IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

PATRICK MORRISEY, in his official capacity as Attorney General of the State of West Virginia,

Petitioner,

v.

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**; **DANIELL MANESS**; and **KATIE QUIÑONEZ**,

Respondents.

From the Circuit Court of Kanawha County

Case Nos. 22-C-556, 22-C-557, 22-C-558, 22-C-559, 22-C-560

MOTION FOR EXPEDITED RELIEF REGARDING MOTION FOR EMERGENCY STAY OF KANAWHA COUNTY CIRCUIT COURT RULING

OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL

PATRICK MORRISEY
Attorney General

Douglas P. Buffington, II (WVB #8157)
Chief Deputy Attorney General

Curtis R. A. Capehart (WVB #9876)
Deputy Attorney General

State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305-0220
Telephone: (304) 558-2021
Facsimile: (304) 558-0140
Douglas.P.Buffington@wvago.gov
Curtis.R.A.Capehart@wvago.gov

Counsel for Petitioner

ALLIANCE DEFENDING FREEDOM

JOHN BURSCH
440 First Street NW, Suite 600
Washington, DC 20001
Telephone: (616) 450-4235
Facsimile: (202) 347-3622
jbursch@adflegal.org

JACOB P. WARNER*
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
jwarner@adflegal.org

ALI KILMARTIN (WVB #12856)
JULIE M. BLAKE*
44180 Riverside Parkway
Lansdowne, VA 20176
(571) 707-4655
akilmartin@adflegal.org
jblake@adflegal.org

Petitioner Patrick Morrisey, in his official capacity as Attorney General of the State of West Virginia, moves under West Virginia Rule of Appellate Procedure 29(c) for this Court to expeditiously rule on his concurrently-filed Motion for an Emergency Stay of the Kanawha County Circuit Court's July 18, 2022 ruling in this matter. In support, Petitioner states as follows:

1. On or around June 30, 2022, Respondent abortion providers Women's Health Center of West Virginia, Dr. John Doe, Debra Beatty, Danielle Maness, and Katie Quiñonez filed, among other papers, a Verified Complaint, a Motion for a Preliminary Injunction, and a Memorandum in support of that Motion, all seeking to enjoin enforcement of West Virginia Code § 61-2-8 (the "Act"), which criminalizes abortions in the State of West Virginia.

2. The Act, which has been West Virginia law since 1870, forbids "any person" from administering "any drug or other thing, or us[ing] any means, with intent to destroy [an] unborn child," which does "destroy [the] child"—unless the "act is done in good faith, with the intention of saving the life of [the] woman or child." W. Va. Code § 61-2-8. Violators face "not less than three nor more than ten years" in prison. *Id.*

3. The State consistently enforced this Act from 1870 until 1973, when the U.S. Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), which prohibited states from protecting unborn human life before viability. Compl. ¶¶ 30-32. A federal court then declared the Act unconstitutional and directed a lower court to preliminarily enjoin the Act. *See Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644-45 (4th Cir. 1975).[1]

4. To address the vacuum created by the Act's enjoinment, the Legislature passed civil laws regulating the constitutionally protected procedure. Compl. ¶¶ 39-48; W. Va. Code §§ 16-2M-1 *et seq.* (Pain-Capable Unborn Child Protection Act), 16-2F-1 *et seq.* (Parental Notification

[1] Doe was dismissed several years later without the entry of a permanent injunction.

of Abortions Performed on Unemancipated Minors Law), 16-2O-1 *et seq.* (Unborn Child Protection from Dismemberment Abortion Act), 16-2I-1 *et seq.* (Women's Right to Know Act), 16-2P-1 *et seq.* (Born-Alive Abortion Survivors Protection Act), 16-2Q-1 (Unborn Child with a Disability Protection Act).

5. Last month, the U.S. Supreme Court overturned *Roe*, allowing states to again enact and enforce rational laws protecting unborn human life, like West Virginia's 1870 Act. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2283-84 (2022). A few days later, Respondents filed this lawsuit seeking to enjoin the Act's enforcement.

6. As explained more fully in Petitioners' accompanying Motion to stay the trial court's preliminary injunction order, Respondents argued that the Legislature impliedly repealed the 1870 Act by enacting *Roe*-era civil laws under the new constitutional rule. They also argued that the Act is void for desuetude because the Act was not enforced after a federal court declared it unconstitutional under *Roe*. *See Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644-45 (4th Cir. 1975).

7. Those arguments fail because the post-*Roe* civil statutes are not irreconcilable with the Act and because the Legislature plainly did not intend to protect unborn life *less* by regulating abortions after the U.S. Supreme Court guaranteed them in *Roe*. And the Act was not enforced while *Roe* was law *because federal law restrained the State's power*, not because of any intentional policy decision made by its leaders. No West Virginia case has invoked the desuetude doctrine successfully in this situation.

8. On July 18, 2022, the lower court held oral argument on Respondents' Motion and ruled from the bench by granting Respondents' Motion for Preliminary Injunction and asking

Respondents' counsel to submit a proposed order granting Respondents' Motion so the Court can make sure it is entered.

9. The lower court concluded that the Act was likely repealed by implication and void for desuetude. The court also held the Act likely unenforceable on the basis of due process concerns—an issue that Respondents had not even made in their motion for preliminary injunction. When explaining its holding on this point, the court heavily emphasized that the Act was "too vague to be applied" and that it "lacked a rape or incest exception." The former point is contradicted by the Act's more than 100-year enforcement history pre-*Roe*. The latter point has nothing to do with vagueness; it is merely a policy criticism.

10. On the record and immediately following that ruling, Petitioner, through counsel, informed the lower court of his plan to appeal the lower court's ruling and made an oral motion for a stay of proceedings under West Virginia Rule of Appellate Procedure 28(a). Instead of ruling on Petitioner's oral motion for a stay, the court instructed Petitioner to file a written motion and granted Respondents the opportunity to file a response brief before the court issues a ruling.

11. Because of the circuit court's refusal to rule on Petitioner's oral motion to stay and its plan, instead, to rule on time-critical exigent circumstances *after* a time-consuming briefing period, Petitioner filed with this Court a Motion for Emergency Stay of the Circuit Court's Ruling under West Virginia Rule of Appellate Procedure 28(b). *See* W. Va. R. App. P. 28(b) ("If the lower tribunal should refuse to grant a stay, **or if the relief afforded is not acceptable**, the applicant may move" for a stay above) (emphasis added).

12. Petitioner now moves this Court for expedited relief in the form of immediate consideration of Petitioner's Motion for an Emergency Stay. *See* W. Va. R. App. P. 29(c).

13. The circuit court's decision to ask for time-consuming briefing instead of ruling on Petitioner's simple and straightforward oral motion to stay is improper and "is not acceptable" to the Attorney General or the public, W. Va. R. App. P. 28(b)—every day that a stay of the circuit court's injunction in this matter is not in place harms the State. It is well settled that an injunction of a state law causes irreparable harm. As Chief Justice John Roberts has said, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). This is especially so when, as here, the enjoined law affects the State's "law enforcement and public safety interests," which is the case with the criminal Act in question. *Id.*

14. Moreover, by deciding to delay what could (and should) have been an immediate ruling to stay the effect of its ruling, the circuit court prevents the State from protecting innocent unborn children from abortion. The harm at risk to the unborn from the circuit court's injunction is fatal. Without this Court's immediate issuance of a stay, every week this law goes unenforced 25 innocent children will lose their life to abortion at Respondent's clinic. (Compl. ¶ 59 (Center performed over 1,300 abortions in 2021)). Petitioner's interest in a stay pending appeal, so that the State may continue to protect its most vulnerable, far outweighs the economic harm asserted by Respondents.

15. Expedited consideration is necessary to minimize further harm to the State's legislative will and to the lives of the unborn. Delaying review unnecessarily adds time to this appeal while taking it away from innocent unborn children in West Virginia. And, the State's ability to enforce its own duly enacted criminal laws is hampered without a stay in place pending

appeal. Therefore, this Court should grant expedited review of the circuit court's actions as to Petitioner's oral motion for a stay.

16. Respondents are not prejudiced by Petitioner's requested relief. And because this Motion narrowly addresses the circuit court's actions as to Petitioner's motion to stay the effect of the circuit court's order, its judicial relief—while powerful—is limited in duration to the pendency of this appeal.

17. Petitioner has provided all opposing parties with a copy of this Motion contemporaneously with filing under West Virginia Rule of Appellate Procedure 29(c).

18. For the foregoing reasons, under West Virginia Rule of Appellate Procedure 29(c), Petitioner respectfully requests that this Court expedite consideration of Petitioner's Motion for Emergency Stay under West Virginia Rule of Appellate Procedure 28(b). The State needs urgent relief in this appeal to vindicate two of its highest interests—protecting vulnerable unborn human life and enforcing its own duly enacted laws. At a bare minimum, the Court should enter an emergency stay of the trial court's order pending this Court's more fulsome consideration of Petitioner's Motion for Emergency Stay.

Respectfully submitted,

PATRICK MORRISEY,
Petitioner,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Douglas P. Buffington, II (WV Bar #8157)
Chief Deputy Attorney General

Curtis R. A. Capehart (WV Bar # 9876)
Deputy Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305-0220
Email: Douglas.P.Buffington@wvago.gov
Curtis.R.A.Capehart@wvago.gov
Telephone: (304) 558-2021
Facsimile: (304) 558-0140

John J. Bursch*
Alliance Defending Freedom
440 First Street NW, Suite 600
Washington, DC 20001
Telephone: (616) 450-4235
Facsimile: (202) 347-3622
jbursch@adflegal.org

Jacob P. Warner*
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
jwarner@adflegal.org

Ali Kilmartin (WV Bar #12856)
Julie M. Blake**
Alliance Defending Freedom
44180 Riverside Parkway
Lansdowne, VA 20176
(571) 707-4655
akilmartin@adflegal.org
jblake@adflegal.org

*Pro Hac Vice applications pending
**Reactivation of West Virginia bar license pending

Counsel for Petitioner

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

PATRICK MORRISEY, in his official capacity as Attorney General of the State of West Virginia,

Petitioner,

v.

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**; **DANIELL MANESS**; and **KATIE QUIÑONEZ**,

Respondents.

From the Circuit Court of Kanawha County

Case Nos. 22-C-556, 22-C-557, 22-C-558, 22-C-559, 22-C-560

CERTIFICATE OF SERVICE

I, Curtis R.A. Capehart, counsel for the Petitioner, Patrick Morrisey, Attorney General of the State of West Virginia, do hereby certify that I caused a true copy of the foregoing motion to be served on all parties and the Court by depositing the same in the U.S. Mail, postage-prepaid, first-class, to each on this 19th day of July, 2022, and via electronic mail.

Loree Stark (WVSB No. 12936) Nicholas Ward (WVSB No. 13703) AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA FOUNDATION P.O. Box 3952 Charleston, WV 25339-3952 Phone: (914) 393-4614 lstark@acluwv.org nward@acluwv.org	Sarah K. Brown (WVSB No. 10845) Bren J. Pomponio (WVSB Bar No. 7774) MOUNTAIN STATE JUSTICE, INC. 1217 Quarrier Street Charleston, WV 23501 Phone: (304) 344-3144 sarah@msjlaw.org bren@msjlaw.org

Alexa Kolbi-Molinas* AMERICAN CIVIL LIBERTIES UNION FOUNDATION 125 Broad St., 18th Floor New York, NY 10004 Phone: (212) 549-2633 akolbi-molinas@aclu.org	Kathleen Hartnett* Julie Veroff Darina Shtrakhman* COOLEY LLP 3 Embarcadero Center 20th Floor San Francisco, CA 94111-4004 Phone: (415) 693-2000 khartnett@cooley.com jveroff@cooley.com dshtralchman@cooley.com
Marc Suskin* Patrick Hayden* Angeline Chen* Vidya Dindiyal* Michael Bannon* COOLEY LLP 55 Hudson Yards New York, NY 10001-2157 Phone: (212) 479-6000 msuskin@cooley.com phayden@cooley.com axchen@cooley.com vdindiyal@cooley.com mbannon@cooley.com *Counsel for Respondents*	Alex Robledo* COOLEY LLP 500 Boylston Street, 14th Floor Boston, MA 02116-3736 Phone: (617) 937-2300 arobledo@cooley.com Heather Speers* COOLEY LLP 4401 Eastgate Mall San Diego, CA 92121-1909 Phone: (858) 550-6000 hspeers@cooley.com

Curtis R. A. Capehart
Deputy Attorney General
Counsel for Petitioner