No. 03-1821/04-1255

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHMOND MEDICAL CENTER FOR WOMEN, et al.,

Plaintiffs-Appellees,

v.

MICHAEL N. HERRING, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

OPPOSITION TO THE PETITION FOR REHEARING *EN BANC*

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Pursuant to this Court's order dated June 12, 2008, Plaintiffs-Appellees Richmond Medical Center for Women and William G. Fitzhugh, M.D. (collectively, "Plaintiffs") hereby respond to the petition for rehearing *en banc* filed by Defendants-Appellants Michael N. Herring and Wade A. Kizer (collectively, the "Commonwealth"). As set forth more fully below, the petition should be denied because this case does not satisfy the standard for *en banc* review. *See* Fed. R. App. P. 35(a). *En banc* consideration is not necessary here to secure or maintain uniformity of the court's decisions. The decision of the Panel is consistent in all respects with the relevant decisions of the Supreme Court, this Court, and the only other circuit court to consider application of *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) ("*Carhart II*"), to a state abortion ban. Further, the Commonwealth has failed to identify any question of exceptional importance raised by the Panel's application of the principles articulated in *Carhart II* to the Virginia Ban.

PROCEDURAL HISTORY

On motion for summary judgment by Plaintiffs, the District Court for the Eastern District of Virginia (Williams, J.) declared Virginia's Partial Birth Infanticide Act, Va. Code Ann. § 18.2-71.1 (the "Virginia Ban"), unconstitutional, and permanently enjoined its enforcement. JA 1245-74. The judgment of the District Court was affirmed by a Panel of this Court. *Richmond Medical Center for Women v. Hicks*, 409 F.3d 619 (4th Cir. 2005). The Commonwealth sought rehearing *en banc*, but the full Court denied the petition. *Richmond Medical Center for Women v. Hicks*, 422 F.3d 160 (4th Cir. 2005) (*en banc*). The Commonwealth then petitioned the United States Supreme Court for a writ of *certiorari*. The Supreme Court granted *certiorari* following its decision in *Carhart II*, in which the Court sustained a federal statute prohibiting so-called

"partial birth abortion" against a constitutional challenge. The Court vacated the judgment of the Panel and remanded the case "for further consideration in light of [*Carhart II*]." *Herring v. Richmond Medical Center for Women*, 127 S. Ct. 2094 (2007). After affording the parties an additional opportunity to be heard, the Panel again affirmed, concluding that the Supreme Court's decision in *Carhart II* did not provide any basis for reversing the judgment of the District Court. *Richmond Medical Center v. Herring*, Nos. 03-1821, 04-1255, slip op. (4th Cir. May 20, 2008). Now, the Commonwealth once again seeks rehearing *en banc*.

INTRODUCTION

The Commonwealth's petition is not limited to arguments concerning the impact of *Carhart II* on Plaintiffs' claims; it also seeks to relitigate issues unaffected by *Carhart II*, which the Commonwealth raised in its prior petition for rehearing *en banc*, and which this Court previously judged an inadequate basis for *en banc* review. *Hicks*, 422 F.3d at 160; *see also* Fed. R. App. P. 35(a). For example, the Commonwealth argues that rehearing should be granted to determine whether the no-set-of-circumstances test should apply in facial challenges to statutes regulating abortion, even though this Court previously denied *en banc* review to address that question, and the Supreme Court in *Carhart II* expressly declined to reach that issue. *See Hicks*, 422 F.3d at 160; *Carhart II*, 127 S. Ct. at 1639. The Commonwealth's unjustified attempt to get another bite at the apple should be denied, particularly because there exists nothing exceptional or erroneous about the Panel's analysis of Plaintiffs' facial claims. *See Air Line Pilots Association International v. Eastern Air Lines, Inc.*, 863 F.2d 891, 925 (D.C. Cir.1988) (Ginsburg, J., concurring in denial of petition for rehearing *en banc*) ("Only in the rarest of circumstances . . . should we countenance the drain on judicial resources, the expense and delay

for the litigants, and the high risk of a multiplicity of opinions offering no authoritative guidance, that full circuit rehearing of a freshly-decided case entails.") (internal quotation marks omitted).

The Panel correctly concluded that the Virginia Ban is unconstitutional and that complete invalidation of the statute is the appropriate remedy. Unlike the federal abortion ban statute at issue in *Carhart II*,[1] the Virginia Ban is not limited to intentionally intact D&E procedures. Rather, it impermissibly bans standard D&E procedures in violation of the Supreme Court's holdings in both *Stenberg v. Carhart*, 530 U.S. 914 (2000) ("*Carhart I*") and *Carhart II*. *See Herring*, slip op. at 25. In *Carhart II*, the Court explained that two features of the Federal Ban limited its application to intentionally intact D&E procedures and, therefore, kept it within constitutional boundaries. One of those was the statute's intentional delivery requirement and the other was the statute's distinct overt-act requirement. *See Carhart II*, 127 S. Ct. at 1629-31. As the Panel decision highlights, both of those features are lacking in the Virginia Ban.[2] *Herring*, slip op. at 25. As a result, the scope of the Virginia Ban is unconstitutional, extending to

[1] That statute is known as the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (the "Federal Ban").

[2] The Virginia Ban lacks the intentional delivery requirement that the Supreme Court found essential to the Federal Ban's constitutionality. To fall within the scope of the Federal Ban's prohibition of partial-birth abortion, the physician performing the abortion must "deliberately and intentionally vaginally deliver[] a living fetus" to a specified anatomical landmark "for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus." 18 U.S.C. § 1531(b)(1)(A). The Virginia Ban, in contrast, contains no such intent requirement with respect to delivery of the fetus. Rather, any fatal act performed on a fetus "that has been completely or substantially expelled or extracted from its mother" past a specified anatomical landmark falls within the scope of the Virginia Ban's prohibition, regardless of whether the physician who performs the fatal act intended, or even caused, the fetus to be completely or substantially expelled or extracted from its mother. Va. Code Ann. § 18.2-71.1(C).

In addition, the Federal Ban distinguishes between the act of delivering the fetus to the anatomical landmark and the fatal act that causes fetal demise. *See* 18 U.S.C. § 1531(b)(1). Criminal liability does not attach unless a physician intentionally performs both distinct acts in sequence. Thus, when fetal demise occurs during, or as a result of, delivery to or beyond the anatomical landmark, the physician performing the abortion is not subject to criminal liability. *See Carhart II*, 127 S.Ct. at 1627-28. The Supreme Court identified this feature of the Federal Ban as a key difference, with respect to the constitutional analysis, from the Nebraska abortion ban statute at issue in *Carhart I*, Neb. Rev. Stat. Ann. §§ 28-326(9), 28-328 (the "Nebraska Ban"). *See Carhart II*, 127 S. Ct. at 1630-31. Like the Nebraska Ban, the Virginia Ban lacks a distinct overt-act requirement. *See* Va. Code Ann. § 18.2-71.1.

standard D&Es. *Id*.

An examination of the legislative history of the Virginia Ban reveals that, as originally introduced, it contained both an intentional delivery requirement and a distinct overt-act requirement, but those provisions were removed from the bill during the legislative process. *Compare* H.B. 1541, 2003 Leg., Reg. Sess. (Va. 2003) (Introduced), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+HB1541+pdf *with* Va. Code Ann. § 18.2-71.1. Consequently, a reviewing court could neither construe the Virginia Ban to contain those provisions nor write them into the statute through an injunction because to do so would be contrary to the intent of the legislature that enacted the statute. *See Ayotte*, 546 U.S. at 330. As a result, complete invalidation of the statute is the only permissible remedy for the Virginia Ban's constitutional defects. *See id*. at 328-30.

With respect to both result and remedy, the decision reached by the Panel is consistent with the decision of the United States Court of Appeals for the Sixth Circuit in *Northland Family Planning Clinic v. Cox*, the only other federal appellate decision to date to consider a state abortion ban statute in light of *Carhart II*. *See Northland Family Planning Clinic v. Cox*, 487 F.3d 323 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 873 (2008). In *Cox*, the court invalidated a Michigan abortion ban statute on the ground that it was unconstitutionally broader in scope than the Federal Ban. *Id*. at 346-47. It explained that the Michigan legislature "opted to use statutory language that pushed almost every boundary that the Supreme Court has imposed for these types of laws, and which have recently been reaffirmed in [*Carhart II*]. Because the statute cannot be squared in any way with these limitations, . . . the district court correctly determined that invalidation is the only available course." *Id*.

ARGUMENT

"An *en banc* . . . rehearing is not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Neither circumstance exists in this case, which involves the constitutionality of an abortion ban that imposes a risk of criminal liability on physicians setting out to perform abortions by the most commonly used second-trimester abortion method, standard dilation and evacuation ("D&E"). The Panel's conclusion that such a *de facto* criminalization of standard D&E abortions violates abortion patients' right to privacy is entirely unexceptional, and accords with the decisions of this Court and the Supreme Court. Accordingly, the Petition provides no grounds for *en banc* review.

I. The Panel's Treatment of Plaintiffs' Facial Challenge Accords with the Weight of Authority from the Supreme Court and Courts of Appeals and Presents no Question of Exceptional Importance.

The Panel applied the same standard in evaluating the facial aspect of Plaintiffs' challenge post-*Carhart II* as it did in its prior opinion in this case.[3] *Compare Herring*, slip. op. at 27-30 *with Hicks*, 409 U.S. at 627-28. In both opinions, the Panel determined that the scope of the Virginia Ban is unconstitutional because the statute effectively bans all standard D&E procedures, thus imposing an undue burden on women seeking abortions. Nothing in *Carhart II* suggests that the standard applied by the Panel was incorrect, or that the Panel should have applied the no-set-of-circumstances test. To the contrary, the Supreme Court expressly declined to apply the no-set-of-circumstances test in that case. *See Carhart II*, 127 S. Ct. at 1639.

[3] In addition to challenging the Virginia Ban on its face, Plaintiffs also challenged the statute as applied to Dr. Fitzhugh. *See* JA 13, 24. The Commonwealth concedes, as it must, that a physician who faces a credible threat of prosecution under the Virginia Ban is entitled to maintain a pre-enforcement as-applied challenge. *See* Pet. for Reh'g *En Banc* at 9.

Accordingly, rehearing to determine whether the Panel applied the proper standard is no more warranted now than it was following the Panel's prior opinion. The Court should deny rehearing now just as it did then. *See Hicks*, 422 F.3d at 160.

Contrary to the Commonwealth's assertions, the Supreme Court's decision in *Carhart II* does not cast doubt on the viability of facial challenges in the abortion context. *Carhart II* merely confirms a longstanding principle of constitutional jurisprudence—that a plaintiff cannot prevail on a facial challenge with evidence that is speculative. In *Carhart II*, the plaintiffs brought a facial challenge to a federal statute banning so-called "partial-birth abortion" on several grounds, including that it lacked a health exception. *Carhart II*, 127 S. Ct. at 1625. After considering the evidence, the Supreme Court concluded that medical uncertainty existed over whether any woman would ever need the banned procedure to avert harm to her health. *Id*. at 1636. In other words, the Supreme Court found the plaintiffs' evidence that use of the banned procedure would be safer in certain circumstances than use of alternative procedures to be speculative. *Id*. As a result, the Supreme Court held that the statute was not unconstitutional on its face for lacking a health exception. *Id*. at 1637. It went on to explain that, "[i]n these circumstances the proper means to consider exceptions is by as-applied challenge. . . . In an as-applied challenge, the nature of the medical risk can be better quantified and balanced than in a facial attack." *Id.* at 1638-39; c*f. Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1622 (2008) ("Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified."); *Washington State Grange v.*

Washington Republic Party, 128 S. Ct. 1184, 1187 (2008) ("[B]ecause respondents' arguments . . . rest on factual assumptions about voter confusion that can be evaluated only in the context of an as-applied challenge, we reverse.").

In contrast, in *Ayotte*, the plaintiffs brought a facial challenge to New Hampshire's parental notification statute on the ground that it lacked a health exception. *Ayotte*, 546 U.S. at 324-25. There, it was undisputed that, in "some very small percentage of cases," pregnant minors would need immediate abortions to avert harm to their health and that, in those cases, application of the statute would be unconstitutional. *Id*. at 328. The Supreme Court did not hold that the plaintiffs could not maintain a facial challenge because the statute would only be unconstitutional in a small percentage of its applications. Rather, it held that the plaintiffs were entitled to relief from the statute's constitutional defects and set forth principles to guide the court of appeals in determining the proper scope of the remedy. *Id*. at 328-31.

There is nothing speculative about Plaintiffs' evidence in the instant case. As in *Ayotte*, the key factual issue underlying the facial challenge is undisputed. *See id*. at 328. The Commonwealth conceded that completion of an accidental intact D&E would violate the Virginia Ban. *See* JA 1259; Appellants' Reply Br. at 11-15; Appellants' Supp. Reply Br. at 5-6. The Commonwealth further conceded that accidental intact D&Es occur in a small fraction of cases in which physicians set out to perform standard D&Es. *See* Appellants' Supp. Reply Br. at 6; *Herring*, slip op. at 25. Dr. Fitzhugh identified this fraction as ten percent. *See* JA 36, 41, 254-61, 767-68. Dr. Fitzhugh had performed standard D&E procedures for more than twenty-five years before the Virginia Ban was enacted and encountered accidental intact D&Es on a regular basis throughout that period. *See* JA 1247, 1251-53. Thus, there exists nothing

hypothetical or speculative about the occurrence of accidental intact D&Es, which violate the Virginia Ban.

Moreover, while accidental intact D&Es occur in only ten percent of cases, Dr. Fitzhugh cannot know at the outset of a standard D&E whether an accidental intact D&E will occur. *See* JA 1253; *Herring*, slip op. at 27. Thus, were the Virginia Ban to take effect, Dr. Fitzhugh would risk violating it—and incurring a criminal penalty—every time he set out to perform a standard D&E. *See* JA 1259; *Herring*, slip op. at 27. Consequently, the Virginia Ban would effectively prohibit Dr. Fitzhugh and others from performing all D&E procedures. That such a D&E ban imposes an undue burden on the right to abortion is entirely unexceptional. *See Carhart II*, 127 S. Ct. at 1629-32; *Carhart I*, 530 U.S. at 938-39; *Cox*, 487 F.3d at 339 ("The district court's decision that Michigan's broad abortion statute created an unconstitutional undue burden on a woman's right to terminate her pregnancy because it prohibits D&E was in full accordance with the Supreme Court's guidance in both *Stenberg* and *Ayotte*, and has in no way been undermined by the interim decision in *Gonzales*."). Accordingly, the Panel correctly concluded that Plaintiffs are entitled to relief from this constitutional defect just as the plaintiffs in *Ayotte* were entitled to relief from the New Hampshire statute's constitutional defect.[4] *See Ayotte*, 546 U.S. at 331.

The Panel's rejection of the no-set-of-circumstances test creates no conflict with decisions of the Supreme Court or other federal courts. Since its landmark decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.), the Supreme Court has never applied the no-set-of-

[4] The Commonwealth conflates the issue of whether Plaintiffs can maintain a facial challenge with the issue of the scope of the remedy to which they are entitled. In *Ayotte*, the Supreme Court made clear that a plaintiff can maintain a facial challenge to a statute even if the plaintiff is not entitled to complete invalidation of the statute as a remedy for its constitutional defects. *See Ayotte*, 546 U.S. at 328-31. The question of whether a plaintiff can maintain a facial challenge is distinct from the question of remedy and must be analyzed separately. *See id.*

circumstances test when evaluating a facial challenge to a statute regulating abortion.[5] In *Casey*, the Court held that a Pennsylvania spousal notice requirement was unconstitutional on its face because the plaintiffs had demonstrated that, in a large fraction of relevant cases, it would impose an undue burden on the right to abortion. *Casey*, 505 U.S. at 895. In *Carhart I*, the Court held that a Nebraska abortion ban was unconstitutional on its face because it would cause abortion providers who performed standard D&E procedures to fear prosecution. *Carhart I*, 530 U.S. at 945. In *Ayotte*, as discussed above, the Court held that a New Hampshire parental notification statute was unconstitutional on its face because the statute lacked a health exception and, in "some very small percentage of cases," pregnant minors would need immediate abortions for health reasons. *Ayotte*, 546 U.S. at 328. In *Carhart II*, the Court declined to apply the no-set-of-circumstances test in a facial challenge to the federal abortion ban; instead, the Court rested its decision to deny the challenge on its conclusion that the plaintiffs had "not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases." *Carhart II*, 127 S. Ct. at 1639.

In addition to the Supreme Court, eight circuit courts, including this one, have also rejected application of the no-set-of-circumstances test in facial challenges to statutes regulating abortion.[6] *See Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 57 (1st Cir.

[5] During the current Term, the Supreme Court expressly declined to apply the no-set-of-circumstances test in two cases unrelated to abortion, casting doubt on the continued validity of the test in any context. *See Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1623 (2008) (facial challenge to an Indiana voter identification law); *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (facial challenge to Washington State's primary election system).

[6] Only the Fifth Circuit has applied the no-set-of-circumstances test in evaluating a facial challenge to a statute regulating abortion. *See Barnes v. Moore*, 970 F.2d 12, 14 (5th Cir. 1992). The decision in *Barnes* came just two months after the Supreme Court's decision in *Casey*. The approach taken by the court drew criticism from several members of the Supreme Court. *See Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1013, 1014 (1996) (Mem.) (Stevens, J.); *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013, 1014 (1993) (Mem.) (O'Connor, J., joined by Souter, J.). In the ensuing 16 years, not a single court of appeals has followed the Fifth Circuit in holding that the no-set-of-

2004), *vacated on other grounds sub nom. Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006); *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 142-43 (3d Cir. 2000); *Richmond Medical Center v. Hicks*, 409 F.3d 619, 627-28 (4th Cir. 2005), *reh'g en banc denied by* 422 F.3d 160 (4th Cir. 2005), *vacated on other grounds sub nom. Herring v. Richmond Medical Center for Women*, 127 S. Ct. 2094 (2007); *Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361, 367 (6th Cir. 2006); *Women's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 698-99 (7th Cir. 2002); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995); *Planned Parenthood of Southern Arizona v. Lawall*, 180 F.3d 1022, 1027 (9th Cir. 1999), *amended on denial of reh'g en banc*, 193 F.3d 1042 (9th Cir. 1999); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996).

In sum, the approach taken by the Panel in evaluating whether the Virginia Ban is unconstitutional accords with the relevant decisions of the Supreme Court and other courts of appeals and is otherwise unexceptional.

II. The Panel's Construction of the Virginia Ban Follows Well-Settled Principles of Statutory Construction and Thus Presents No Conflict or Exceptional Question for the Full Court to Review.

Contrary to the Commonwealth's assertions, the Panel could not construe the Virginia Ban to avoid its unconstitutionality because the statute is not genuinely susceptible of a constitutional construction. *See Carhart II*, 127 S. Ct. at 1631; *see also Clark v. Martinez*, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*.") (emphasis in original). The Virginia Ban's constitutional defects derive from its lack of an intentional

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circumstances test applies in facial challenges to statutes regulating abortion, though, as set forth above, eight have reached the opposite conclusion.

delivery requirement and its lack of a distinct overt-act requirement. *Herring*, slip op. at 25. Those two features sharply distinguish the Federal Ban at issue in *Carhart II* from the Nebraska Ban at issue in *Carhart I* and the Virginia Ban at issue here, and prevent the Federal Ban from applying to accidental intact D&E procedures. *Id*.; s*ee Carhart II*, 127 S. Ct. at 1629-32; *Carhart I*, 530 U.S. at 938-45. Although the Commonwealth argues that the Virginia Ban should be construed to contain these features, as the Panel explained in painstaking detail, the text of the Virginia Ban simply is not susceptible of that construction.[7] *Herring*, slip op. at 13-27; *cf. Cox*, 487 F.3d at 336 (rejecting a proffered limiting construction on the grounds that the statute under review was not genuinely susceptible of it).

Moreover, that construction is not consistent with the intent of the legislature. As originally introduced, the Virginia Ban contained both an intentional delivery requirement and a distinct overt-act requirement, expressed in language identical to that of the Federal Ban. *See* H.B. 1541, 2003 Leg., Reg. Sess. (Va. 2003) (Introduced), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+HB1541+pdf. But the legislature amended that language out of the bill during the legislative process and replaced it with the current language. *See* H.B. 1541-H2, 2003 Leg., Reg. Sess. (Va. 2003) (House Substitute), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+HB1541H2+pdf. To construe the statute to contain features that were expressly stricken from it by the legislature would be plainly contrary to the intent of the legislature and therefore impermissible.

In sum, the Panel's application of well-settled principles of statutory construction to the Virginia Ban creates no conflict with relevant authorities and presents no question of exceptional importance that would merit *en banc* review.

[7] Although in the instant petition the Commonwealth asserts that the Virginia Ban can be construed in a manner to avoid application to accidental intact D&Es, throughout this litigation the Commonwealth took the opposite position. *See* JA 1259; Appellants' Reply Br. at 11-15; Appellants' Supp. Reply Br. at 5-6.

III. The Remedy Affirmed by the Panel Fully Conforms with the Standards Set Forth by the Supreme Court in *Ayotte* and Therefore Provides No Conflict or Exceptional Question for the Full Court to Review.

In evaluating the remedy crafted by the District Court, the Panel faithfully applied the directives set forth in *Ayotte*. In that case, the Supreme Court explained that, as a general matter, when a statute is unconstitutional in some, but not all of its applications, partial invalidation, rather than complete invalidation, is the preferred remedy. *Ayotte*, 546 U.S. at 328-29. But the Court went on to announce three limitations on the general rule. First, a court must avoid substantial rewriting of a statute. *Id.* ("[M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it.") (internal quotation marks omitted). Second, a court must avoid any remedy that would be inconsistent with legislative intent. *Id*. at 330 ("[T]he touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature.") (internal citations omitted). Third, a court must be wary of legislatures that would draft broad statutes without regard to constitutional parameters and then rely on the judiciary to define the proper scope of their application. *Id.* ("[I]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside to announce to whom the statute may be applied.") (internal quotation marks omitted).

Here, all three limiting principles weigh in favor of complete, rather than partial, invalidation of the Virginia Ban. First, curing the statute's constitutional defects would require substantial rewriting of the statute, a task best left to the legislature. *Herring*, slip op. at 30-31 ("Any remedy short of declaring the Act invalid would require us to rewrite its very core, and that is a task that must be left to the legislature."); *see Ayotte*, 546 U.S. at 328-29.

Second, a partial-invalidation remedy would be inconsistent with the intent of the legislature. As discussed *supra*, as originally introduced, the Virginia Ban contained both an intentional delivery requirement that mirrored the language of the Federal Ban and a distinct overt-act requirement that mirrored the language of the Federal Ban. *See* H.B. 1541, 2003 Leg., Reg. Sess. (Va. 2003) (Introduced), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+HB1541+pdf. It also contained a severability provision. *See id*. During the legislative process, all three of those provisions were amended out of the bill. *See* H.B. 1541-H2, 2003 Leg., Reg. Sess. (Va. 2003) (House Substitute), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+HB1541H2+pdf; *compare* H.B. 1541, 2003 Leg., Reg. Sess. (Va. 2003) (Introduced) *with* Va. Code Ann. § 18.2-71.1. For a court to write them back in would be contrary to the intent of the legislature and an improper usurpation of the legislative function. *See Ayotte*, 546 U.S. at 328-30. Moreover, the fact that the legislature removed the severability provision from the bill is strong evidence that it would prefer "no statute at all" to what would be "left of its statute" after it were partially invalidated. *See id.* at 330.

Third, the Virginia Ban is the second abortion ban enacted by the Virginia legislature that far exceeds constitutional parameters. *See Richmond Medical Center for Women v. Gilmore*, 224 F.3d 337 (4th Cir. 2000) (*per curiam*). By rewriting the statute to make it constitutional, a court would create a disincentive for the legislature to heed constitutional mandates in this area in the future. *See Ayotte*, 546 U.S. at 330. Accordingly, the Panel acted properly and consistently with *Ayotte* in approving the remedy crafted by the district court.

In *Cox*, the court likewise concluded that complete invalidation of the statute was the only appropriate remedy under *Ayotte*. *See Cox*, 487 F.3d at 339, 346-47. After considering the

breadth of the statute and the legislative intent underlying it, the court concluded that it could not craft a narrower remedy without improperly encroaching on the legislature's domain. *See id*.

In sum, the Panel's affirmance of the injunction entered by the District Court creates no conflict with relevant authorities and presents no question of exceptional importance that would merit *en banc* review.

CONCLUSION

For the reasons set forth above, Plaintiffs-Appellees respectfully request that the Commonwealth's petition for rehearing *en banc* be denied.

Dated: June 20, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 20, 2008, I electronically filed the foregoing **Opposition to the Petition for 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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