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MEMORANDUM

To: Virginia House of Delegates

From: John W. Whitehead, President*
The Rutherford Institute

Date: February 7, 2011

Subject: H.B. 1440

The Rutherford Institute supports House Bill 1440, and we urge you to pass this important legislation. This bill creates a civil cause of action for the wrongful death of an unborn child, and is thus a natural complement to Virginia's fetal homicide statute, VA. CODE ANN. § 18.2-32.2. In short, it is illogical to recognize one, but not both, of these legal actions.

The clear national trend is toward greater legal cognizance of the agony suffered by parents when the unborn child they love is killed by the wrongful actions of a third party. Thirty-six (36) states recognize fetal homicide as a crime, and thirty-five (35) states allow a civil cause of action for the wrongful death of an unborn child. Thus, the passage of this bill recognizing the civil cause of action would merely bring the Commonwealth into line with the majority of states that already do so.

This exact legislation has been in effect in Missouri for over twenty years in the form of Missouri Rev. Stat. §1.205.1.[†] The United States Supreme Court refused to entertain a legal challenge to that law in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), ruling

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[†] The substantive text of HB1440 is identical to the Missouri statute, with the exception of Section 7 of HB1440, which was added to the Virginia bill to specifically address concerns about potential for the bill to interfere with *in vitro* fertilization procedures.

that the statute had no impact on the practice of abortion. This decision puts to rest any questions concerning the bill's constitutionality.

Finally, ample care has been taken to ensure that no alarming unintended consequences would result from the legislation. Section 6 ensures that pregnant women will not become the subjects of lawsuits based on their activities during pregnancy. Abortion practices will continue to be governed by VA. CODE ANN. § 18.2-71 *et seq.* and will be unaffected by the law. And Section 7 of the bill specifically precludes it from interfering with assisted conception.

While some have suggested that passage of this bill would result in the banning of oral contraception or interference with women's health care decisions, these arguments are far-fetched and are based on a fundamental misunderstanding of law. This bill is a mere rule of construction that will inform the interpretation of statutes where the legislature's intent is unclear, such as Virginia's wrongful death statute, VA. CODE ANN. § 8.01-50.

The bill is **not** a criminal statute, and in no case would provide such specific notice of prohibited activity as to comport with the United States Constitution's Fourteenth Amendment Due Process requirements. No kind of criminal prosecution could originate from this type of law. Most significantly, the bill would not in any way diminish or supersede the Commonwealth's existing abortion statutes, so it could not possibly interfere with the use of oral contraception or with women's health care decisions.

I am proud to be a Virginian. However, the great Commonwealth has fallen far behind the times in its failure to recognize a civil cause of action for the wrongful death of an unborn child. Parents who suffer the incredible tragedy of losing a beloved unborn baby due to the wrongful act of a third party should not suffer additional injury in the form of the denial of an appropriate legal remedy, including just compensation for medical and funeral expenses. I urge you to pass H.B. 1440.