthood  
Federation of America; FORTY-TWO  
INDIVIDUAL PHYSICIANS,  
*Amici Supporting Appellees.*

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**ORDER**

I.

Upon a request for a poll of the court on the petition for rehearing en banc, Judges Widener, Niemeyer, and Shedd voted to grant the petition for rehearing en banc. Chief Judge Wilkins, Judges Wilkinson, Luttig, Michael, Motz, Traxler, King, Gregory, and Duncan

voted to deny rehearing en banc. Accordingly, the petition for rehearing en banc is denied.

II.

The panel considered the petition for rehearing. Judge Niemeyer voted to grant the petition for rehearing, and Judges Michael and Motz voted to deny the petition for rehearing. Accordingly, the petition for rehearing is denied.

III.

Judge Wilkinson, Judge Luttig, and Judge Michael filed separate opinions concurring in the denial of rehearing en banc. Judge Niemeyer filed a separate opinion dissenting from the denial of rehearing en banc, in which Judge Widener joined. The separate opinions are attached.

IV.

Judge Williams, being disqualified, did not participate in the proceedings with respect to this case.

For the Court

/s/ Patricia S. Connor  
Clerk

WILKINSON, Circuit Judge, concurring in the denial of rehearing en banc:

Whatever one's views on the various issues surrounding abortion, ending the life of an infant at the moment of its birth is a uniquely disturbing act.

At the very least, the democratic process should not be precluded from coming to that judgment. We have always relied upon that process to soften the harsh blows of life. The New Deal and Great Society had in common a desire to help those who through no fault of

their own found themselves in straitened circumstances. If our democracy can work to enhance equal opportunity in life, should it not also be permitted here to enhance the opportunity for life to begin? I am at a loss to explain how a partially born child can be excluded from the American embrace.

Whether a health exception to a partial birth abortion ban is a necessity or a loophole — and the proper scope of such exceptions — strike me as altogether fair and debatable questions, but again, I believe the political process deserves some leeway in arriving at the answers. Our democracy often cools passions by giving them appropriate expression. The partial birth abortion debate will, I fear, be only further inflamed through judicially imposed solutions.

The moment a child is brought into the world is supposed to represent the ultimate in human joy. Instead, through methods of partial birth abortion too gruesome to bear repetition here, medical science is employed to bring a child's life to an end. That a right to the "intact D&E/D&X procedure" is now found in no less than our founding document is simply and indescribably sad. The means that so transform the miracle of birth are not something this good land should seek to constitutionalize.

\* \* \* \*

We do not write upon a clean slate here. As circuit judges, we are bound to follow the Supreme Court. I can find no fair basis for distinguishing this case from *Stenberg v. Carhart*, 530 U.S. 914 (2000). For that reason, I vote to deny rehearing en banc.

LUTTIG, Circuit Judge, concurring in the denial of rehearing en banc:

I vote to deny rehearing en banc in this case for the reasons stated in my concurrence in *Richmond Medical Center for Women v. Gilmore*, 219 F.3d 376 (4th Cir. 2000).

MICHAEL, Circuit Judge, concurring in the denial of rehearing en banc:

I concur in the court's denial of rehearing en banc. The panel decision, *Richmond Medical Center for Women v. Hicks*, 409 F.3d 619

(4th Cir. 2005), holds that the Commonwealth of Virginia's latest statute criminalizing "partial birth abortion" is unconstitutional on its face because it lacks an exception to protect a woman's health. The decision is mandated by *Stenberg v. Carhart*, 530 U.S. 914 (2000), which holds that any statute banning "partial birth abortion," specifically the intact D&E/D&X procedure, must contain a health exception in order to be constitutional.

In *Carhart* the Supreme Court, in striking down a Nebraska ban on "partial birth abortion," based its holding on longstanding precedent and a thoroughgoing analysis of all available medical information. The Court began by recognizing the established standard from *Roe v. Wade*, 410 U.S. 113, 164-65 (1973), a standard reiterated by the plurality opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992): "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*" *Carhart*, 530 U.S. at 930 (internal quotation marks and citation omitted). The *Carhart* Court applied this standard by examining medical opinion and information regarding the intact D&E/D&X procedure from a broad range of sources. The Court drew both from the record and sources outside the record, including medical textbooks and journals covering abortion, the factual records developed in other "partial birth abortion" cases, and amicus briefs (with citations to medical authority) submitted by medical organizations. Based on all of this information, the Court determined that substantial medical authority supports the proposition that the intact D&E/D&X procedure offers significant health and safety advantages in certain circumstances. *See id.* at 934-38. This determination led the *Carhart* Court to establish as a *per se* constitutional rule the health exception requirement for any statute outlawing "partial birth abortion." *Id.* at 938 (holding that "a statute that altogether forbids [the intact D&E/D&X] procedure necessarily "creates a significant health risk" and "consequently must contain a health exception"). As Virginia acknowledges, its statute criminalizes "the D&X procedure, or what is sometimes referred to as an 'intact D&E.'" Reply Br. of Appellants at 2; *see also id.* at 3 (identifying "[t]he central issue in this case" as "whether [Virginia] may prevent use of the D&X or intact D&E" procedure). Because the Virginia statute lacks a health exception, it is unconstitutional on its

face. *See Carhart*, 530 U.S. at 938; *see also Sabri v. United States*, 124 S. Ct. 1941, 1948-49 (2004) (recognizing the validity of facial challenges to statutes regulating abortion procedures).

NIEMEYER, Circuit Judge, dissenting from the denial of Virginia's petition to rehear this case *en banc*:

In the aftermath of the Supreme Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000) (holding unconstitutionally overbroad a Nebraska partial-birth abortion statute), Virginia enacted a narrowly focused law in 2003, making it a criminal offense "to kill a human infant who has been born alive, but who has not been completely extracted or expelled from its mother." Va. Code Ann. § 18.2-71.1(B). The statute explicitly excludes numerous abortion methods from its coverage and applies *only* to protect a live fetus that has been delivered halfway into the world — i.e., either "the infant's entire head is outside the body of the mother" or, for a breech delivery, "any part of the infant's trunk past the navel is outside the body of the mother." *Id.* § 18.2-71.1(D). Virginia found it unnecessary, based on the narrow proscriptions of its statute, to include an exception for the health of the mother because the available medical data revealed that protecting a live fetus that is delivered at least halfway from its mother does not put the mother's health at risk.

Without analysis of the statute's application to the facts in the record, the panel majority struck down Virginia's statute as unconstitutional under *Carhart*. Rather than analyze the statute's reach and the record, the majority held simply that *Carhart* created a *per se constitutional rule* that any partial-birth abortion statute must contain a health exception regardless of whether the facts relevant to the statute's prohibition demonstrate a need for one. *See Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 624-26 (4th Cir. 2005).

In addition, in striking down Virginia's statute on a facial challenge, the majority disregarded the standard for reviewing facial challenges defined in *United States v. Salerno*, 481 U.S. 739, 745 (1987), and ignored this circuit's standard for facial challenges of abortion laws, *see Greenville Women's Clinic v. Comm'r*, 317 F.3d 357, 362 (4th Cir. 2002); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157,





