Notes

RICHMOND MEDICAL CENTER FOR WOMEN v. GILMORE: VIRGINIA PARTIAL-BIRTH ABORTION ACT'S CLARITY EXTINGUISHES PHYSICIAN STANDING

LEE ANN LEZZER

A new provocative ad campaign will appear in *Rolling Stone, People,* and college newspapers across the country.[1] One such ad reads, "77% of anti-abortion leaders are men, 100% of them will never be pregnant."[2] Another focuses on symbols of the 1970s such as lava lamps and platform shoes; the ad states, "Of all the things from the '70s to make a comeback, there's one we really hate to see," [and the text is] followed by a photo of a coat hanger.[3] A final ad addresses abortion from a legal stand-point asking, "When your right to a safe and legal abortion is finally taken away, what are you going to do?" – the question mark is a coat hanger.[4] The ads were launched to arouse support among choice supporters to oppose Capitol Hill efforts to curb abortion.[5] Following the federal government's failed attempts to pass a controversial "partial-birth abortion"[6] ban bill, twenty-seven states, including Virginia, have passed "partial-birth abortion" bans.[7]

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1. *See* Paula Span, *Choice Ads Target Young And Listless: Abortion Rights Activists Try An Appeal to the Apolitical,* WASH. POST, Dec. 3, 1998, at D1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.*

6. The term partial-birth abortion is a legislative term used by anti-choice advocates. *See* AM. CIV. LIBERTIES UNION, *Stop Congress from Criminalizing Safe Abortion Procedures!* (visited Jan. 22, 1999) <http://www.aclu.org/issues/reproduct/feature/html> [hereinafter *Stop Congress from Criminalizing Safe Abortion Procedures*]. A "partial-birth abortion" ban would "cover the vast majority of abortion procedures used after the first twelve weeks of pregnancy." *Id.* "Partial-birth abortion" "is not a medical term; [r]ather, it is invented, inflammatory terminology: a propaganda ploy intended to provoke legislators and the public." *Id.*

7. *See* AM. CIV. LIBERTIES UNION, *The State "Partial-Birth" Bills: Enjoined in the Courts* (visited Jan. 22, 1999) <http://www.alcu.org/issues/reproduct/statepbbans.html> [hereinafter *State "Partial-Birth" Bills*]. The states which have passed "partial-birth abortion" bans include: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, New Jersey, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. *See id.*

Virginia's "partial-birth abortion" ban was challenged in *Richmond Medical Center for Women v. Gilmore*.[8] In *Gilmore*, the United States Fourth Circuit Court of Appeals granted a stay on a district court's grant of a preliminary injunction to enjoin enforcement of the "partial-birth abortion" ban.[9] In the district court, a group of plaintiffs challenged the constitutionality of the Virginia "partial-birth abortion" ban statute; they claimed the statute was so broad and vaguely worded that it would prohibit abortion methods they performed.[10] The district court agreed with the plaintiffs and granted preliminary injunctive relief because the "partial-birth abortion" statute's language was so vague and the defendants were "unwilling to agree that" the plaintiffs' abortion procedures were prohibited by the statute.[11] Thus, the district court found it necessary to prohibit the enforcement of the Act until those issues could be resolved;[12] however, the court declined to stay the preliminary injunction pending review by the Court of Appeals.[13]

The defendants filed an application to stay the district court's preliminary injunction with the Court of Appeals pending appeal.[14] The Court of Appeals granted the defendants' requested stay on the preliminary injunction and held that the plaintiffs had failed to establish that the statute prohibited "the particular [abortion] procedures that plaintiffs actually [did] perform."[15] As a result, the Court of Appeals found that the plaintiffs lacked standing because they did not have a reasonable fear of prosecution under the statute.[16] The plaintiffs filed a motion requesting that the stay be vacated with a three-judge panel of the Fourth Circuit.[17] The Commonwealth of Virginia simultaneously appealed the merits of the lower court's preliminary injunction.[18]

This note examines *Gilmore* on four grounds and concludes that the case was improperly decided by the Court of Appeals and threat-

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8. 144 F.3d 326 (4th Cir. 1998), *rev'g* 11 F. Supp. 2d 795 (E.D. Va. 1998).

9. *See id.* at 332.

10. *See* Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 799-800 (E.D. Va. 1998), *rev'd* 144 F.3d 326 (4th Cir. 1998) ("seeking a declaration that Chapters 448 and 579 of the 1998 Acts of the General Assembly, Va. Code §18.2-74.2 offend the Constitution of the United States").

11. *Id.* at 829.

12. *See id.*

13. *See Gilmore*, 144 F.3d at 327.

14. *See id.*

15. *Id.* at 328.

16. *See id.*

17. *See State "Partial-Birth" Bills, supra* note 7.

18. *See id.*

ens a woman's constitutionally protected liberty interest to choose abortion as guaranteed by the United States Supreme Court's landmark decision in *Roe v. Wade*.[19] *Gilmore* allows a broad, legislatively-coined term to ban the vast majority of abortion procedures used after the first twelve weeks of pregnancy.[20] First, the Court of Appeals ignored contrary persuasive authority by concluding that the Virginia physicians did not have standing to challenge the "partial-birth abortion" ban statute.[21] Second, the Court of Appeals improperly concluded that the statute was unambiguous and therefore deviated from the reasoning in other "partial-birth abortion" ban cases.[22] Third, assurances from future prosecution by the defendants should not have been weighed as heavily in the standing decision-making process.[23] Finally, the decision is problematic on public policy grounds because the decision could severely limit the ability of physicians to bring claims on behalf of themselves and their patients and increase health risks to women seeking abortions.[24]

I. THE CASE

A group of Virginia physicians, medical clinics, and non-profit corporations offering reproductive health services, including abortions, filed a civil rights action seeking a declaration that §18.2-74.2 of the Virginia Code,[25] which states, in part, "that a physician shall not knowingly perform a partial birth abortion that is not necessary to save the life of a mother,"[26] violated the United States Constitution.[27] Particularly, the plaintiffs claimed that Virginia's Partial-Birth Abortion Act violated a woman's right to privacy under the Due Process

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19. 410 U.S. 113, 151-67 (1973) (holding that a woman can constitutionally choose abortion with varying qualifications depending on the stage of her pregnancy).

20. *See Stop Congress from Criminalizing Safe Abortion Procedures*, *supra* note 6.

21. *See id. See also infra* notes 131-49 and accompanying text.

22. *See infra* notes 150-69 and accompanying text.

23. *See infra* notes 170-72 and accompanying text.

24. *See infra* notes 173-85 and accompanying text.

25. *See* VA. CODE ANN. §18.2-74.2(A) (Michie 1998) (describing the Partial Birth Abortion Prohibited Act).

26. *Id.* The statute defines the term "partial-birth abortion" as "an abortion in which the person performing the abortion deliberately and intentionally delivers a living fetus or a substantial portion thereof into the vagina for the purpose of performing a procedure the person knows will kill the fetus, performs the procedure, kills the fetus and completes the delivery." VA. CODE ANN. §18.2-74.2(D) (Michie 1998).

27. *See* Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 799 (E.D. Va. 1998), *rev'd* 144 F.3d 326 (4th Cir. 1998).

Clause of the Fourteenth Amendment,[28] was void for vagueness,[29] and violated the Equal Protection Clause of the Fourteenth Amendment.[30]

> First, the plaintiffs argued that the Act offended the
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> controlling [Constitutional] principles that: (i) the State may not, before fetal viability, constitutionally impose an undue burden on a woman's decision to have an abortion; and (ii) that '[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'[31]

The plaintiffs contended that the Act violated the rule in *Planned Parenthood v. Casey* which required an exception for maternal health after viability.[32] Second, the plaintiffs argued that the legislatively-coined term "partial-birth abortion"[33] used in §18.2-74.2(D)[34] was so broad and vague that it may have encompassed two key procedures they currently performed legally.[35] Finally, the plaintiffs contended that the Act violated the Equal Protection Clause of the Fourteenth Amendment.[36]

The district court held that the medical clinics and physicians had standing to challenge the statute since they intended to continue

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28. *See id. See also* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) ("Matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."). *Casey* affirmed that "the reasoning in *Roe v. Wade*, 410 U.S. 113 (1973), relate[s] to a woman's liberty because it involves personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it." *Id.* at 853. *See also* U.S. CONST. amend. XIV, §1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

29. *See Gilmore*, 11 F. Supp. 2d at 799. The void for vagueness doctrine provides that criminal laws "must provide fair notice to persons before making their activity criminal and also . . . restrict the authority of police officers to arrest persons for a violation of the law." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §16.9 (5th ed. 1995).

30. *See Gilmore*, 11 F. Supp. 2d at 799. *See also* U.S. CONST. amend. XIV, §1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

31. *Gilmore*, 11 F. Supp. 2d at 801 (quoting *Casey*, 505 U.S. at 878).

32. *See id.* at 801 (citing *Casey*, 505 U.S. at 879) (holding that a "[s]tate may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability") (reaffirming the holding of *Roe v. Wade*, 410 U.S. 113, 164-65 (1973), that "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")).

33. *See supra* note 6.

34. VA. CODE ANN. §18.2-74.2 (D) (Michie 1998).

35. *See* Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 800 (E.D. Va. 1998), *rev'd* 144 F.3d 326 (4th Cir. 1998).

36. *See id.* at 799.

performing abortions, guaranteed under *Roe v. Wade*,[37] that were arguably prohibited and therefore prosecutable under the broad, vague language of the state's "partial-birth abortion" statute.[38] Next, the court considered whether or not to grant a preliminary injunction.[39] A preliminary injunction is warranted if a plaintiff satisfies each of the four elements of a hardship balancing test:[40] likelihood of irreparable harm to the plaintiff if denied, likelihood of harm to defendant if granted, likelihood of plaintiff success on the merits, and public interest.[41]

In applying these factors, the district court first found that the plaintiffs established an immediate irreparable harm because the statute would require the physicians, who had previously performed legal abortions, "to alter their medical advice to, and their medical care of their patients, contrary to their best professional judgment."[42] Second, the court found that the harm to the plaintiffs outweighed possible harm to the defendants because a woman's constitutional liberty interest to terminate her pregnancy outweighs a State's interest in potential life before viability.[43] Third, the court found that the plaintiff would likely succeed on the lack of maternal health exception claim.[44] Finally, the court felt that the public interest favored a grant of a preliminary injunction since the statute may have been unconstitutional because it was so vague.[45] Since the plaintiffs established the four factors of the hardship balancing test, the district court concluded that the plaintiffs were entitled to preliminary injunctive relief on June 25, 1998.[46]

On June 29, 1998, the district court declined to stay its order pending an appeal to the United States Court of Appeals for the Fourth Circuit.[47] In a single judge decision, the Court of Appeals questioned the district court's conclusion that the plaintiffs faced a reasonable fear of prosecution under section §18.2-74.2(D) and thus

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37. 410 U.S. 113 (1973).

38. *See Gilmore*, 11 F. Supp. 2d at 805.

39. *See id.* at 806-19.

40. *See id.* at 806.

41. *See id.* (citing Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 812 (1992) (citing L.J. By & Through Darr v. Massinga, 838 F.2d 118, 120 (4th Cir. 1988) *cert. denied*, 488 U.S. 1018 (1989))).

42. *Id.* at 809.

43. *See id.* at 810 (citing Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992)).

44. *See id.* at 823-27.

45. *See id.* at 829.

46. *See id.*

47. *See* Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326, 327 (4th Cir. 1998), *rev'g* 11 F. Supp. 2d 795 (E.D. Va. 1998).

had standing to challenge the provision.[48] The Court of Appeals concluded that the plaintiffs had not established that the statute covered their procedures and held that the physicians did not have standing to challenge the statute.[49]

II. LEGAL BACKGROUND

Congress and the states have recently begun to introduce and pass "partial-birth abortion" bans.[50] Physicians and abortion providers have continually challenged the various state "partial-birth abortion" bans.[51] Challenges to "partial-birth abortion" ban statutes often present questions of standing.[52] The recent "partial-birth abortion" ban cases have generally held that physicians do have standing to challenge the statutes on constitutional grounds.[53]

The "partial-birth abortion" ban movement began when the National Right to Life Committee (NRLC) obtained a paper delivered by an Ohio doctor at a 1992 National Abortion Federation meeting in which he described an abortion procedure performed on patients twenty to twenty-six weeks pregnant.[54] Instead of limiting the abortion ban to a medical procedure as described by the Ohio physician, anti-choice advocates created the "partial-birth abortion" term for political reasons.[55]

In 1995, Congress introduced the Partial-Birth Abortion Ban Act[56] for the first time as an attempt to prohibit abortions in which the physician "partially vaginally delivers a living fetus before killing the fetus and completing the delivery."[57] Both houses of Congress approved the Ban; however, President Clinton vetoed the legislation on April 10, 1996 because the bill failed to include a provision al-

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48. *See id.* at 327-32.

49. *See id.* at 332.

50. *See* H.R. 1833, 104th Cong. § 1531 (1995); H.R. 1122, 105th Cong. § 1531 (1997); *supra* note 7 (listing the 27 states that have introduced and passed "partial-birth abortion" bans).

51. *See generally State "Partial-Birth" Bills, supra* note 7.

52. *See, e.g.*, Richmond Med. Ctr. For Women v. Gilmore, 11 F. Supp. 2d 795 (E.D. Va. 1998), *rev'd* 144 F.3d 326 (4th Cir. 1998); Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997); Carhart v. Stenberg, 972 F. Supp. 507 (D. Neb. 1997); Planned Parenthood v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997); Summit Med. Assocs. v. James, 984 F. Supp. 1404 (M.D. Ala. 1998).

53. *See infra* notes 88-109 and accompanying text.

54. *See* CONG. Q., *Roe v. Wade at 25* (visited Jan. 21, 1999) <http://voter.cq.com/news/roe19980121cqr1.html> [hereinafter *Roe v. Wade at 25*].

55. *See id.*

56. H.R. 1833, 104th Cong. § 1531 (1995).

57. *Id.*

lowing "partial-birth abortions" to be performed when necessary to protect the mother's health.[58]

Constitutionally, an exception for maternal health is required in all abortion regulations.[59] In *Roe v. Wade*, the Supreme Court held that although a state may regulate abortion in the second trimester, the state "must regulate the abortion procedure in ways that are reasonably related to maternal health."[60] Moreover, in the third trimester, even though states can ban abortions, they must make exceptions "where it is necessary . . . [to] preserv[e] the life or health of the mother."[61] The anti-choice movement specifically lobbied to leave the word health out of the ban because health "has been construed by the Court to mean 'psychological as well as physical well-being.'"[62] Although the House subsequently voted to cancel President Clinton's veto on the "partial-birth abortion" ban, the Senate sustained the President's veto by nine votes.[63]

The legislature reintroduced the bill on "partial-birth abortions" in February 1997,[64] in response to announcements by a panel of the American College of Obstetricians and the American Medical Association that a "partial-birth abortion"-type procedure was not generally the only means available to save the life of the mother.[65] Moreover, in the same year, "Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, announced that he had lied about

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58. *See* Kathleen A. Cassidy Goodman, *Recent Development, The Mutation of Choice*, 28 ST. MARY'S L.J. 635, 640-41 (1997).

59. *See Roe v. Wade at 25*, *supra* note 54.

60. Roe v. Wade, 410 U.S. 113, 164 (1973).

61. *Id.* at 164-65.

62. Goodman, *supra* note 58, at 641 (quoting Doe v. Bolton, 410 U.S. 179, 191-92 (1973)).

63. *See id.* at 640.

64. *See* H.R. 1122, 105th Cong. § 1531 (1997).

65. *See* Goodman, *supra* note 58, at 642. The American College of Obstetricians and Gynecologists (ACOG), "while ultimately opposing the Ban, stated in January 1996 that it could not identify any circumstances under which partial-birth abortions would be the only option available to save the life or preserve the health of the mother." *Id.* Ironically, the ACOG stated in January that these partial-birth-type abortions "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman." *Roe v. Wade at 25*, *supra* note 54 (quoting AM. COLLEGE OBSTETRICIANS & GYNECOLOGISTS, *Statement* (Jan. 12, 1999)).

In May 1997, the "American Medical Association (AMA) endorsed a ban on partial-birth abortions, stating '[i]t is a procedure which is never the only appropriate procedure.'" Goodman, *supra* note 58, at 642 (quoting Helen Dewar, *AMA Blocks "Partial-Birth" Abortion Curb: Endorsement of Legislation Comes as Senate Vote Nears*, WASH. POST, May 20, 1997, at A1). However, new evidence indicates that the AMA was so politically naive and consumed by protecting the financial interests of doctors on Medicare issues that it ended up supporting legislation that did not benefit the patient or protect the physician-patient relationship. *See The A.M.A.'s 'Partial Birth' Fiasco*, N.Y. TIMES, Dec. 7, 1998, at A1.

the number of partial-birth abortions performed nationwide on healthy babies for non-therapeutic purposes."[66] The President once again vetoed the Act.[67] If Congress reintroduces, or if Congress is successful in overriding the presidential veto, the legislation could still face a major obstacle with the United States Supreme Court.[68] Judge Richard G. Kopf of the Federal District Court for Nebraska believes the statutes are likely to be unconstitutional because they are so vague; "'One simply cannot ascertain from the legislative history precisely what the Legislature wanted to ban. . . . We know the legislators wanted to ban 'partial birth' abortions, but that term is unknown in medical circles.'"[69]

Despite the possible constitutional problems with the federal "partial-birth abortion" ban, many states have introduced similar bans.[70] Virginia based its "partial-birth abortion" ban statute on the federal Act.[71] In Virginia, the constitutional challenge of the state "partial-birth abortion" ban statute revolved around the issue of standing.[72]

In order for a court to have jurisdiction, a "case or controversy" must exist,[73] and the plaintiffs must establish standing.[74] The judicial power given under Article III does not unconditionally authorize the court to determine the constitutionality of legislative acts,[75] but rather the Article III judicial power is a last resort for the determination of a

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66. Goodman, *supra* note 58, at 642. However, "partial-birth abortion" ban opponents claim that Fitzsimmons was merely speaking without statistical evidence. *See* Deborah Sontag, *Physicians Say 'Partial Birth' is Just One Way*, N.Y. TIMES, Mar. 21, 1997, at A1.

67. *See* Goodman, *supra* note 58, at 642.

68. *See id.* at 642-43. "Until the Supreme Court deals directly with partial-birth abortion, nobody is going to know whether these laws are constitutional or not." *Judges Block Partial-Birth Abortion Bans*, 28 MARANATHA CHRISTIAN J. 2440, ¶ 2 (visited Apr. 21, 1998) <http://www.mcjonline.com/news/news2440.htm> (quoting Nik Nikas, attorney for Americans United for Life).

69. Robert Pear, *Inquiry Criticizes A.M.A. Backing of Abortion Procedure Ban*, N.Y. TIMES, Dec. 4, 1998, at A1 (quoting Judge Richard G. Kopf).

70. *See supra* note 7 (listing the 27 states that have introduced "partial-birth abortion" bans).

71. *See* COMMONWEALTH VA., OFFICE ATTORNEY GEN., *Statement by Attorney General Mark Earley* (visited Jan. 21, 1999) <http://www.state.va.us/~oag/press/partial/htm>.

72. *See generally* Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795 (E.D. Va. 1998), *rev'd* 144 F.3d 326 (4th Cir. 1998).

73. U.S. CONST. art. III, §2 ("The judicial Power shall extend to all Cases . . . and to Controversies. . . .").

74. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-78 (1992).

75. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982).

real and vital controversy.[76] The district court never addressed whether the plaintiffs' challenge in *Gilmore* was a "case or controversy;" however, since the court immediately addressed standing,[77] it likely assumed a "case or controversy" existed.

Once the court determines that a "case or controversy" exists, the plaintiff must establish standing.[78] In order to establish standing, the plaintiff must prove three elements.[79] First, the plaintiff must have suffered an "injury in fact," an invasion of a concrete and actual or imminent legally protected interest.[80] Second, a causal connection must exist between the injury and the conduct at issue such that the injury is "'fairly . . . trace[able] to the challenged action of the defendant.'"[81] Third, it must be likely "that the injury will be 'redressed by a favorable decision.'"[82] Each element requires separate analysis.

The "injury in fact" requirement for standing is generally at issue in cases challenging "partial-birth abortion" ban statutes. When proving an "injury in fact," it is not necessary to wait for the threatened injury to occur in order to obtain preventive relief.[83] An impending injury will satisfy the "injury in fact" requirement of standing.[84] When challenging the constitutionality of a criminal statute, plaintiffs do not have to first "expose themselves to actual arrest or prosecution."[85] In other words, even when a plaintiff alleges s/he will engage in conduct allowed by the Constitution but forbidden by a statute, under which s/he may be prosecuted, the plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."[86] In sum, to prove a credible threat of prosecution exists, a plaintiff must prove that the threat is real and immediate and not imaginary, speculative, conjectural, or hypothetical.[87]

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76. *See id.* (quoting Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

77. *See generally* Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795 (E.D. Va. 1998), *rev'd* 144 F.3d 326 (4th Cir. 1998).

78. *See Lujan*, 504 U.S. at 560.

79. *See id.* at 560-61.

80. *Id.* at 560.

81. *Id.* (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

82. *Id.* at 561 (quoting *Simon*, 426 U.S. at 43).

83. *See* Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 804 (E.D. Va. 1998), *rev'd* 144 F.3d 326 (4th Cir. 1998) (citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (quoting Pennsylvania v. West Va., 262 U.S. 553, 593 (1923))).

84. *See id.* (citing *Babbitt*, 442 U.S. at 298 (quoting *Pennsylvania*, 262 U.S. at 593)).

85. *Id.* (citing *Babbitt*, 442 U.S. at 298). *See also* Steffel v. Thompson, 415 U.S. 452, 459 (1974).

86. *Gilmore*, 11 F. Supp. at 804 (quoting Doe v. Bolton, 410 U.S. 179, 188 (1973)).

87. *See id.* (citing *Babbitt*, 442 U.S. at 298).

Three of the most recent cases in which plaintiffs challenged "partial-birth abortion" bans centered around physician standing to challenge the statutes individually and on behalf of patients. For example, in *Evans v. Kelley*,[88] the court held, and the defendants did not dispute, that the plaintiff physicians had standing to challenge Michigan's "partial-birth abortion" ban statute on vagueness grounds because as providers of abortion they were subject to prosecution under the statute.[89] However, the *Evans* defendants did contest the physicians' standing to challenge the ban on the grounds that it constituted an undue burden to women seeking abortion,[90] claiming that only women seeking abortions covered under the statute had standing to bring such a claim.[91] The court found, based on U.S. Supreme Court precedent, that doctors who perform abortions are entitled to assert third-party standing for the rights of women seeking abortions.[92] In sum, the court held that the physician plaintiffs had individual standing to challenge the vagueness of the statute and third-party standing to challenge the statute as an undue burden on behalf of their patients.

A physician's standing to challenge a "partial-birth abortion" act individually, and on behalf of her/his patients was also addressed in *Carhart v. Stenberg*.[93] In this case, the physician intended and preferred to use a method of abortion[94] he feared was criminalized by the act.[95] Seeking a preliminary injunction, Dr. Carhart claimed he had standing both to raise his own rights and the rights of his patients.[96] First, he argued that the "partial-birth abortion" ban caused him to subject his patients to a greater risk of injury or death by following the statute instead of just performing a safe and effective abortion when medically advisable.[97] Since the statute prohibited the plaintiff from performing an abortion method that he may deem safest for his patients, Dr. Carhart was subjecting his patients to an increased medical

88. 977 F. Supp. 1283 (E.D. Mich. 1997).

89. *See id.* at 1302-03.

90. *See id.* at 1302.

91. *See id.* Women seeking abortions would have standing to challenge the statute because states can impose restrictions on abortions before fetal viability as long as those restrictions do not impose an "undue burden" on the woman's ability to get an abortion. Roe v. Wade, 410 U.S. 113, 163-64 (1973).

92. *See Evans*, 977 F. Supp. at 1302.

93. 972 F. Supp. 507 (D. Neb. 1997).

94. *See id.* at 514.

95. *See id.* at 520.

96. *See id.*

97. *See id.* at 525.

risk; therefore, the court held that Dr. Carhart had individual standing to challenge the statute.[98]

Next, the court held that Dr. Carhart had the right to assert third-party standing on behalf of his patients for two reasons.[99] First, the patient-doctor relationship is "fiduciary-like."[100] Secondly, women seeking abortions often cannot challenge statutes on their own behalf for they may fear a loss of privacy, and their claims may be mooted[101] by the "time-sensitive problem of pregnancy."[102] Based on the fiduciary nature of the relationship and womens' difficulties in bringing their own claims, the court held that Dr. Carhart had standing to challenge the "partial-birth abortion" ban statute based on his own rights and on the rights of his patients.[103]

Individual and third-party standing for a physician to challenge a "partial-birth abortion" ban statute was also addressed in *Planned Parenthood v. Woods.*[104] Similar to the *Carhart*[105] decision, the *Woods* court found individual and third-party standing for physicians to challenge the "partial-birth abortion" ban.[106] First, the court held that the physicians had individual standing to challenge the ban as unconstitutionally vague.[107] Secondly, since the physician-patient relationship was "fiduciary-like" and since women may be prevented from challenging the statute for privacy or mootness reasons, the court found standing for the physicians to challenge the statute on behalf of their patients as an undue burden.[108] Thus, in *Woods,* the physician plain-

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98. *See id.* at 520-21.

99. *See id.* at 520.

100. *Id.* at 521.

101. A claim is "moot" if "'there is no subject matter on which the judgment of the court's order can operate.'" JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §2.12(c) (5th ed. 1995) (quoting *Ex parte* Benz, 177 U.S. 378, 390 (1900)). Due to the importance of some constitutional issues, the Supreme Court has been willing at times to relax the mootness rule so that it will not prevent review. *See id.* In abortion cases, a plaintiff's claim would not be initially moot, but it would become moot because the plaintiff would no longer be pregnant by the time of trial; therefore, the claim would lack a subject matter upon which the court could rule. *See id.*

102. *Carhart,* 972 F. Supp. at 521.

103. *See id.* at 520.

104. 982 F. Supp. 1369 (D. Ariz. 1997).

105. 972 F. Supp. at 520.

106. *Woods,* 982 F. Supp. at 1376-77.

107. *See id.* at 1376. The court then held that the ban was unconstitutionally vague because it did not give physicians fair warning as to the procedures it prohibited. *See id.* at 1379.

108. *Id.* at 1376. The court held that the "ban constituted an 'undue burden' on the right to have an abortion because, in prohibiting the safest, most common methods of abortion after the first trimester, the ban would force women from safer to riskier procedures." *State "Partial-Birth" Bills, supra* note 7 (citing *Woods,* 982 F. Supp. at 1376-78). More-

tiffs were found to have standing to challenge the statute individually and on behalf of their patients.[109]

Although, "partial-birth abortion" ban statutes have been passed in twenty-seven states,[110] many courts have found standing for physicians to challenge the bans themselves and on behalf of their patients.[111] The Fourth Circuit Court of Appeals' finding of no standing for the plaintiffs in *Gilmore* deviates from this trend.

III. SUMMARY OF THE COURT'S REASONING

The first question facing the United States Court of Appeals for the Fourth Circuit on the issue of standing was whether or not the plaintiffs had proven "injury in fact."[112] The plaintiffs argued that they suffered an "injury in fact" because they faced a reasonable fear of prosecution under Virginia's "partial-birth abortion" ban statute.[113] The court concluded that the statute was limited to prohibit one particular type of abortion procedure.[114] Moreover, the court concluded that the plaintiffs had conceded, and the district court had determined, that the physicians did not perform the particular procedure prohibited by the statute.[115] Therefore, the Court of Appeals found that the plaintiffs had no reasonable fear of prosecution under the statute, and held the district court's finding of standing to be in error.[116]

However, the court reasoned that even if the statute could be read to prohibit other methods of abortion, the district court should have taken into account the defendants' assurances not to prosecute the plaintiffs under the statute, rather than lightly dismissing them.[117] First, the Attorney General and the Commonwealth of Virginia had "provided unequivocal assurances" that they did not interpret the statute to prohibit abortion methods the plaintiffs performed before the

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over, the court explained that even if the statute did not ban procedures which physicians may find to be the safest, the statute's lack of an exception for maternal health "[was] another reason to find [it] unconstitutional." *Woods*, 982 F. Supp. at 1378.

109. *See Woods*, 982 F. Supp. at 1376-78.

110. *See State "Partial-Birth" Bills*, *supra* note 7.

111. *See supra* notes 88-109 and accompanying text.

112. *See* Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326, 328 (4th Cir. 1998), *rev'g* 11 F. Supp. 2d 795 (E.D. Va. 1998).

113. *See id.*

114. *See id.* (claiming that "the plain language of the Virginia statute cannot reasonably be read to prohibit the particular procedures the plaintiffs actually do perform").

115. *See id.*

116. *See id.*

117. *See id.* at 330-31.

statute was enacted.[118] Secondly, the defendants had maintained that they would not enforce the statute against plaintiffs' performance of such procedures.[119] Third, even if a physician began to perform an abortion procedure that was legal under the "partial-birth abortion" ban statute but incidentally became one that was banned by statute, the defendants had maintained that the physician would not be prosecuted under the statute.[120] Although the district court rejected these assurances, the Court of Appeals found them persuasive for two reasons.[121]

"First, by suggesting that the Commonwealth's officials [would] yield to politics over law, the district court impute[d] a type of bad faith, if not lawlessness, to the State's officials without either authority or justification."[122] Second, the district court's finding that these assurances could be abandoned by the same officials who promised them when the winds of public opinion changed, ignored "the fact that these statements were made under oath and with the knowledge and imprimatur of the Governor of the Commonwealth."[123] Thus, the Court of Appeals held that even if the "partial-birth abortion" ban statute could be read to include plaintiffs' procedures, the district court's finding of standing would still be in error because it did not give the defendants' assurances the proper weight and authority they deserved.[124]

Overall, the Court of Appeals claimed that the district court erred by over-reading portions of the statute and finding ambiguity where none existed.[125] Moreover, the Court of Appeals maintained that the district court had completely failed to consider those portions of the statute that bore directly upon the plaintiffs' claims that the statute was so broad and vague as to prohibit their abortion procedures.[126] Therefore, the Court of Appeals granted a stay on the district court's injunction because the district court's finding of standing was in error.

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118. *Id.* at 330.
119. *See id.*
120. *See id.*
121. *See id.* at 331.
122. *Id.*
123. *Id.*
124. *See id.*
125. *See id.*
126. *See id.*

IV. ANALYSIS

The Court of Appeals decision is problematic for four reasons. First, it shows a deviation from the analysis of physician standing usually followed in "partial-birth abortion" ban cases.[127] Second, its conclusion that the "partial-birth abortion" ban statute was unambiguous deviates from the reasoning of other "partial-birth abortion" ban cases.[128] Third, it places too much weight on the assurances of the defendants not to prosecute.[129] Fourth, for public policy reasons, the decision could threaten a woman's constitutional right to choose an abortion under *Roe v. Wade*.[130]

First, the decision deviates from the analysis of physician standing in similar cases where "partial-birth abortion" ban statutes were challenged. Although not mandatory authority for the Fourth Circuit Court of Appeals, three other courts addressing "partial-birth abortion" bans, *Evans*,[131] *Carhart*,[132] and *Woods*,[133] found standing for physicians to bring vagueness claims on behalf of themselves, and undue burden claims on behalf of their patients.[134] In *Evans*, the defendants claimed that the physician plaintiffs lacked standing to challenge the statute on undue burden grounds, arguing that only women seeking abortions under the statute could assert an undue burden claim.[135] Moreover, in *Evans*, as well as in *Woods*,[136] the defendants did not dispute that the physician plaintiffs had standing to raise a vagueness challenge because they were subject to prosecution under the statute as providers of abortion.[137] The court found that the physicians suffered a reasonable threat of prosecution because the statute was "hopelessly ambiguous and not susceptible to a reasonable understanding of its meaning."[138]

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127. *See infra* notes 131-49 and accompanying text.

128. *See infra* notes 150-69 and accompanying text.

129. *See infra* notes 170-72 and accompanying text.

130. *See infra* notes 173-85 and accompanying text.

131. Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997). *See supra* notes 88-92 and accompanying text.

132. Carhart v. Stenberg, 972 F. Supp. 507 (D. Neb. 1997). *See supra* notes 93-103 and accompanying text.

133. Planned Parenthood v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997). *See supra* notes 104-09 and accompanying text.

134. *See, e.g., Evans*, 977 F. Supp. at 1302-03; *Carhart*, 972 F. Supp. at 520; *Woods*, 982 F. Supp. at 1376.

135. *See Evans*, 977 F. Supp. at 1302.

136. *See Woods*, 982 F. Supp. at 1376.

137. *See Evans*, 977 F. Supp. at 1302.

138. *Id.* at 1311.

In *Gilmore*, the Fourth Circuit Court of Appeals concluded the "partial-birth abortion" ban statute to be unambiguous by finding that only one procedure was banned.[139] Since no reasonable fear of prosecution could exist under a statute that clearly does not prohibit the procedures the plaintiffs performed, the Court of Appeals held that the physicians lacked standing.[140] With a statute as medically controversial and vague as a "partial-birth abortion" ban statute,[141] the Court of Appeals should have found physician standing on the physicians' vagueness claim for the reason stated by the courts in *Evans* and *Woods*. As providers of abortions, they were subject to prosecution under the statute.[142]

The Court of Appeals also could have granted the *Gilmore* physicians standing because the statute limited their abilities to choose safe, effective methods of abortion for their patients. For example, the court in *Carhart* granted physician standing because the "partial-birth abortion" ban at issue prohibited physicians from practicing medicine in a safe and effective manner.[143] Since the ban may have forced Dr. Carhart to forego a particular procedure he may have believed was the safest and most effective for a patient, his patients may have been subjected to increased medical risk, and therefore, standing was warranted.[144] In *Gilmore*, the Court of Appeals held that the Virginia "partial-birth abortion" ban statute prohibited one particular type of procedure.[145] As a result of this finding, physicians' discretion to choose the most medically appropriate abortion method for their patients will likely be denied.[146] Therefore, as in *Carhart*,[147] standing was warranted because physicians may be forced to subject their patients to increased medical risk under "partial-birth abortion" bans.

In accordance with *Carhart*, *Woods*, and *Evans*, the district court found standing in *Gilmore* because the possible ban on some of the procedures plaintiffs performed would have prevented them from the

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139. *See* Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326, 327-28 (4th Cir. 1998), *rev'g* 11 F. Supp. 2d 795 (E.D. Va. 1998).

140. *See id.* at 328.

141. *See* AM. CIV. LIBERTIES UNION, *Bans on So-Called "Partial-Birth Abortions,"* (visited Jan. 25, 1999) <http://www.aclu.org/library/pbabans.html> (quoting *Evans*, 977 F. Supp. at 1311) ("[P]hysicians 'simply cannot know with any degree of confidence' which procedures the ban prohibits.") [hereinafter *Bans on So-Called "Partial-Birth Abortions"*].

142. *See Evans*, 977 F. Supp. at 1302; *Woods*, 982 F. Supp. at 1376.

143. *See Carhart*, 972 F. Supp. at 520-21.

144. *See id.*

145. *See* Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326, 328 (4th Cir. 1998), *rev'g* 11 F. Supp. 2d 795 (E.D. Va. 1998).

146. *See Bans on So-Called "Partial-Birth Abortions," supra* note 141.

147. 972 F. Supp. at 520-21.

safe practice of medicine.[148] The result of the stay the Court of Appeals granted will be to "chill . . . physicians' practice of medicine to such an extent that [they will] be required to rely on procedures which are medically less safe, or to refer patients out-of-state for the method of abortion which is safest and in their best interests."[149]

In addition to deviating from the standing analysis generally used in "partial-birth abortion" ban cases, the Court of Appeals decision that the statute was unambiguous was also inappropriately premised on the reasoning of only one "partial-birth abortion" ban case. In *Planned Parenthood v. Doyle*,[150] a group of physicians, on behalf of themselves and their patients, filed suit challenging the constitutionality of the 1997 Wisconsin "partial-birth abortion" ban statute[151] and seeking a preliminary injunction.[152] The *Doyle* court denied the plaintiffs' request for an injunction on the grounds that the plaintiffs failed to establish that they were likely to succeed on the merits or that an irreparable injury would result from an enforcement of the Act.[153]

Specifically, the *Doyle* court did not find the statute to be vague[154] or to include plaintiffs' procedures.[155] In examining the Virginia "partial-birth abortion" ban statute for vagueness, the Court of Appeals in *Gilmore* cited *Doyle* several times.[156] However, the Court's reliance on *Doyle* was misplaced because the *Gilmore* appeal focused on the physicians' standing,[157] while standing in *Doyle* was merely assumed.[158] In *Gilmore*, the Court of Appeals found that the plaintiffs failed to establish the likelihood that the Virginia "partial-birth abortion" ban statute applied to their abortion procedures and therefore lacked standing to bring a claim of vagueness.[159] In *Doyle*, on the other hand, the court not only found that the statute was not vague, but it charged the plaintiffs with creating the alleged vagueness as to the meaning of the statute.[160] The *Doyle* court opined that the physicians "feigned ignorance" because "the phrase 'partial-birth abortion'

148. *See Gilmore*, 11 F. Supp. 2d at 807.
149. *Id.*
150. 9 F. Supp. 2d 1033 (W.D. Wis. 1998).
151. *See id.* at 1035 (discussing WIS. STAT. §§ 895.038 and 940.16 (1997)).
152. *See id.*
153. *See id.* at 1046.
154. *See id.* at 1040-45.
155. *See id.* at 1045-46.
156. *See* Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326, 328-30 (4th Cir. 1998), *rev'g* 11 F. Supp. 2d 795 (E.D. Va. 1998).
157. *See generally id.*
158. *See generally Doyle*, 9 F. Supp. 2d 1033.
159. *See Gilmore*, 144 F.3d at 332.
160. *See Doyle*, 9 F. Supp. at 1041.

[was] understood in the medical community" to refer to a specific procedure.[161] Thus, the *Gilmore* court inappropriately cited *Doyle* as evidence that Virginia's "partial-birth abortion" ban was vague.

Gilmore can be further distinguished from *Doyle* because the decision in *Doyle* was based on the testimony of an expert doctor who testified that the Wisconsin statute proscribed plaintiffs' abortion procedures as criminal.[162] In *Gilmore*, however, both the defendants' counsel and experts were unwilling to concede that the Virginia statute banned a particular procedure.[163] As a result, the district court granted the preliminary injunction in part because the disagreement between the plaintiffs and the defendants showed that the ban "[did] not give 'a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.'"[164] The district court found that Virginia's statute was vague and stated, "[W]hen persons of ordinary intelligence, including the defendants' own expert, are confused as to the statute's meaning and differ as to the interpretation of the Act, there is good reason to believe that, at law, the statute is unclear and ill-defined."[165]

Since the experts in *Gilmore* could not agree to the procedures prohibited by the ban, the Court of Appeals improperly cited *Doyle* as evidence that a "partial-birth abortion" ban statute was not vague. In *Doyle*, the experts agreed that the Wisconsin statute was vague.[166] In *Gilmore*, the experts did *not* agree on whether the statute was vague.[167] The vagueness problem rests on the fact that legislators are not equipped to make medical decisions; therefore, they should not regulate medicine in a manner that undermines patient safety.[168] "The ['partial-birth abortion'] bans' uncertain scope and use of non-medical terminology simply highlight that" decisions about the best surgical techniques for abortions should be made by doctors and not politicians.[169]

The Court of Appeals decision placed too much weight on the assurances of the defendants not to prosecute. The Court felt that the

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161. *Id.*

162. *See* Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 819 (E.D. Va. 1998), *rev'd* 144 F.3d 326 (4th Cir. 1998) (describing the testimony of Dr. Aultman in *Doyle*).

163. *See id.*

164. *Id.* at 818 (citation omitted).

165. *Id.*

166. *See supra* note 162 and accompanying text.

167. *See Gilmore*, 11 F. Supp. 2d at 819.

168. *See Bans on So-Called "Partial-Birth Abortions," supra* note 141.

169. *Id.*

district court should have given the defendants' assurances against prosecution a sufficient amount of weight when considering the plaintiffs' vagueness claim because the defendants maintained that they did not interpret the ban to include plaintiffs' abortion procedures.[170] Furthermore, the defendants maintained that they would not enforce the statute against persons performing such procedures even if they occurred incidentally.[171]

Although the Court of Appeals would have relied heavily on the defendants' sworn affidavits, the district court correctly found it impossible to give them much weight. A state cannot effectively protect a physician against prosecution under a "partial-birth abortion" ban statute when it is not clear what procedures are banned. Since the defendants themselves were unable to agree whether or not the plaintiffs' procedures were excluded from the reach of the statute, their sworn assurances could not accurately be said to protect the plaintiffs and therefore should not have been given any weighted consideration. Furthermore, it is possible that the defendants could have been pressured and threatened by anti-choice advocates to start prosecuting under the statute anyway.[172] Therefore, the only way to protect women's rights to seek abortion is to grant physicians standing.

Finally, for public policy reasons, the *Gilmore* decision could threaten a woman's constitutional right to choose an abortion under *Roe v. Wade.* The "partial-birth abortion" ban issue is a surrogate for the larger abortion debate.[173] State "partial-birth abortion" ban statutes thrust the horrible aspects of abortion in the face of the American public; anti-choice advocates hope this will encourage most Americans, even those who thought they agreed with *Roe,* to support the bans.[174]

In nineteen of the twenty-seven states with "partial-birth abortion" ban statutes, medical providers have challenged the bans "on grounds that they endanger women's health, jeopardize safe medical practice, and violate the constitutional rights of both patients and doctors."[175] However, out of these nineteen challenges, seventeen of the "partial-

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170. *See* Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326, 330 (4th Cir. 1998), *rev'g* 11 F. Supp. 2d 795 (E.D. Va. 1998).

171. *See id.*

172. This is especially likely given that "partial-birth abortion" ban statutes were originally introduced as a result of anti-choice pressure.

173. *Cf. Roe v. Wade at 25, supra* note 54 ("[T]he anti-abortion movement seized [the] limited ban because public sentiment is strongly against the movement's broader goal of outlawing abortions.").

174. *See id.*

175. *Bans on So-Called "Partial-Birth Abortions," supra* note 141.

birth abortion" bans have been enjoined.[176] The *Gilmore* decision is particularly problematic because it holds that a vague statute prohibiting no known medical procedure is unambiguous and therefore constitutional. Therefore, the Court of Appeals has allowed the state legislators to assault reproductive freedom through the back door.[177] Since the Court of Appeals found that the statute was unambiguous, it, in effect, opened the back door for legislators to attack abortion one procedure at a time. The Court of Appeals decision was in error given that the defendants' own experts could not even agree as to what procedures the statute covered.[178]

Gilmore also undermines a woman's right to seek an abortion because it severely limits the ability of physicians to bring claims on behalf of themselves and their patients concerning the constitutionality of abortion statutes in the future.[179] By not allowing physicians standing to challenge the constitutionality of the "partial-birth abortion" ban statute, the Court is essentially condoning vague legislation and subjecting physicians to arbitrary enforcement under unclear standards.[180] Under these "partial-birth abortion" ban statutes which do not describe any known medical procedure, physicians will be unable to conclusively determine which procedures are prohibited.[181] As a result, they will likely fear prosecution and may stop performing abortions.

Moreover, the *Gilmore* decision will unconstitutionally endanger women's health and safety.[182] Since "partial-birth abortion" bans prohibit safe and common methods of abortion, they interfere with a physician's decision to select the type of abortion that is best for her/his patient because s/he will be forced to rely on a method s/he is certain will not violate the statute.[183] Furthermore, since "partial-birth abortion" bans do not provide exceptions for maternal health, they are

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176. *See id.*

177. *See* AM. CIV. LIBERTIES UNION, *ACLU Asks VA Governor to Veto Abortion Ban, Promises Legal Challenge if Bill Becomes Law* (visited Jan. 25, 1999) <http://www.aclu.org/news/n032798a.html>.

178. *See* Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 813 (E.D. Va. 1998), *rev'd* 144 F.3d 326 (4th Cir. 1998).

179. *See Congressional Record: Don't Endanger a Woman's Health*, (visited Jan. 24, 1999) <http://www.policy.com/docs/cr/boxer091798.html> (providing Senator Barbara Boxer's statement that "partial-birth abortion" bans silence physicians).

180. *See Bans on So-Called "Partial-Birth Abortions," supra* note 141.

181. *See id.* (claiming that "physicians appearing in courts all over the country have testified that they read the language of the bans to reach most methods of abortion used throughout pregnancy").

182. *See id.*

183. *See id.*

unconstitutional[184] and will "require women to remain pregnant even in the face of serious health concerns."[185] If standing for physicians to challenge these bans is prohibited, many women will likely be refused abortions that they have a constitutional right to obtain.

V. CONCLUSION

"Partial-birth abortion" bans are the newest issue encompassed within the always controversial realm of abortion.[186] The bans are also a political "indicator of the direction the United States is moving" with respect to a woman's choice.[187] The root of the problem is a politically-created, non-medical, vague term called "partial-birth abortion."

If the "partial-birth abortion" issue is to be resolved, physician standing is key. *Gilmore* sets a precedent for future "partial-birth abortion" cases that will allow courts to eradicate women's constitutional right to abortion procedure by procedure. Although currently there is more legislative than judicial activity on "partial-birth abortion," the issue is probably going to arise in the judicial setting soon. In order for resolution to occur, physicians must have standing to challenge the bans so women's constitutional rights can be protected.

184. *See id.*
185. *Id.* (paraphrasing Hope Clinic v. Ryan, 995 F. Supp. 847, 860 (N.D. Ill. 1998)).
186. *See id.*
187. Goodman, *supra* note 58, at 661.