IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WOMEN'S HEALTH CENTER OF WEST VIRGINIA, ***on behalf of itself, its staff, its physicians, and its patients*****; DR. JOHN DOE,** ***on behalf of himself and his patients*****; DEBRA BEATTY; DANIELLE MANESS; and KATIE QUIÑONEZ,**

Plaintiffs,

Civil Action No. ___
Honorable ____

v.

CHARLES T. MILLER, ***in his official capacity as Prosecuting Attorney of Kanawha County*****; and PATRICK MORRISEY,** ***in his official capacity as Attorney General of West Virginia*****,**

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Other Authorities

Steven Allen Adams, *Old West Virginia Law Making Abortion a Felony Could Be Revived in Post-Roe Decision*, The Parkersburg News & Sentinel (May 7, 2022), https://www.newsandsentinel.com/news/local-news/2022/05/old-west-virginia-law-making-abortion-a-felony-could-be-revived-in-post-roe-decision/ ... 18

1 W. Blackstone, *Commentaries on the Laws of England* (7th ed. 1775) ... 30

Black's Law Dictionary (7th ed. 1999) ... 29

Code of W.V. Comprising Legislation to the Year 1870 ... 3

Brad McElhinny, *Special Session Looms Over West Virginia Abortion Law, But Shape Is Unclear*, West Virginia Metro News (June 26, 2022, 10:50 p.m.), https://wvmetronews.com/2022/06/26/special-session-looms-over-west-virginia-abortion-law-but-shape-is-unclear/ 17

Brad McElhinny, *Justice Says He Doesn't Want to Rush Into Special Session to Clarify West Virginia Abortion Law*, West Virginia Metro News (June 27, 2022, 2:12 p.m.), https://wvmetronews.com/2022/06/27/justice-says-he-doesnt-want-to-rush-into-special-session-to-clarify-west-virginia-abortion-law/ 17

David W. Frame, *Parental Notification and Abortion: A Review and Recommendation to West Virginia's Legislature*, 85(5) W. Va. L. Rev. 943 (1983) 6

June Leffler, *Abortion Access in Question After Leaked Supreme Court Draft Ruling*, West Virginia Public Broadcasting (May 3, 2022, 4:46 p.m.), https://www.wvpublic.org/health-science/2022-05-03/abortion-access-in-question-after-leaked-supreme-court-draft-ruling 16, 17

Katherine Kortsmit et al., *Abortion Surveillance System – United States, 2019*, Centers for Disease Control and Prevention 70(9):1-29 (Nov. 26, 2021), https://www.cdc.gov/mmwr/volumes/70/ss/pdfs/ss7009a1-H.pdf. ("*Abortion Surveillance System*") 7, 23

Patrick Morrisey (@MorriseyWV), Twitter (May 2, 2022, 10:45 p.m.), https://twitter.com/MorriseyWV/status/1521320044797571077 16

Patrick Morrissey (@MorriseyWV), Twitter (June 24, 2022, 11:41 a.m.), https://twitter.com/MorriseyWV/status/1540359576930983938 16

James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (Oxford Univ. Press. 1978) 4

Newsmax, *Roe: Politics of Life*, Interview with Attorney General Patrick Morrisey (May 17, 2022), https://www.youtube.com/watch?v=D_xB7yXXSI0........16

W.V. Public Broadcasting, *W. Va. Leaders React To Overturn of Roe v. Wade* (June 24, 2022 12:28 p.m.), https://www.wvpublic.org/government/2022-06-24/w-va-leaders-react-to-overturn-of-roe-v-wade 18

INTRODUCTION

More than 150 years ago, West Virginia enacted a law criminalizing abortion in virtually all cases and enforced it against a wide range of individuals—from physicians to the partners of pregnant women to at least one pregnant woman herself. *See* W. Va. Code § 61-2-8 ("Criminal Abortion Ban" or "the Ban"). The Criminal Abortion Ban has only a narrow exception for life-saving abortions: in nearly all circumstances, it makes abortion a felony punishable by up to a decade in prison.

For the past half century, however, the Criminal Abortion Ban has lain dormant, having been replaced by a detailed, comprehensive statutory regime that recognizes and regulates the provision of *legal* abortion in West Virginia without imposing any criminal penalties. Among other things, this contemporary regime creates an informed consent process for abortion, authorizes the use of public funds for abortion under certain circumstances, and permits most pre-viability abortions. Plaintiffs—the Women's Health Center of West Virginia ("WHC") and its Executive Director and employees—have relied on this modern regime to provide lawful abortion care to thousands of pregnant people in West Virginia.[1]

Now, in the aftermath of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2022 WL 2276808, 597 U.S. ___ (2022), overturning *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and in the absence of immediate clarification by this Court that the Criminal Abortion Ban is no longer good law, that statute threatens felony charges against anyone in West Virginia who "administer[s]," "cause[s]," or "use[s] any means" to produce an abortion. Numerous statements

[1] Although the majority of patients seeking abortion care identify as women, people of all gender identities, including transgender men and gender-diverse individuals, may become pregnant and seek abortion care.

by public officials and others in recent weeks—in addition to generating confusion about whether the Ban is enforceable—have reinforced Plaintiffs' fears that they face a credible threat of prosecution if they continue to provide abortion care in West Virginia.

Plaintiffs therefore seek a preliminary injunction against any enforcement of the Criminal Abortion Ban as contrary to state law. Because Plaintiffs are likely to succeed on the merits of their claims; because they face irreparable harm absent entry of an injunction; and because the balance of the equities and public interest heavily favor enjoining enforcement of the Criminal Abortion Ban, this Court should issue a preliminary injunction.

First, with respect to likelihood of success on the merits, West Virginia's comprehensive, contemporary statutory regulation of abortion impliedly repealed the Criminal Abortion Ban, which would otherwise criminalize virtually all abortion care in West Virginia. Enforcement of the Criminal Abortion Ban would render meaningless the State's detailed, non-criminal regime allowing for *lawful* abortion—contrary to the Legislature's intent.

Second, and in the alternative, the Criminal Abortion Ban is void on the grounds of desuetude—*i.e.*, longstanding non-enforcement of a criminal statute despite open violations of its terms. The Criminal Abortion Ban has not been enforced in a half century, during which time West Virginians have relied on the ability to lawfully access abortion care in the State.

The ongoing and irreparable harm caused by the Criminal Abortion Ban is stark. The threat of prosecution it poses in the aftermath of *Dobbs* has already forced WHC and its personnel to stop providing abortions, cancel appointments, and turn away people seeking essential medical care. The consequences for WHC's physicians, staff, and patients, as well as for families and communities across West Virginia, are devastating. Patients denied an abortion will be faced with serious burdens and harms: some may attempt to end their pregnancies on their own, outside the

medical system, risking criminalization if they are discovered; others may attempt to travel hundreds, if not thousands, of miles out of state to seek care, at great personal burden and expense, as well as delay, which increases the risk both from the ongoing pregnancy and the abortion itself; and still others will be prevented from obtaining an abortion at all, and forced to carry a pregnancy to term and give birth against their will, putting at risk their health and lives, threatening their stability and security, and denying them autonomy and dignity.

Accordingly, the Court should preliminarily enjoin the Criminal Abortion Ban.

STATEMENT OF FACTS

I. The Criminal Abortion Ban Has Been Replaced By A Modern Regulatory Regime.

A. The Anachronistic Criminal Abortion Ban Was Enacted 150 Years Ago.

In 1849, the Virginia General Assembly passed a criminal abortion ban, which West Virginia adopted through its constitution when it became a state in 1863. *See* Virginia Code tit. 54, ch. 191, § 8 (1849); W. Va. Const. art. XI § 8 (1862). In 1870, West Virginia affirmatively adopted a materially identical statute. *See Code of W.V. Comprising Legislation to the Year 1870*, at 678, *available at* https://bit.ly/3a4capO. West Virginia then amended the statute in 1882, which statute constitutes the Criminal Abortion Ban and remains part of the West Virginia Code today.

The Criminal Abortion Ban states:

> Any person who shall administer to, or cause to be taken by, a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than three nor more than ten years; and if such woman die by reason of such abortion performed upon her, such person shall be guilty of murder.

W. Va. Code § 61-2-8. The Criminal Abortion Ban contains exceptions only for abortions performed to save the life of the pregnant person or for measures taken to save the embryo or fetus.

Id. ("No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child.").

Prior to these legislative efforts 150 years ago, there was no universal criminalization of abortion at common law. Rather, abortion of an "unquickened" fetus—roughly, a pre-viability fetus—generally was not a punishable offense at common law.[2] After quickening, destruction of a fetus was considered a crime, but typically was punished less harshly than murder. Stark Aff. Ex. 1 at 3.

The Criminal Abortion Ban was enacted as part of a wave of anti-abortion legislation that swept across the United States in the mid-nineteenth century. Between the 1840s and 1870s, in response to the increased accessibility and use of abortion care, *id.* at 46–49, 52, an anti-abortion movement that advocated for greater abortion restrictions and harsher criminal penalties gained prominence. Certain physicians and medical writers blamed women's purported "self-indulgence" and "social extravagance" in seeking abortions, claiming that abortion was undermining marital relationships because "a willingness to abort signified a wife's rejection of her traditional role as housekeeper and child raiser." *Id.* at 108. Indeed, these restrictions were part and parcel of a wide range of laws enacted during the same period reflecting the worldview that women were appropriately destined for the home and childrearing. *See Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (noting that "statute books gradually became laden with gross, stereotyped distinctions between the sexes," including prohibitions on women holding office, serving on juries, and suing

[2] "Quickening" has been described as the point at which the pregnant person first perceives fetal movement, and it typically takes place "near the midpoint of gestation, late in the fourth or early in the fifth month, though it could and still does vary a good deal from one woman to another." James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* at 3 (Oxford Univ. Press. 1978) ("*Abortion in America*") (hereinafter, Affidavit of Loree Stark in Support of Plaintiffs' Motion for Preliminary Injunction ("Stark Aff.") Ex. 1).

in their own names, and on married women holding or conveying property and serving "as legal guardians of their own children"); *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (surveying "the history of the many state laws limiting women's employment opportunities" and noting they "frequently subjected women to distinctive restrictions"); *Taylor v. Louisiana*, 419 U.S. 522, 533 (1975) (noting that women could not serve on juries).

B. The Criminal Abortion Ban Was Initially Enforced Against A Range Of Actors.

After its enactment, the Criminal Abortion Ban was used to prosecute a wide range of actors, ranging from physicians to spouses to pregnant people themselves, under both direct and accomplice liability theories. (*See* Compl. ¶¶ 30–32 (collecting accounts of enforcement actions documented in West Virginia newspapers); *see also* Stark Aff. Exs. 2–10.) These prosecutions continued through the mid-twentieth century. (*See* Compl. ¶¶ 32); *see, e.g.*, *State v. Lilly*, 47 W. Va. 496, 498, 35 S.E. 837, 838 (1900) (affirming conviction of pregnant woman's partner, who administered drugs for the "purpose of producing a miscarriage" and was present to dispose of the fetus); *State v. Lewis*, 133 W. Va. 584, 57 S.E.2d 513 (1949) (affirming conviction of doctor for murder, as directed by Criminal Abortion Ban, after performing an abortion during which the patient died and noting that nurse was also indicted); *State v. Evans*, 136 W. Va. 1, 66 S.E.2d 545 (1951) (affirming conviction of a doctor for allegedly performing failed abortion, where baby was delivered months later but died shortly afterward); *State v. Davis*, 139 W. Va. 645, 81 S.E.2d 95 (1954) (reversing conviction of a doctor for aiding and abetting an abortion by allegedly referring teenager to two women who performed the procedure because of insufficient evidence); *cf.* Syl. Pt. 1–2, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967) (holding that a murder case involving a woman's death from an illegal abortion could be tried in county where woman died, even though defendant was not physically present in that county when the death occurred).

C. The Criminal Abortion Ban Has Lain Dormant For A Half Century.

In 1973, the Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), which held that the Due Process Clause of the U.S. Constitution did not permit a ban on abortion prior to viability, and accordingly did not permit a state criminal abortion statute that, like West Virginia's, "excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved." *Id.* at 164.

Soon after *Roe* was decided, numerous courts recognized that the Criminal Abortion Ban was irreconcilable with *Roe*. *See Smith v. Winter & Browning*, No. 74-571-CH (S.D. W. Va. Apr. 17, 1975) (three-judge panel dismissing action challenging the constitutionality of the Criminal Abortion Ban because there "exist[ed] no substantial constitutional question" following *Roe*); *id.* No. 75-1710 (4th Cir. Oct. 14, 1975) (agreeing to dismiss appeal); *Roe v. West Virginia Univ. Hosp.*, No. 75-0524-CH (S.D. W. Va. Aug. 15, 1975) (holding that the Criminal Abortion Ban was "invalid, void, and without force and effect, under decisions of the United States Supreme Court") (as quoted in *Smith v. Winter & Browning*, No. 75-1710 (4th Cir. Oct. 14, 1975)); *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644 (4th Cir. 1975) ("The West Virginia criminal abortion statute is unconstitutional beyond question.").[3]

Despite (and/or because of) these decisions, the West Virginia Legislature never expressly repealed the Criminal Abortion Ban.

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[3] Other sources report that a West Virginia circuit court similarly held in 1975 that "[S]ection 61-2-8 is defunct." David W. Frame, *Parental Notification and Abortion: A Review and Recommendation to West Virginia's Legislature*, 85(5) W. Va. L. Rev. 943, 946 n.28 (1983) (citing *Roe v. Winter*, No. 13,228 (W. Va. Cir. Ct. Kanawha County 1975)).

D. The West Virginia Legislature Has Replaced the Criminal Abortion Ban With A Comprehensive Statutory Regime Recognizing And Regulating Legal Abortion Care.

Over the last twenty years, the West Virginia Legislature has enacted a comprehensive statutory framework that recognizes and regulates abortion as one of many legal medical procedures performed by a licensed physician with the patient's consent. These laws exhaustively set forth the circumstances under which an abortion may be lawfully obtained and performed in West Virginia. And perhaps most notably, contrary to the Criminal Abortion Ban, none of the current statutory provisions imposes criminal liability on licensed medical professionals or patients. The statutory provisions comprising this scheme are as follows:

Stage of Pregnancy. West Virginia law permits abortions during the first "twenty-two weeks since the first day of the woman's last menstrual period ["LMP"]," W. Va. Code §§ 16-2M-2(7), 16-2M-4, which is when approximately 99% of abortions are performed.[4] Abortions may still be performed after this period if "there exists a nonmedically viable fetus" or if terminating the pregnancy is necessary "to avert [the pregnant person's] death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function." W. Va. Code § 16-2M-4(a). Physicians who intentionally or recklessly perform abortions outside this time period where an exception does not apply are subject to civil penalties and potentially licensure penalties,

[4] *See* Katherine Kortsmit et al., *Abortion Surveillance System – United States, 2019*, Centers for Disease Control and Prevention 70(9):1-29 (Nov. 26, 2021), https://www.cdc.gov/mmwr/volumes/70/ss/pdfs/ss7009a1-H.pdf. ("*Abortion Surveillance System*"). In 2022, the West Virginia Legislature considered but did not pass a bill that would have limited abortion to fifteen weeks since LMP absent a medical emergency or severe fetal abnormality. *See* https://www.wvlegislature.gov/bill_status/bills_history.cfm?year=2022&sessiontype=RS&input=4004.

but not criminal penalties. *Id.* § 16-2M-6(a). This provision does not impose any penalties on any patient upon whom an abortion is performed or induced. *Id.* § 16-2M-6(d).

Patient Reason. West Virginia law permits pregnant people to elect an abortion prior to 22 weeks LMP for any reason, except if the patient is seeking the abortion "because of a disability." W. Va. Code §§ 16-2Q-1(b), (c). That limitation, however, does not apply in a medical emergency or if the fetus is not medically viable. *Id.* A licensed medical professional who violates this provision is subject to licensing penalties, but not criminal liability. *Id.* § 16-2Q-1(j). This provision does not impose any penalties on any patient upon whom an abortion is performed or induced. *Id.* § 16-2Q-1(l).

Abortion Methods. For certain abortion methods, West Virginia law provides specific conditions that must be satisfied. For example, the law requires that the medications used in a medication abortion be prescribed in person. W. Va. Code §§ 30-3-13a(g)(5). A physician who violates this provision is subject to licensing penalties, but not criminal liability. *Id.* § 30-3-14(c)(17).

The law also specifies the conditions under which certain second trimester abortion procedures may be used; namely, that, except in medical emergencies, certain procedures may only be used after fetal demise has occurred. W. Va. Code § 16-2O-1. Physicians who intentionally or recklessly perform or induce abortions in violation of these conditions are subject to civil penalties and potentially licensure penalties. *Id.* § 16-2O-1(c)(1), (3). This provision does not impose any criminal penalties on physicians performing abortions in violation of these

conditions. *Id.* § 16-2O-1(c)(1)(2).[5] Nor do they impose any penalties on any patient upon whom an abortion is performed or induced. *Id.* § 16-2O-1(c)(1)(4).[6]

Patient Consent. As it does with other medical procedures or treatments, *see, e.g.*, W. Va. Code § 16-11-1 (sterilization), § 16-51-3(5) (use of investigational drugs and devices), § 16-4-10 (diagnosing and treating minors for sexually transmitted infections), the West Virginia Legislature set forth specific provisions governing consent to abortion. Under West Virginia Code § 16-2I-1 *et seq.*, a pregnant person provides "voluntary and informed consent" for abortion when, at least 24 hours prior to obtaining an abortion, the physician or licensed health care professional to whom the responsibility has been delegated by the physician gives the patient certain information about abortion, either by telephone or in person. *Id.* § 16-2I-2. Abortion patients also must be provided with the option to view their ultrasound images. *Id.* § 16-2I-2(c). These requirements are waived in medical emergencies. *Id.* § 16-2I-2; *see also id.* § 16-2I-5 (encouraging but not requiring a physician to inform the patient of the medical basis for deeming an abortion necessary due to medical emergency). A physician who willfully fails to obtain voluntary and informed consent is subject to licensing penalties, but not criminal liability. *Id.* § 16-2I-8.

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[5] Roughly a quarter-century ago, West Virginia's Legislature sought to impose criminal liability on physicians who performed a different procedure—a so-called "partial-birth" abortion—providing that doing so constituted a felony punishable by up to two years' imprisonment and/or a fine of up to $50,000. *See* W. Va. Code § 33-42-8. That law was immediately enjoined as unconstitutional, and the State did not appeal. *See Daniel v. Underwood*, 102 F. Supp. 2d 680 (S.D. W. Va. 2000). Its criminal penalty provision was and is an outlier in West Virginia's legislative scheme governing abortion; no other statute concerning abortion, other than the dormant Criminal Abortion Ban, imposes criminal penalties on licensed health care providers. In any event, WHC also has never utilized this method.

[6] The "partial-birth abortion" ban likewise foreclosed any prosecution of the pregnant person. *See* W. Va. Code § 33-42-8(c).

Parental Notification. When the pregnant person seeking an abortion is an unemancipated minor, the Legislature has further specified that the provider must notify the minor's parent or guardian 48 hours in advance of the abortion (though that waiting period is not required if receipt of the notice is certified in writing). W. Va. Code § 16-2F-3. The Legislature has also provided for a judicial bypass to the parental notification requirement. Specifically, notice is not required where a court finds that the patient "is mature and well informed sufficiently to make the decision to proceed with the abortion independently and without the notification or involvement of her parent or legal guardian," or that such notice "would not be in the best interest of the unemancipated minor." *Id.* § 16-2F-4(f)(1)–(2). This law also imposes licensing penalties and potential malpractice liability against physicians who violate the parental notice requirement. *Id.* § 16-2F-8(a), (c). These provisions do not impose any criminal penalties on physicians performing abortions without providing such notification. *Id.* § 16-2F-8(b). Nor do they impose any penalties on any patient upon whom an abortion is performed or induced. *Id.* § 16-2F-8(d).

State Reporting. The Legislature further mandates that the West Virginia Department of Health and Human Resources collect a range of anonymized statistical and demographic information about abortions and abortion patients in West Virginia. For example, any physician who performs an abortion shall annually report, among other things, the gestational age of the fetus; the pregnant person's age and state and county of residence; the type of procedure performed; the method of payment used; and "whether birth defects were known, and if so, what birth defects." W. Va. Code § 16-5-22(a)(1)–(6); *see also id.* § 16-2M-5 (similar); *id.* § 16-2I-7 (requiring reporting of information connected to the provision of informed consent); *id.* § 16-2F-6 (requiring reporting of information connected to the provision of abortion care to unemancipated minors). The Legislature has taken care to ensure that its reporting requirements do not

compromise the privacy of abortion providers or persons who decide to terminate. *Id.* § 16-2I-7(e) (requiring the Department of Health and Human Resources to "prevent any of the information from [collected] from being included in the public reports that could reasonably lead to the identification of any physician who performed or treated an abortion, or any female who has had an abortion"); *id.* § 16-5-22(a)(7) (protecting patient privacy); *id.* § 16-2M-5(c) (same); *id.* § 16-2F-6(b) (same).

State Funding. The Legislature has also specified the circumstances in which state Medicaid funding can be used for abortion care. West Virginia law states Medicaid funds may be used to fund an abortion when, "on the basis of the physician's best clinical judgment," there is a "medical emergency that so complicates a pregnancy as to necessitate an immediate abortion to avert the death of the mother or for which a delay will create grave peril of irreversible loss of major bodily function or an equivalent injury," there is "[c]lear clinical medical evidence that the fetus has severe congenital defects or terminal disease or is not expected to be delivered," or the individual seeking an abortion "is a victim of incest" or rape and the rape was "reported to a law-enforcement agency." W. Va. Code § 9-2-11.

Licensure Penalties and Civil Liability. In enacting the legal framework described above, West Virginia replaced the Criminal Abortion Ban with a comprehensive scheme that provides only licensing penalties and civil liability for physicians and other licensed medical professionals (save for one long-enjoined outlier)[7] and never subjects pregnant people, let alone their partners or family members who assist them in obtaining an abortion, to any penalty.[8] The West Virginia

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[7] *See supra* note 4.

[8] Only individuals who are not physicians or other licensed professionals whose actions are deemed to constitute the misdemeanor offense of practicing medicine without a license are subject

Legislature also explicitly exempted legal abortion from those provisions of the criminal code that would otherwise treat embryos and fetuses as independent victims of homicide, assault, and abuse:

> (d) Exceptions. – The provisions of this section do not apply to:
>
> (1) Acts committed during a legal abortion to which the pregnant woman, or a person authorized by law to act on her behalf, consented or for which the consent is implied by law;
>
> (2) Acts or omissions by medical or health care personnel during or as a result of medical or health-related treatment or services, including, but not limited to, medical care, abortion, diagnostic testing or fertility treatment; . . . .

W. Va. Code § 61-2-30.

II. Until Recently, Plaintiffs Provided Abortion Care In West Virginia.

Plaintiffs are WHC, one of its physicians, and members of its staff, all of whom are dedicated to providing abortion care in West Virginia.

Until June 24, 2022, when the Supreme Court issued its decision in *Dobbs* and WHC ceased providing abortion care, WHC was the only outpatient clinic providing abortion care in West Virginia. (Affidavit of Katie Quiñonez ("Quiñonez Aff.") ¶ 4.) Founded in Charleston in 1976, WHC was the first clinic to provide such care in West Virginia. (*Id.*) In the years before WHC opened, when the Criminal Abortion Ban was in force, West Virginians facing unplanned or unwanted pregnancies had limited options—they either had to travel out of state for care, an option limited to those with connections to information and resources; seek clandestine, illegal care or attempt to induce their own abortions; or remain pregnant and deliver a child against their will. (Affidavit of Debra Beatty ("Beatty Aff.") ¶¶ 10–11; Affidavit of Maggie McCabe ("McCabe

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to criminal liability. *See* W. Va. Code §§ 30-3-13(g), 16-2Q-1(k), 16-2O-1(c)(2), 16-2P-1(c)(2), 16-2M-6(b), 16-2F-8(b).

Aff.") ¶¶ 5–6; Affidavit of Rev. Jim Lewis ("Lewis Aff.") ¶¶ 13, 16–17; Affidavit of Nancy Tolliver ("Tolliver Aff.") ¶ 28.) WHC's founders recognized that ensuring access to safe and legal abortion is an essential part of fully responding to the needs of pregnant people and created WHC in the years immediately following *Roe v. Wade*, to do just that. (Tolliver Aff. ¶¶ 14, 31.)

Today, WHC offers a wide range of health care services, including gynecological and support services. (Quiñonez Aff. ¶ 13.) Prior to *Dobbs*, WHC also provided abortion care and offered both medication abortion and procedural abortion. (*Id.* ¶ 14.) Pregnant people came to WHC seeking abortion care for a variety of personal reasons, including that, for some, it was not the right time to have a child or add to their families, including because they lack the necessary financial resources and/or worry about being unable to adequately care for their existing children; for others, termination was necessary to preserve their physical, psychological, and/or emotional health, all of which can be jeopardized by pregnancy and delivery; and for others, they did not want to continue a pregnancy resulting from violence. (Affidavit of Dr. John Doe ("Doe Aff.") ¶¶ 20–23; Quiñonez Aff. ¶ 17.)

Plaintiff Katie Quiñonez is the Executive Director of WHC. Inspired to join WHC based on her own experience receiving excellent care there as an abortion patient, Ms. Quiñonez provides executive leadership; creates and oversees all personnel policies and program activities; publicly represents WHC; manages personnel, property, and finances; and works with the Board of Directors. (Quiñonez Aff. ¶¶ 9–11.) Ms. Quiñonez fears that if WHC continues to provide abortion care, after *Dobbs*, she could face possible criminal prosecution under the Criminal Abortion Ban. (*Id.* ¶ 21.) She has the same concern for WHC and its officers, directors, and staff. (*Id.*)

Plaintiff Dr. John Doe is a board-certified family medicine physician who, until *Dobbs*, provided abortion care at WHC. (Doe Aff. ¶¶ 5, 7–8.) He grew up in West Virginia and chose to provide care here because of his strong desire to serve his community. (*Id.* ¶ 51.) Since WHC was forced to stop providing abortion services last week, WHC no longer needs Dr. Doe's services as an abortion provider and has stopped employing him for that purpose. (*Id.* ¶ 47; Quiñonez Aff. ¶ 23.) Even if WHC had not stopped providing abortion services, Dr. Doe cannot continue to provide abortion care in West Virginia because he cannot risk possible criminal prosecution under the Criminal Abortion Ban, as well as suspension or revocation of his medical license. (Doe Aff. ¶ 42.) Having to deny his patients abortion care is deeply distressing for Dr. Doe—he feels forced by the Criminal Abortion Ban to break the Hippocratic Oath to avoid violating the criminal code, a choice no physician should have to make. (*Id.* ¶ 52.)

Plaintiff Danielle Maness is an Independent Women's Health Care Nurse Practitioner, Certified Nurse-Midwife, and Advance Practice Registered Nurse, and the Chief Nurse Executive at WHC. (Affidavit of Danielle Maness ("Maness Aff.") ¶¶ 3, 6.) Ms. Maness is responsible for overseeing all clinical procedures and processes associated with abortion care at WHC, including managing all clinical staff. (*Id.* ¶¶ 10–14.) Ms. Maness fears that if she were to continue her work with abortion care—as she strongly wishes to do—she could be criminally prosecuted as well as risk suspension or revocation of her nursing licenses. (*Id.* ¶ 17.)

Plaintiff Debra Beatty is a Licensed Independent Clinical Social Worker who, until *Dobbs*, worked as a counselor at WHC. (Beatty Aff. ¶¶ 5, 8; Quiñonez Aff. ¶ 23.) Ms. Beatty grew up hearing stories from her mother about the desperation of people facing unplanned and unwanted pregnancies in rural West Virginia, and herself provided counseling to pregnant people in the early 1970s when abortion was still criminalized in West Virginia. (Beatty Aff. ¶¶ 10–11.) As a

counselor at WHC, Ms. Beatty met with patients seeking abortion to provide non-directional, professional counseling, and coordinated with clinical staff regarding the provision of care for patients who decided to proceed with an abortion. (*Id.* ¶¶ 13, 16.) In speaking with patients, Ms. Beatty endeavored to understand their histories, listen to their questions, concerns, or ideas, and provide them with the tools and resources they needed to make the best decision for themselves. (*Id.* ¶¶ 20–21.) Ms. Beatty fears that if WHC were to continue to provide abortion care and she were to perform any aspect of her counseling work, she could be at risk of criminal prosecution. (*Id.* ¶¶ 29–31.) Because WHC is currently unable to provide abortion care, Ms. Beatty's counseling services there are no longer needed. (*Id.* ¶ 32; Quiñonez Aff. ¶ 23.)

III. The Criminal Abortion Ban Is Causing Significant And Irreparable Harm.

For the past half century, West Virginians relied on the availability of legal abortion as central to their equality, dignity, autonomy, bodily integrity, and health. On June 24, 2022, the Supreme Court issued its decision in *Dobbs*, holding that "*Roe* and *Casey* must be overruled." *Dobbs*, No. 19-1392, slip op. at 5. Because the Criminal Abortion Ban was never explicitly legislatively repealed, and out of fear that it will now be used to prosecute medical professionals who provide abortion care in West Virginia as well as anyone who helps a pregnant person in West Virginia obtain an abortion (or even patients themselves), Plaintiffs have been forced to stop providing abortion care to their patients. (Quiñonez Aff. ¶ 20.)

Plaintiffs' fears have only been exacerbated by public statements made by West Virginia Attorney General Patrick Morrisey and other state officials in the weeks leading up to *Dobbs* and in the hours after the decision was issued. Those statements have caused real and significant concern that individuals involved in providing abortion care such as Plaintiffs—and even pregnant patients themselves—may face prosecution under the Ban.

Initially, after a draft of the *Dobbs* opinion was leaked in May 2022, Attorney General Morrisey indicated that the Criminal Abortion Ban may no longer be good law, stating that "[w]hen the Supreme Court's final opinion is published, we will weigh in more formally and work closely with the legislature to protect life in all stages as much as we legally can under the law."[9] However, approximately two weeks later, Attorney General Morrisey appeared to hedge his position, saying in a media interview: "[W]e have trigger laws, but some of the stuff that goes back to the 1920s or the 1800s, it's unclear how that would take effect. It all depends upon the actual text of the . . . decision [in *Dobbs*] presumably replacing *Roe* and then the State's Constitution and laws."[10] Then, on June 24, 2022, the day *Dobbs* was released, Attorney General Morrisey—the chief legal officer for the State of West Virginia—simply refused to directly answer the question whether abortion is still legal in West Virginia at all, stating, "I have been asked what the state of the law is in West Virginia regarding abortion. My response is very simple: you should not have one! Today, is a landmark day in our effort to protect babies."[11] He later said, "I'm going to issue a legal opinion articulating some of the challenges and the ways the Legislature and the governor can deal with this because I want to save as many lives as humanly possible. We know that because

[9] June Leffler, *Abortion Access in Question After Leaked Supreme Court Draft Ruling*, West Virginia Public Broadcasting (May 3, 2022, 4:46 p.m.), https://www.wvpublic.org/health-science/2022-05-03/abortion-access-in-question-after-leaked-supreme-court-draft-ruling; *see also* Patrick Morrisey (@MorriseyWV), Twitter (May 2, 2022, 10:45 p.m.), https://twitter.com/MorriseyWV/status/1521320044797571077 ("The Supreme Court should allow the states to decide how restrictive states can act regarding abortion. In WV, I will provide counsel to try to block this practice as much as we legally can under the law.") (Stark Ex. 11).

[10] Newsmax, *Roe: Politics of Life*, Interview with Attorney General Patrick Morrisey (May 17, 2022), https://www.youtube.com/watch?v=D_xB7yXXSI0.

[11] Patrick Morrissey (@MorriseyWV), Twitter (June 24, 2022, 11:41 a.m.), https://twitter.com/MorriseyWV/status/1540359576930983938 (Stark Ex. 12).

[the Criminal Abortion Ban] has not been on the books for a long time, a lot of people are going to challenge it."[12]

Governor Jim Justice similarly expressed uncertainty about the force of the Criminal Abortion Ban, stating in an interview, "[T]here needs to be a lot more discussion with the legal team to see if what we have on the books is adequate or if there is a need to call a special session."[13]

West Virginians for Life Executive Director Wanda Franz, who has long been a leader in the anti-choice movement at a national level and has played a critical role in crafting anti-choice legislation in West Virginia, also issued conflicting statements. At one point, referring to the Criminal Abortion Ban, she said, "[W]e already have what's essentially a trigger law . . . We have a law on the books that has been suppressed by [*Roe v. Wade*] that will spring back if the Supreme Court decision is overturned."[14] But Franz also stated elsewhere, "There's no way I think that legislators would want to see criminalization of abortion in the way that [the Criminal Abortion Ban] provides for it. We've been working with our legislators for many years on legislation to

[12] Brad McElhinny, *Special Session Looms Over West Virginia Abortion Law, But Shape Is Unclear*, West Virginia Metro News (June 26, 2022, 10:50 p.m.), https://wvmetronews.com/2022/06/26/special-session-looms-over-west-virginia-abortion-law-but-shape-is-unclear/.

[13] Brad McElhinny, *Justice Says He Doesn't Want to Rush Into Special Session to Clarify West Virginia Abortion Law*, West Virginia Metro News (June 27, 2022, 2:12 p.m.), https://wvmetronews.com/2022/06/27/justice-says-he-doesnt-want-to-rush-into-special-session-to-clarify-west-virginia-abortion-law/.

[14] June Leffler, *Abortion Access in Question After Leaked Supreme Court Draft Ruling*, West Virginia Public Broadcasting (May 3, 2022, 4:46 p.m.), https://www.wvpublic.org/health-science/2022-05-03/abortion-access-in-question-after-leaked-supreme-court-draft-ruling.

protect life, and I think we're going to continue to work with them to try to address the problems that come with that old piece of legislation."[15]

Other state political figures have likewise issued conflicting statements regarding the Criminal Abortion Ban's durability. For example, State Senator Ryan Weld indicated that the Ban may no longer be enforceable, saying, "Look, [the Criminal Abortion Ban] hasn't been enforced in four decades or five decades. Most likely this is not enforceable because of that. This is a case where a law is on the books but wasn't enforced because it had been previously found to be unconstitutional."[16] On the other hand, Mike Pushkin, West Virginia Democratic Party Chair, unambiguously stated after *Dobbs* was issued that it "will make all abortions illegal in West Virginia."[17]

Given the threat of prosecution under West Virginia's Criminal Abortion Ban following *Dobbs*, WHC ceased all abortion care as soon as the Supreme Court issued its decision. As set forth more fully below, *see infra* Argument Section III, shutting down WHC's abortion services is already greatly harming WHC, its staff, and its patients.

WHC's mission is to provide reproductive health care that respects patients' choices. (Quiñonez Aff. ¶ 25.) But because of the threat of prosecution under the Criminal Abortion Ban, it cannot provide abortion care to pregnant people who desire it, and so cannot honor their choices.

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[15] Steven Allen Adams, *Old West Virginia Law Making Abortion a Felony Could Be Revived in Post-Roe Decision*, The Parkersburg News & Sentinel (May 7, 2022), https://www.newsandsentinel.com/news/local-news/2022/05/old-west-virginia-law-making-abortion-a-felony-could-be-revived-in-post-roe-decision/.

[16] *Id.*

[17] W.V. Public Broadcasting, *W. Va. Leaders React To Overturn of Roe v. Wade* (June 24, 2022 12:28 p.m.), https://www.wvpublic.org/government/2022-06-24/w-va-leaders-react-to-overturn-of-roe-v-wade.

(*Id.*) Being unable to provide abortion care to people who need it is devastating for WHC's staff members. (*Id.*) WHC has already had to lay off counselors, physicians, and nurse anesthetists who were dedicated to supporting WHC's abortion patients. (*Id.* ¶ 23.) And WHC is now facing a significant budget deficit that may necessitate further staff layoffs. (*Id.*)

When, on June 24, WHC staff broke the news to dozens of patients with scheduled appointments that it was no longer able to provide abortion care, patients were stunned and despondent. (*Id.* ¶ 27.) Because WHC was the only outpatient abortion clinic in West Virginia and provided nearly all abortion care in the State (*id.* ¶¶ 4, 15–16), these patients and all other pregnant people in West Virginia who wish to terminate their pregnancies now must seek to travel out of state to obtain the care they need (a challenging prospect for many, especially the 40% of WHC's patients who struggle financially (*id.* ¶ 19)); seek to end their pregnancies outside of the medical system, risking criminal penalty themselves; or remain pregnant and give birth against their will.

Absent injunctive relief from this Court, the irreparable harm caused by the Criminal Abortion Ban will only continue to grow. This Court's intervention is urgently needed.

LEGAL STANDARD

West Virginia courts "apply th[e] same four-factor methodology [as federal courts] when weighing the granting or refusal of a preliminary injunction." *Morrisey v. W. Virginia AFL-CIO*, 239 W. Va. 633, 638, 804 S.E.2d 883, 888 (2017). To obtain a preliminary injunction, the moving party "must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's

likelihood of success on the merits; and (4) the public interest." *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 366, 844 S.E.2d 133, 137 (2020) (quoting *State ex rel. McGraw v. Imperial Mktg.*, 196 W. Va. 346, 352 n.8, 472 S.E.2d 792, 798 n.8 (1996)).

ARGUMENT

This Court should enter a preliminary injunction against enforcement of the Criminal Abortion Ban because Plaintiffs are likely to succeed on the merits of their claims and will suffer irreparable harm absent such injunctive relief, and because the balance of the equities and public interest weigh strongly in favor of an injunction.

I. Plaintiffs Are Likely To Succeed On the Merits Of Their Implied Repeal Claim.

Under the doctrine of implied repeal, a statute is considered repealed by later-enacted statutes in two circumstances: (1) if later-enacted statutes revise the whole subject matter of an earlier statute, or (2) if subsequent statutes are "repugnant" to an earlier statute. *See State v. Mines*, 38 W. Va. 125, 130, 18 S.E. 470, 471–72 (1893); Syl. *State v. Snyder*, 89 W. Va. 96, 108 S.E. 588 (1921); *id.* 89 W. Va. at 100–01, 108 S.E. at 589.

Applying virtually identical principles, nearly every court to consider the issue has concluded that pre-*Roe* criminal bans on abortion like the Criminal Abortion Ban are impliedly repealed by post-*Roe* laws comprehensively addressing the circumstances under which abortion care is *legal*. *See McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004); *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990); *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980).

West Virginia fits neatly within this line of precedent: its modern, comprehensive statutory framework regulating abortion cannot be squared with the Criminal Abortion Ban's 150-year-old flat prohibition of nearly all abortions as a felony offense.

A. Through Laws Enacted After The Criminal Abortion Ban, The Legislature Has Revised The Whole Subject Matter Of Abortion In West Virginia.

If, as here, a later statute "makes full and complete provision touching the subject common to both" the later and an earlier statute, courts conclude that the earlier statute is impliedly repealed. *See* Syl. Pt. 1, *State v. Hinkle*, 129 W. Va. 393, 41 S.E.2d 107 (1946) ("A subsequent statute, which revises the whole subject matter of a former statute, and which is evidently intended by the Legislature as a substitute for such former statute, although it contains no express words to that effect, operates to repeal the former statute"). The "whole subject matter" standard applies regardless whether the later statute explicitly repeals the former statute. Syl. Pt. 3, *State ex rel. Wheeling v. Renick*, 145 W. Va. 640, 116 S.E.2d 763 (1960). Additionally, the party arguing for implied repeal need not prove that legislators intended such a repeal, because the legislature "must be presumed to know the language employed in former acts, and, if in a subsequent statute dealing with the same subject it uses different language concerning that subject, it must be presumed that a change in the law was intended." *State v. General Daniel Morgan Post*, 144 W. Va. 137, 144, 107 S.E.2d 353, 358 (1959); *see also id.* Syl. 1, 144 W. Va. at 137, 107 S.E.2d at 354 ("A subsequent statute, which revises the entire subject matter of a former statute and which is evidently intended as a substitute for such former statute, operates to repeal the former statute even though such subsequent statute does not contain express words to that effect.").

West Virginia courts have applied the "whole subject matter" standard to find implied repeal in a variety of contexts. For example, in *State v. Hinkle*, the original statute—spanning five short sections—provided that a person who had the intent to sell or dispense narcotic drugs was guilty of a felony and should be sentenced to one to ten years in jail, while the later statute contained 28 sections that "in comprehensive manner, and in elaborate detail" addressed narcotic drugs, and provided that a violation of the statute was punishable by fine or imprisonment for not

more than ten years. 129 W. Va. at 396–97, 41 S.E.2d at 108–09. As such, the court held that the subsequent, more comprehensive statute impliedly repealed the earlier one. *Id.* at 399, 41 S.E.2d at 110. Similarly, in *Gibson v. Bechtold*, 161 W. Va. 623, 629, 245 S.E.2d 258, 261 (1978), the Supreme Court of Appeals found that the "1977 changes in the juvenile law relating to jurisdictional matters . . . effected fundamental changes in juvenile proceedings and [were] intended as a substitute for all previous law pertaining to this subject matter." *Id.*; *see also, e.g.*, *State v. Jackson*, 120 W. Va. 521, 525, 199 S.E. 876, 877–78 (1938) (finding that the later statute "cover[ed] the whole range and subject of licensing and regulating the real estate business" and thus impliedly repealed the earlier, less detailed licensing act); *Cunningham v. Cokely*, 79 W. Va. 60, 65–66, 90 S.E. 546, 548 (1916) ("It is obvious that the Primary Act, dealing comprehensively and fully with the matter of official nominations, was not intended to be amendatory of older statutes on the same subject or supplementary thereto, but as an elaborate and ample scheme for the selection of political nominees. So construed, it repeals by necessary implication section 18, c. 3, Code 1913, relating to conventions."); *id.* Syl., 90 S.E. at 547 ("When two statutes passed at different dates cover and fully provide for the same general subject, the subsequent one, not purporting to amend the earlier act, but manifestly intended to be a substitute therefor, is to be deemed and treated as the last legislative expression on that subject, and as operative to repeal the former statute by necessary implication.").

The principles from these decisions readily apply here. The Criminal Abortion Ban has been impliedly repealed by the modern, comprehensive, *non-criminal* framework for lawful abortion enacted by the Legislature. This modern scheme revised the whole subject matter of abortion in West Virginia. Whereas the 150-year-old, two-sentence Ban criminalizes virtually all abortion care, the modern statutory scheme provides for lawful abortion in West Virginia "in [a]

comprehensive manner, and in elaborate detail." *Hinkle*, 129 W. Va. at 396–97, 41 S.E.2d at 108–09. In particular, West Virginia law now addresses:

- ***Stage of Pregnancy***. West Virginia law permits abortions during the first "twenty-two weeks since the first day of the woman's last menstrual period." W. Va. Code §§ 16-2M-2(7), 16-2M-4.[18] Approximately 99% of abortions are performed within this time frame.[19]

- ***Patient Reason***. West Virginia law permits pregnant people to elect an abortion prior to 22 weeks LMP for any reason, unless, with certain exceptions, the patient is seeking the abortion "because of a disability." W. Va. Code §§ 16-2Q-1(b), (c).

- ***Abortion Methods***. West Virginia law provides detailed regulations concerning the use of specific abortion methods. *See, e.g.*, W. Va. Code § 30-3-13a(g)(5) (medications used in a medication abortion be prescribed in person); W. Va. Code § 16-2O-1 (certain procedures may not be used in second trimester abortions absent medical emergency or fetal demise).

- ***Patient Consent***. As with other medical procedures, *see, e.g.*, W. Va. Code § 16-11-1 (sterilization), § 16-51-3 (use of investigational drugs and devices), § 16-4-10 (diagnosing and treating minors for sexually transmitted infections), West Virginia sets forth rules concerning informed consent to abortion. W. Va. Code § 16-2I-1 *et seq.*

- ***Parental Notification***. West Virginia law provides detailed regulations for unemancipated minors to consent to abortion. *See* W. Va. Code § 16-2F-3.

- ***State Funding***. The Legislature has also specified the circumstances in which state Medicaid funding can be used for abortion care. *See* W. Va. Code § 9-2-11.

- ***State Reporting***. The Legislature has mandated that the West Virginia Department of Health and Human Resources collect and report a range of specified information about abortions and abortion patients in West Virginia. *See, e.g.*, W. Va. Code §§ 16-5-22, 16-2M-5, 16-2I-7, 16-2F-6.

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[18] Earlier this year, the Legislature considered but did not pass a bill that would have limited abortion to fifteen weeks since LMP absent a medical emergency or severe fetal abnormality. *See* https://www.wvlegislature.gov/bill_status/bills_history.cfm?year=2022&sessiontype=RS&input=4004.

[19] *See* Katherine Kortsmit et al., *Abortion Surveillance System – United States, 2019*, Centers for Disease Control and Prevention 70(9):1-29 (Nov. 26, 2021), https://www.cdc.gov/mmwr/volumes/70/ss/pdfs/ss7009a1-H.pdf.

- ***Liability***. The Legislature has specified that physicians who violate any of these provisions are subject only to licensing penalties and civil liability—in direct contrast to the felony charges physicians would face under the Ban. Patients are never subject to any penalty. *See, e.g.*, W. Va. Code §§ 16-2M-6(a), 16-2P-1(c)(1), 16-2O-1(c)(1), 16-2F-8(a).

Through these laws, the Legislature has replaced the draconian Criminal Abortion Ban with a comprehensive, detailed framework permitting abortion in West Virginia. This modern framework is entirely incompatible with the near-total Criminal Abortion Ban, and, indeed, would serve no purpose whatsoever were the Ban to remain in effect.

Courts, when faced with similar circumstances in other states, have not hesitated to conclude that an outdated criminal prohibition on abortion was impliedly repealed through subsequent statutes regulating abortion. In *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), for example, the Fifth Circuit determined that the statutes criminalizing abortion were later repealed by implication because "Texas regulates abortion in a number of ways," including through civil regulations on the availability of abortions for minors, health and safety regulations regulating clinics, and laws limiting the availability of Medicaid funding for abortion care. *Id.* at 849. The Fifth Circuit held the later provisions could not "be harmonized with provisions that purport to criminalize abortion" and thus struck down the earlier laws. *Id.* Similarly, in *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980), a three-judge panel of the Eastern District of Arkansas held that a 1969 abortion law impliedly repealed a criminal abortion law from 1875, including because the later law "treat[ed] the subject of abortion in a much more comprehensive manner than Act 4 of 1875" had. *Id.* at 924. In doing so, the court underscored that the 1969 law "sets forth in detail the conditions which make abortion 'legal' and the restrictions which are placed on the performance of legal abortions." *Id.* (further noting that this "constitute[d]'" the most significant difference between the two acts"); *cf. State v. Black*, 188 Wis. 2d 639, 646 (Wis. 1994)

(recognizing that statutes regulating abortion impliedly repeal an earlier criminal prohibition on abortion, noting that "any attempt to apply [Section 940.04(2)(a), a feticide law] to a physician performing a consensual abortion after viability would be inconsistent with the newer sec. 940.15 [an abortion law] which limits such action and establishes penalties for it").

What the Fifth Circuit held in *McCorvey* is equally applicable to the Criminal Abortion Ban here: "There is no way to enforce both sets of laws; the current regulations are intended to form a comprehensive scheme—not an addendum to the criminal statutes struck down in *Roe*." 385 F.3d at 849. Because West Virginia's modern framework governing lawful abortion has revised the whole subject matter of abortion regulation in West Virginia, the Criminal Abortion Ban has been impliedly repealed.

B. West Virginia's Later-Enacted Abortion Legislation Is Repugnant To The Criminal Abortion Ban.

Implied repeal also occurs where, as here, subsequent statutes are "repugnant" to an earlier statute. *Snyder*, 89 W. Va. at 100–01, 108 S.E. at 589 (noting that the later statutes will repeal the earlier one because they are "the last expression of the legislative will on the subject"); *id.* Syl. (explaining that repeal by implication "is allowable when the statutes deal with the same subject–matter and are so repugnant that both cannot coexist, and if so, the older must yield to the later, it being the last legislative declaration upon the subject"). Laws are "repugnant" to previously enacted laws when, among other things, they prescribe different penalties for the same act. *See id.* at 101, 108 S.E. at 589 (holding that a divorce statute imposing criminal penalties for remarrying within a certain period impliedly repealed an earlier divorce statute exonerating such a person from

criminal liability, as these differences were "too palpable to admit of their coexistence as the law").[20]

In the abortion context, this framework has led multiple other courts to strike down earlier laws whose terms conflict with—and thus are "repugnant" to—later-enacted legislation. For example, in *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990), a Louisiana district court held that the state's criminal abortion ban was impliedly repealed by numerous subsequent laws, including ones that required informed consent, established reporting requirements, required parental or court consent for minors, and required physicians to keep certain abortion records. *See id.* at 1038. In so holding, the court observed that "it is *clearly inconsistent* to provide in one statute that abortions are permissible if set guidelines are followed and in another to provide that abortions are criminally prohibited." *Id.* (emphasis added).[21] Similarly, in *Planned Parenthood Association of Nashville, Inc. v. McWherter*, the Tennessee Supreme Court held that a Tennessee statute requiring "notice to parents or guardians" was in "direct conflict" with an older statute requiring "parental consent for abortions by minors," because the "notice" law effectively permitted abortions for which "consent" had not been obtained. 817 S.W.2d 13, 15 (Tenn. 1991).

[20] West Virginia courts have also found statutes to be repugnant in other contexts. For example, in *In re Sorsby*, the Supreme Court of Appeals found that two statutes "provide[d] completely different time frames" for how to perfect a security interest on motor vehicle liens in other states. 210 W. Va. 708, 713, 559 S.E.2d 45, 50 (2001). The court could "conceive of no way to harmonize these two conflicting provisions" and held that the latter impliedly repealed the former. *Id.*; *see also Brown v. Preston Cty. Ct.*, 78 W. Va. 644, 645, 90 S.E. 166, 167 (1916) (holding that two statutes provided conflicting requirements regarding notice of elections in newspapers and "the last statute controls").

[21] Implied repeal decisions on repugnancy grounds often have an analysis that overlaps with analysis on "whole subject matter" grounds.

Given this "irreconcilable conflict" between the two laws, the court held that "the latter statute has effectively repealed the former by implication." *Id.* at 16.

Here, West Virginia's modern statutory framework for abortion is in direct conflict with, and is therefore repugnant to, the Criminal Abortion Ban, which is thus impliedly repealed. Whereas the Criminal Abortion Ban prohibits nearly all abortions and imposes severe criminal penalties, the later-enacted statutes describe the circumstances and conditions under which abortion in West Virginia is *legal*. In further conflict with the Criminal Abortion Ban, *none* of the later-enacted statutes impose any criminal penalties on physicians performing abortions. *See* W. Va. Code § 16-2O-1(c)(1); *id.* § 16-2M-6(a), (b); *id.* § 61-2I-2-8; *id.* § 16-2F-8(b); § 16-2Q-1(j); *id.* § 16-2P-1(c)(1). Nor do they impose any penalties on any patient upon whom an abortion is being performed—again unlike the Criminal Abortion Ban, which leaves open the possibility of prosecuting the pregnant person. *See, e.g.*, *id.* § 16-2Q-1(l), (k); *id.* § 16-2P-1(c)(4), (c)(2); *id.* § 16-2M-6(d); *id.* § 16-2O-1(c)(4); *id.* § 16-2F-8(d). Because West Virginia's "later acts regulating abortion are clearly inconsistent with a criminal prohibition of abortion," *Weeks*, 733 F. Supp. at 1038, the Criminal Abortion Ban falls as impliedly repealed.

* * *

Accordingly, Plaintiffs are likely to succeed on the merits of their claim that the Criminal Abortion Ban has been impliedly repealed.

II. Plaintiffs Are Likely To Succeed On The Merits Of Their Alternative Claim Of Desuetude.

Courts in West Virginia have long recognized that penal statutes that have gone unenforced for many years can be declared "void due to desuetude." *Comm. on Legal Ethics of the W. Virginia State Bar v. Printz*, 187 W. Va. 182, 188, 416 S.E.2d 720, 726 (1992). "Desuetude . . . is based on the concept of fairness embodied in the due process and equal protection clauses." *Id.* at 186,

416 S.E.2d at 724. When "a law prohibiting some act . . . has not given rise to a real prosecution" in many years, renewed use of that law would be unfair and therefore impermissible. *Id.* In discussing the core of the doctrine, the Supreme Court of Appeals explained:

> There is a problem with laws like these [that have gone unenforced for many years.] They are kept in the code books as precatory statements, affirmations of moral principle. It is quite arguable that this is an improper use of law, most particularly of criminal law, that statutes should not be on the books if no one intends to enforce them. It has been suggested that if anyone tried to enforce a law that had moldered in disuse for many years, the statute should be declared void by reason of desuetude or that the defendant should go free because the law had not provided fair warning.

Id. at 186–87, 416 S.E.2d 724–25 (quoting R. Bork, *The Tempting of America* 96 (1990)).

West Virginia courts have applied these principles in a variety of contexts to invalidate as void for desuetude laws that—like the Criminal Abortion Ban—have gone dormant. In *Printz*, for example, the Supreme Court of Appeals held that a 1923 criminal statute prohibiting offers of non-prosecution in exchange for a defendant's return of embezzled or stolen funds had, by 1992, "clearly fail[ed] due to desuetude," where there had been no prosecution under the law in 54 years. *Id.* at 189, 416 S.E.2d at 727. Similarly, in *State ex rel. Canterbury v. Blake*, 213 W. Va. 656, 584 S.E. 512, 517 (2003) (per curiam), the Supreme Court of Appeals held that a 1981 criminal statute requiring proof of ownership and record-keeping of precious metals had fallen into desuetude, and echoed *Printz*'s explanation that "a law prohibiting some act that has not given rise to a real prosecution in 20 years is unfair to the one person selectively prosecuted under it." *Id.* at 661 (quoting *Printz*, 187 W. Va. at 186, 416 S.E.2d at 724).

The doctrine of desuetude has particular force in the realm of sexual and reproductive autonomy, where anachronistic criminal laws fall into disuse but may nonetheless remain on the books as a formal matter. In *Poe v. Ullman*, 367 U.S. 497 (1961), for instance, the U.S. Supreme Court invoked desuetude in holding that it need not consider whether Connecticut's statute

proscribing the use of contraceptives was unconstitutional because the law had not been enforced for more than 75 years other than a single test case, despite the open, common, and notorious sale of contraceptives in Connecticut drug stores. *Id.* at 501–02. Similarly, in *State ex rel. Golden v. Kaufman*, 236 W. Va. 635, 647, 760 S.E.2d 883, 895 (2014), the West Virginia Supreme Court of Appeals held that a law prohibiting "criminal conversation" (*i.e.*, adultery), for which there had been no reported claims asserted since 1969—when a more recent statute abolished all civil actions for alienation of affections—"had lapsed into desuetude." *Id.*; *see also, e.g.*, *Fort v. Fort*, 425 N.E.2d 754, 758 (Mass. App. Ct. 1981) ("It seems beyond dispute that the statutes defining or punishing the crimes of fornication, adultery, and lewd and lascivious cohabitation have fallen into a very comprehensive desuetude.").

In assessing whether a particular penal statute should be declared void for desuetude, the Supreme Court of Appeals has set out three factors that must be considered: (1) Whether the penal statute proscribes acts that are *malum prohibitum* and not *malum in se*; (2) whether there has been "open, notorious, and pervasive violation of the statute for a long period"; and (3) whether there has been "a conspicuous policy of nonenforcement." Syl. Pt. 3, *Printz*, 187 W. Va., 416 S.E.2d. Here, each factor strongly favors the conclusion that the Criminal Abortion Ban is void for desuetude.

First, providing abortion care is *malum prohibitum*, not *malum in se*. "A crime that is *malum in se* is 'a crime or an act that is inherently immoral, such as murder, arson, or rape,' while a crime that is *malum prohibitum* is 'an act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.'" *Blake*, 213 W. Va. at 660 n.1, 584 S.E.2d at 516 n.1 (quoting Black's Law Dictionary 971 (7th ed. 1999)) (cleaned up). Yet it is inconceivable to imagine the Legislature setting up a comprehensive *non-criminal* regulatory scheme for

committing arson and rape in the same way it has comprehensively regulated legal abortion for multiple decades. Indeed, West Virginia's longstanding legislative decision to regulate abortion without criminal penalties in virtually all circumstances only underscores that abortion cannot be considered *malum in se*.[22]

Second, the Criminal Abortion Ban has been openly, notoriously, and pervasively violated for nearly fifty years. The Women's Health Center has been publicly providing abortion care in West Virginia since 1976. (Quiñonez Aff. ¶¶ 4, 15–16; Tolliver Aff. ¶ 17.)

Third, the Criminal Abortion Ban has not been enforced in at least fifty years—comparable to or far longer than the periods of disuse in other cases holding West Virginia statutes void for desuetude. *See Kaufman*, 236 W. Va. at 646, 760 S.E.2d at 894 (no enforcement for 45 years); *Blake*, 213 W. Va. at 661, 584 S.E.2d at 517 (no enforcement for 22 years); *Printz*, 187 W. Va. at 189, 416 S.E.2d at 727 (no enforcement for 54 years). Moreover, as detailed above, during the Criminal Abortion Ban's long period of disuse, the State has enacted a statutory regime governing the *lawful* provision of abortion care, under which even State funds can be used for abortion care in certain circumstances. *See supra* Argument Section I.A. No one could fairly argue that conduct that the State *subsidizes* today is criminal under a law it has not enforced for half a century.

For years, abortion care providers like Plaintiffs have relied on the ability to operate without fear of criminal sanction. Pregnant people in West Virginia likewise have sought abortion

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[22] Even at common law, abortion was not wholly criminalized, *see, e.g.*, 1 W. Blackstone, *Commentaries on the Laws of England* 129–30 (7th ed. 1775) (Blackstone). But even if it were, that would not change the outcome here: "[A]s societal norms shift, crimes may move between these [*malum in se* and *malum prohibitum*] categories." *Gov't of Virgin Islands v. Richards*, No. F40/01, 2001 WL 1464765, at *4 n.5 (Terr. V.I. June 24, 2001). Here, the longstanding regulation and legal protection of abortion in recent decades defeats any suggestion that abortion could be considered *malum in se* today.

care with the understanding that the Criminal Abortion Ban would not be enforced against them or those who helped them access care. Against that background, initiating a criminal prosecution for providing abortion care would work tremendous unfairness. Plaintiffs are therefore likely to succeed on their claim that the Criminal Abortion Ban is void for desuetude.

III. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief.

"[I]n order to obtain a preliminary injunction, a party must demonstrate the presence of irreparable harm." *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 367, 844 S.E.2d 133, 138 (2020) (citation omitted). Following *Dobbs*, the credible threat of prosecution under West Virginia's Criminal Abortion Ban, given the inconsistent statements by state officials, has forced WHC to cease all abortion care, causing grave and irreparable harm to WHC, its staff, its patients, and all West Virginians. Preliminary injunctive relief is urgently needed to avoid further irreparable injury.

First, absent a preliminary injunction, Plaintiffs all face the credible threat that they will be prosecuted under the Criminal Abortion Ban, either directly or as accomplices, if WHC were to continue to provide abortion care and they were to continue to fulfill their responsibilities at the Center. Courts have long recognized that "irreparable harm may be present where engaging in the prohibited conduct would result in the realistic possibility of felony prosecution." *Planned Parenthood Great Nw., Hawaii, Alaska, Indiana, & Kentucky, Inc. v. Cameron*, No. 3:22-cv-198-RGJ, 2022 WL 1597163, at *13 (W.D. Ky. May 19, 2022); *see also Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624, 631 (S.D. W. Va. 2013) ("The threat of prosecution . . . can constitute irreparable injury."). For each Plaintiff, that threat is now self-evident and acute. As a physician at WHC, Dr. Doe performs abortions that the Criminal Abortion Ban prohibits, which plainly puts him at risk of criminal prosecution for direct liability if he continues to do so. (Doe Aff. ¶¶ 7, 9.)

Similarly, Katie Quiñonez, as Executive Director of WHC, faces the risk of prosecution for direct, accomplice, accessory, and/or conspiracy liability by continuing to manage the Center's operations should it continue to provide abortion care. (Quiñonez Aff. ¶¶ 11, 21.) The same holds true of Ms. Maness, WHC's Chief Nurse Executive, who directly oversees all clinical procedures and processes associated with abortion care at WHC. (Maness Aff. ¶¶ 10–14, 17.) Ms. Beatty, as a counselor at WHC, is also at risk of prosecution for her role in counseling WHC patients who come to the Center seeking abortion care. (Beatty Aff. ¶ 30.) The threat all Plaintiffs now face of criminal prosecution for simply doing their jobs and performing, assisting with, or enabling abortion care at WHC is a classic form of irreparable harm warranting preliminary injunctive relief.

Moreover, several Plaintiffs face the further threat of licensure penalties for providing abortion care in violation of the Criminal Abortion Ban. Under West Virginia law, licensure penalties flow from providing services beyond the scope permitted by law—thus jeopardizing Dr. Doe's medical license, *see* W. Va. Code § 30-3-14(c)(15), Ms. Maness's nursing license, *see* W. Va. Code § 30-7-11(a)(2), and Ms. Beatty's social worker license, W. Va. Code § 30-30-26(g)(2). For this reason, these Plaintiffs reasonably fear that they may not only be prosecuted, but also be stripped of licenses essential to performing their professional duties if the Criminal Abortion Ban is not enjoined. (*See, e.g.*, Doe Aff. ¶ 42; Maness Aff. ¶ 17.)

Second, shutting down WHC's abortion services is already causing WHC to suffer the irreparable harm of losing its ability to continue its operations. *See, e.g.*, *Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981) (acknowledging "[t]he right to continue a business" and affirming finding of irreparable injury where plaintiff sought to "preserve its existence and its business" (citation omitted)); *Planned Parenthood Sw. Ohio Region v. Hodges*, 138 F. Supp. 3d 948, 960 (S.D. Ohio 2015) (recognizing "the inability to operate an ongoing

business for an unknown period of time constitutes irreparable harm that cannot be fully compensated by monetary damages"). Abortion care accounts for 40% of WHC's annual revenue, and WHC will have no choice but to continue to reduce its staff if it is forced to stop providing this care. (Quiñonez Aff. ¶ 23.) Indeed, WHC has already stopped employing physicians and counselors who are wholly dedicated to abortion care. (*Id.*) And as seen in other states, restricting abortion care can lead to *permanent* clinic closures, even if restrictions ultimately are lifted. (*Id.* ¶ 24.) That is because restarting an abortion care practice can present significant logistical and financial challenges—it is very difficult, for example, to recruit out-of-state physicians to provide abortion care in West Virginia, and now that WHC has been forced to stop employing its current providers for such care, there is no guarantee that it will be able to recruit them or others to return to WHC. (*Id.*) Thus, by jeopardizing the viability of WHC's business, the threat of prosecution under the Criminal Abortion Ban inflicts yet another form of irreparable harm. *See, e.g.*, *Sogefi USA, Inc. v. Interplex Sunbelt, Inc.*, 538 F. Supp. 3d 620, 630 (S.D. W. Va. 2021) (finding business being forced to shut down results in harm that "is likely to be immediate and irreparable"); *W. Alabama Women's Ctr. v. Miller*, 217 F. Supp. 3d 1313, 1334 (M.D. Ala. 2016) (finding irreparable harm where plaintiff clinics "would stop providing abortions and begin to wind down operations" and "would have to lay off staff and close their businesses"); *Hughes v. Cristofane*, 486 F. Supp. 541, 544 (D. Md. 1980) (inability to feasibly operate and "loss of revenue" under a new law irreparably harms the plaintiff); *North Carolina v. Dep't of Health, Educ., & Welfare*, 480 F. Supp. 929, 939 (E.D.N.C. 1979) (finding irreparable harm where loss of critical funding would "inject an air of unpredictability" into future planning and budgeting).

Third, WHC will suffer further irreparable harm absent a preliminary injunction because being forced to stop providing abortion care "perceptibly impair[s]" its work and frustrates its

mission of providing reproductive health care that respects patients' choices. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016); *see also Action NC v. Strach*, 216 F. Supp. 3d 597, 642 (M.D.N.C. 2016) ("An organization has been harmed if the defendant's actions 'perceptibly impaired' the organization's programs, making it more difficult to carry out its mission."); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013) (recognizing that even a "temporary gap of 'unknown duration' in which abortions would be unavailable supports a finding of irreparable harm"); (Quiñonez Aff. ¶ 25). If WHC cannot provide abortion care to patients who want it, then the Center is simply not honoring their choice—betraying its core mission in the process. (Quiñonez Aff. ¶ 25.) WHC is seeing that harm today: its staff members have been devastated because they cannot—despite the aims and principles of the organization they chose to join—provide the care their patients have chosen to seek. (*Id.*).

Finally, enforcement of the Criminal Abortion Ban will cause irreparable harm to pregnant people in West Virginia who wish to terminate their pregnancies. Forcing patients to remain pregnant inflicts serious physical, emotional, and psychological consequences that alone constitute irreparable harm. WHC has already seen this harm to patients first-hand: the day *Dobbs* was decided, WHC called dozens of patients to cancel abortion care appointments in the coming weeks, and some were sobbing so heavily they could not speak. (*See id.* ¶ 27; Doe Aff. ¶ 48.) Because WHC performed virtually all abortions in West Virginia, these patients will now be forced to travel out of state to obtain the care they need, seek to end their pregnancies outside of the medical system and risk criminal prosecution, or remain pregnant and give birth against their will. (*See, e.g.*, Doe Aff. ¶ 49; Beatty Aff. ¶ 33; McCabe Aff. ¶¶ 16–17.) Whichever path they take, pregnant people will suffer: traveling out of state imposes costs and logistical challenges that many pregnant people cannot bear, forcing someone to remain pregnant can cause lasting psychological damage, and

ending a pregnancy outside the medical system puts a person's health and even life at risk. (*See, e.g.*, Doe Aff. ¶¶ 49–50; Beatty Aff. ¶¶ 33–34.)

The irreparable harm that pregnant people face through enforcement of the Criminal Abortion Ban is already palpable and more than sufficient to warrant injunctive relief. *See, e.g.*, *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health*, 896 F.3d 809, 832 (7th Cir. 2018) ("Even an extended delay in obtaining an abortion can cause irreparable harm by resulting in the progression of a pregnancy to a stage at which an abortion would be less safe[.]" (quotation marks omitted)), *judgment vacated on other grounds*, 141 S. Ct. 184 (2020); *Van Hollen*, 738 F.3d at 795–96 (affirming finding of irreparable harm to pregnant people where they would be subjected to weeks of delay and the "nontrivial burden" of traveling hundreds of miles to abortion clinics); *Harris v. Bd. of Supervisors,* 366 F.3d 754, 766 (9th Cir. 2004) (noting that plaintiffs demonstrated irreparable harm by establishing likelihood of suffering pain and medical complications from delayed medical care); *Planned Parenthood of South Atlantic v. Wilson*, 527 F. Supp. 3d 801, 811 (D.S.C. 2021) (finding irreparable harm where abortion law disproportionately affected the health of low-income patients, patients of color, and patients who live in rural areas); Note, *Medford v. Levy*, 31 W. Va. 649, 8 S.E. 302, 308 (1888) (recognizing that "injury to health is special and irreparable" and "justif[ies] the interference of equity"); *see also Daniel v. Underwood*, 102 F. Supp. 2d 680, 681 (S.D. W.Va. 2000) (possibility that "the plaintiffs' patients may be denied appropriate medical care either because physicians, fearing liability under the Act, will choose not to treat the patient" weighs in favor of finding irreparable harm).

Accordingly, enforcement of the Criminal Abortion Ban will cause irreparable harm.

IV. The Balance Of Equities And The Public Interest Strongly Favor An Injunction.

The balance of equities and public interest weigh heavily in favor of an injunction. Whereas Plaintiffs and their patients will suffer grave harm in the absence of an injunction, Defendants will suffer no injury at all from an injunction. The Criminal Abortion Ban has lain dormant for a half century. In the meantime, abortion has been lawfully provided to and accessed by thousands of people in West Virginia pursuant to the State's comprehensive scheme regulating abortion care. A preliminary injunction will merely preserve that status quo. *See Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) ("[P]reliminary injunction . . . protect[s] the status quo and . . . prevent[s] irreparable harm during the pendency of a lawsuit.") (internal citation omitted).

In addition, there is a strong public interest in ensuring continued access to abortion care. "[P]ublic policy supports an injunction when there would be a disruption to medical services or a patient's continuity of care." *Cameron*, 2022 WL 1597163, at *15; *see also Hampton Univ. v. Accreditation Council for Pharm. Educ.*, 611 F. Supp. 2d 557, 569 (E.D. Va. 2009) (public interest particularly affected when a case "implicates concerns about public health").

V. The Bond Should Be Waived.

Defendants will not be harmed by the issuance of a preliminary injunction against enforcement of the Criminal Abortion Ban. Accordingly, this Court should waive the West Virginia Rule of Civil Procedure 65(c) bond. *See Collins v. Stewart*, No. 11-0056, 2012 WL 2924133, at *6 (W. Va. Feb. 14, 2012) (explaining that the decision to require a bond is ultimately "dependent on the prerogative of the enjoining court" and affirming waiver of bond requirement because defendant was not harmed by preliminary injunction permitting plaintiffs to use road on defendant's property); *Kessel v. Leavitt*, 204 W. Va. 95, 160, 511 S.E.2d 720, 785 (1998) (noting that there will be cases "in which the facts and circumstances simply do not compel the posting of an injunctive bond,"

such as where the defendant would not be harmed by the issuance of a temporary injunction, even where the defendant's rights were otherwise restricted, and waiving bond requirement where defendant would not be harmed by temporary injunction prohibiting defendant from placing unborn child up for adoption).

CONCLUSION

The Criminal Abortion Ban is a relic of a bygone era—one fundamentally out of step not only with the way pregnant people in West Virginia approach their pregnancies today, but also with the West Virginia Code itself. Yet Plaintiffs and others are experiencing grave harm from the threat now posed by enforcement of the Criminal Abortion Ban—harm that grows more acute every day. This Court should issue a preliminary injunction, and later a permanent injunction, restraining Defendants, their employees, agents, and successors in office, and all those acting in concert with them, from enforcing the Criminal Abortion Ban, W. Va. Code § 61-2-8, or from taking any enforcement action premised on a violation of W. Va. Code § 61-2-8 that occurred while such relief was in effect. This Court should further waive the Rule 65 bond.

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By Counsel
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