

Virginia AG asks Full Court to Hear Case

By Dave Andrusko

Two weeks after a divided three-judge panel upheld a lower court ruling that overturned Virginia's Partial-Birth Abortion Infanticide Act, the state attorney general filed a petition asking all 13 judges from the 4th U.S. Circuit Court of Appeals to rehear the case.

On June 3 the panel decided on a 2-1 vote to gut the 2003 law largely on the grounds that it lacked an exception to protect a woman's health. Judge Paul V. Niemeyer filed a brilliant dissent.

Attorney General Judith Williams Jagdmann said the state believes the panel's majority decision is "fundamentally flawed." The Virginia Society for Human Life (VSHL) applauded Jagdmann's June 17 announcement.

"We believe the ruling is incompatible with the freedoms upon which our nation was founded," said VSHL President Brenda Fastabend. "We hope the attorney general will appeal this act of judicial extremism all the way to the U.S. Supreme Court, if necessary."

Virginia's Partial-Birth Abortion Infanticide statute was blocked the day it was to go into effect by U.S. District Judge Richard L. Williams of Richmond. In an intriguing choice of words, Judge Williams called his July 2003 decision a "no-brain case."

Six months later, he granted the Center for Reproductive Rights' motion for summary judgment and declared the law unconstitutional. For its own reasons, the center then filed the federal appeal.

Judge M. Blane Michael wrote the appeals panel's decision upholding Judge Williams and was joined by Judge Diana Gribbon Motz.

Michael paralleled Williams's argument, saying, "Because the Virginia Act does not contain an exception for circumstances when the banned abortion procedures are necessary to preserve a woman's health, we affirm the summary judgment order declaring the Act unconstitutional on its face."

A careful reading of Judge Niemeyer's extraordinary dissent helps us understand why the panel reached the wrong conclusion.

First, and most important, as Niemeyer observed over and over, the majority simply accepted without hesitation the notion that Virginia's law was indistinguishable from Nebraska's ban on partial-birth abortion, which the Supreme Court narrowly overturned in 2000. But that simply isn't true.

Niemeyer explains that what five members of the Supreme Court did in the 2000 *Carhart* decision was to conclude that Nebraska had impermissibly prohibited an array of abortion techniques.

By contrast, he wrote, Virginia's Partial-Birth Infanticide law is not about an abortion procedure. The law, he observes, "limits itself to protecting the fetus by prohibiting the killing of a 'human infant who has been born alive, but who had not been completely expelled from its mother ... regardless of whether death occurs before or after extraction or expulsion from its mother has been completed.'"

In other words (to quote Judge Niemeyer), "It is the killing of the fetus, not the abortion procedure, that is the concern of Virginia's statute." This is a fundamental and genuine difference which the majority ignored.

Rather, Niemeyer writes, Judge Williams and the two members of the 4th Circuit panel have adopted the "simplistic view" that Virginia's law must be banning what courts have called an "intact D&E/D&X procedure" because the child's skull is/must be collapsed using this technique. Niemeyer explains that this "fails to account for the Commonwealth's evidence that crushing the fetal skull is necessary neither to terminate the pregnancy after an intact delivery nor to obtain the purported safety advantages of the infant D&E/D&X procedure." The child need not be destroyed.

"The majority's opinion is a bold, new law that, in essence, constitutionalizes infanticide of a most gruesome nature. ... By expanding abortion rights to this extent, the majority unnecessarily distances our jurisprudence from that of the Supreme Court and from general norms of morality. I profoundly dissent from today's decision."

Judge Paul Niemeyer

He makes another important point: "No one has contended that banning the destruction of a fetus after an intact delivery implicated the mother's health at all." In a particularly telling way, he cites the testimony of the abortionist who brought the suit to support his analysis.

During cross-examination, it was pointed out to William Fitzhugh that whatever health concerns he had about the woman would be eliminated if the pregnancy were terminated "whether or not what is removed is alive or dead; is that correct?"

Fitzhugh's response is classic: "My ultimate job on any given patient is to terminate that pregnancy, which means that I don't want a live birth." This is not about a woman's health at all. It is about ensuring that the baby is dead.

Judge Niemeyer's conclusion is passionate, persuasive, and definitive:

"As it must, judicial authority finds process and reason as its supporting pillars, but reason alone applied formulaically and without regard to context can wring results that even the most carefully reasoning decisionmaker finds unacceptable. At the depths of judicial decisionmaking lies a bedrock demanding accountability to the mind's sense of right, and this bedrock guides or perhaps even vetoes whatever absurdities reason might deliver.

"In the opinions we issue today, we speak of the legal and the illegal ways to dismember the arms and legs of

human fetuses and the legal and illegal ways to crush the budding human head. The doctors, of course, are given a choice: They can insert scissors into the base of the neck and suck out the brain matter, or they can crush the tender skull with forceps. Indeed, some of these procedures remain legal under Virginia's statute, but the statute does prohibit the destruction of a fetus halfway or fully delivered from its mother's body. Dr. Fitzhugh complained of this proscription because—even though killing the infant could not affect the mother's health at that stage—he could not complete his job. He said, 'I don't want a live birth.' The majority redresses his complaint with the ruling today. ... Even the majority's opinion, however, seems to have shuddered at discussing the nuances of fetal destruction, employing uncommon and clinical words as if they would dull the moral context

"I too have shuddered and must turn away.

"Can we not see that our discussions and the law we make in striking down Virginia's prohibition are unfit for the laws of a people of liberty? I wonder with befuddlement, fear, and sadness, how we can so joyfully celebrate the birth of a child, so zealously protect an infant and a mother who is pregnant, so reverently wonder about how human life begins, grows, and develops, and at the same time write to strike down a law to preserve a right to destroy a partially born infant. If the disconnect is explained by personal convenience, then we must reason that all morality is personal, without commonality and source. The product of such chaos is unfathomable."

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