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 EMERGENCY STAY OF KANAWHA COUNTY CIRCUIT COURT RULING

STAY REQUESTED BY 9:00 A.M. JULY 20, 2022

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INTRODUCTION

West Virginia seeks to protect unborn human life. That is why the State maintained and enforced W. Va. Code § 61-2-8 (the "Act") to protect all unborn human life from destruction except to save the mother's life—until the U.S. Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), forbade such laws from protecting pre-viable life. To address the environment left by this erroneous but binding legal barrier, the Legislature passed a series of supplemental civil laws protecting women and unborn human life under the *Roe* framework. These laws were meant to regulate abortions that were allowed under *Roe,* not to repeal the 1870 Act. Their enactment and legislative history support this. But now, with *Roe* finally overturned and West Virginia free to again enforce its pro-life Act, Plaintiff abortion providers Women's Health Center of West Virginia, Dr. John Doe, Debra Beatty, Danielle Maness, and Katie Quiñonez seek to enjoin it, suggesting that the Legislature impliedly repealed the Act, and that the Act is void for desuetude. Not so.

First, implied repeal is strongly disfavored. That is especially true here, where (1) the *Roe*-era civil laws and the Act can be harmonized, and (2) the Legislature showed no clear intent to repeal the Act. As to the former, nothing in the *Roe*-era civil laws compels what the Act forbids. All the State's laws proscribe similar conduct and complement each other in that the civil statutes attack the lesser offense of reckless abortions in addition to certain intentional ones. The State can act both criminally and civilly, as is the case in many regulatory areas. As to the latter, the Legislature enacted the newer civil laws in response to *Roe*—which kept the State from enforcing the Act. It makes no sense to say that, by enacting protections that would *protect* the unborn and their mothers post-*Roe,* the Legislature intended to *repeal* an Act that provided yet greater protection for those same individuals. All the laws shared the same legislative purpose.

Second, West Virginia appears to be the only state in the nation that holds desuetude can invalidate an enacted law. The U.S. Supreme Court and other states reject the doctrine because the "failure of the executive branch to enforce a law does not result in its modification or repeal." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113–14 (1953) (citations omitted). This Court should abrogate the doctrine. What's more, desuetude cannot apply under existing West Virginia precedent where the bar to the Act's enforcement was a legal decision by the federal courts, not a failure of executive enforcement.

The lower court agreed with Plaintiffs, enjoining Section 61-2-8 on both fronts (implied repeal and desuetude) and on a front not even briefed by the parties (Plaintiffs' claim that Section 61-2-8 is an unconstitutionally vague violation of procedural due process under the West Virginia Constitution). Under West Virginia Rule of Appellate Procedure 28(b), Petitioner Patrick Morrisey moves this Court to immediately stay pending appeal the lower court's order preliminarily enjoining the W. Va. Code § 61-2-8.

BACKGROUND

For 173 years, West Virginians have sought to protect unborn human life. In 1849, the Virginia General Assembly passed a law protecting unborn human life, which West Virginia adopted through its Constitution when it became a state in 1863. *See* Va. Code tit. 54, ch. 191, § 8 (1849); W. Va. Const. art. XI § 8 (1862). In 1870, West Virginia affirmatively adopted a nearly identical statute, later amended to become the Act codified as W. Va. Code § 61-2-8. Appx. 0009-0010 (Compl. ¶¶ 27-28). This Act 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.*

The State consistently enforced this law until 1973, when the U.S. Supreme Court decided *Roe*, which prohibited states from protecting unborn human life before viability. Appx. 0010-0013 (Compl. ¶¶ 30-32). A federal court then declared the Act unconstitutional and directed a lower court to preliminarily enjoin it. *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644-45 (4th Cir. 1975).[1] To address this legal barrier, the Legislature passed a series of civil laws protecting women and unborn human life under the new post-*Roe* regime. Appx. 0015-0020 (Compl. ¶¶ 39-48); *see, e g.*, W. Va. Code §§ 16-2M-1 *et seq.* (Pain-Capable Unborn Child Protection Act), 16-2F-1 *et seq.* (Parental Notification 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 and Education Act).

Last month, the U.S. Supreme Court overturned *Roe*, allowing states to again enforce rational laws protecting unborn human life. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2283-84 (2022). Plaintiffs stopped performing abortions after this decision because their conduct is now again illegal under the Act. Appx. 0033-0038 (Compl. ¶¶ 98-119). Plaintiffs want to restart their abortion practice and seek to have the Act declared impliedly repealed and void for desuetude. Appx. 0041-0042 (Compl., Prayer for Relief). Per their Complaint, they also seek a preliminary and permanent injunction. *Id.*

The lower court granted a preliminary injunction on July 18, 2022, holding that Plaintiffs were likely to succeed on their implied-repeal and void-for-desuetude claims, and that Plaintiffs'

[1] No permanent injunction was ever entered before the matter was dismissed.

third claim, not briefed by the parties—that, as written, Section § 61-2-8 deprives Plaintiffs of procedural due process as unconstitutionally vague under Article III, Section 10 of the West Virginia Constitution—also supported issuing the injunction. This order blocks enforcement of the existing criminal law banning abortions. And it jeopardizes the lives of multiple unborn children every day it remains in effect. The Act is meant to protect these children. The State orally moved for an emergency stay in the lower court, which directed the parties to brief the issue. The Attorney General now moves this court to immediately stay the preliminary injunction for the reasons below to avoid the most severe consequences—the loss of life.

ARGUMENT

The Attorney General seeks an emergency stay of the lower court's order preliminarily enjoining the Act. To obtain this injunction, Plaintiffs had to show that the "balance of hardship test" favored entering it. *Morrisey v. W. Va. AFL-CIO*, 239 W. Va. 633, 638, 804 S.E.2d 883, 888 (2017). This test requires courts to consider four factors: (1) "the likelihood of irreparable harm to plaintiff without the injunction"; (2) "the likelihood of harm to the defendant with an injunction"; (3) the plaintiffs' "likelihood of success on the merits"; and (4) "the public interest." *Id.*

The lower court erred by entering an injunction. This Court reviews the lower court's "ultimate disposition" for "abuse of discretion," factual findings for clear error, and legal rulings de novo. Syl. pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996). The lower court legally erred by ruling that the Legislature impliedly repealed the Act, that the Act was void for desuetude, and that the Act violated due process. It also abused its discretion, holding that the balance of equities and the public interest favor Plaintiffs instead of the Defendants.

I. Plaintiffs are unlikely to succeed on the merits of their implied-repeal and void-for-desuetude claims.

A. The Act was not repealed by implication when the State enacted civil laws in response to *Roe*.

The lower court held that the State impliedly repealed W. Va. Code § 61-2-8 by enacting additional civil laws after *Roe*. That ruling is unmerited and contradicts legislative intent. Implied repeals are strongly disfavored. Syl. pt. 1, *Trumka v. Clerk of Cir. Ct. of Mingo Cnty.*, 175 W. Va. 371, 332 S.E.2d 826 (1985). A later statute, "which does not use express terms or employ words which manifest a plain intention to do so," does not repeal another and "the two statutes will operate together unless the conflict between them is so real and irreconcilable *as to indicate a clear legislative purpose to repeal the former statute*." Syl. pt. 1, *Brown v. Civ. Serv. Comm'n*, 155 W. Va. 657, 186 S.E.2d 840, 841 (1972) (emphasis added). The State's civil laws do not conflict with the Act, and, equally important, the civil laws show an intent to protect unborn life and mothers, not a clear intent to repeal the 1870 Act.

1. The Act does not conflict with the State's civil laws adopted after *Roe*.

W. Va. Code § 61-2-8 is not "irreconcilable" with the State's civil laws enacted after *Roe*. *Brown*, 155 W. Va. at 660. These laws can and should be "read and applied together." Syl. Pt. 10, *Rice v. Underwood*, 205 W. Va. 274, 277, 517 S.E.2d 751, 754 (1998) (citing Syl. Pt. 3, *Smith v. State Workmen's Compensation Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975)). And they should be applied in "accord with the spirit, purposes, and objects of the general system of law of which" they are part, which is to protect unborn life to the extent allowed under existing law. Syl. pt. 11, *Rice*, 205 W. Va. 274. Here, the Court should "harmonize" the Act and the *Roe*-era civil laws to allow the alternative enforcement schemes to protect unborn life. *Id.* (quoting Syl. pt. 5, *State v. Snyder*, 64 W. Va. 108, 219 S.E. 385 (1905)). No "legal impossibility" bars this view. *Belknap v. Shock*, 125 W. Va. 385, 24 S.E.2d 457, 460 (1943)).

Most important, nothing in the *Roe*-era laws compels what the Act forbids. All the State's laws proscribe similar conduct and "complement each other in that the civil statute[s] attack[ ] the lesser offense" of reckless abortions in addition to certain intentional ones. *United States v. Hansen*, 566 F. Supp. 162, 164-65 (D.D.C. 1983); *compare, e.g.*, W. Va. Code § 61-2-8 *with* W. Va. Code §§ 16-2M-6(a)-(b), 16-2F-5, 16-2I-5. Specifically, the Act includes a specific intent requirement, W. Va. Code § 61-2-8, while the Pain-Capable Unborn Child Protection Act forbids even reckless abortions in some instances, W. Va. Code § 16-2M-6(a)-(b). And the Parental Notification of Abortions Performed on Unemancipated Minors Law, the Women's Right to Know Act, and the Born-Alive Survivors Protection Act each provide supplementary rules covering medically necessary abortions the Act exempts. *See* W. Va. Code §§ 16-2F-5, 16-2I-5, 16-2P-1.

The "prohibitory language" in these laws "do[ ] not conflict"; "the only matter to 'reconcile' is the availability of both civil and criminal remedies" for intentional abortions. *Hansen*, 566 F. Supp. at 165. "This poses no problem, inasmuch as it is established that where a single act violates more than one statute, the government may elect" to act under either. *Id.*; *see United States v. Brown*, 482 F.2d 1359, 1360 (9th Cir. 1973) (citing *United States v. Gilliland*, 312 U.S. 86 (1941)). This Court should not "presume" that the Legislature divested the Executive of "prosecutorial authority absent 'a clear and unambiguous expression of legislative will.'" *Bialek v. Mukasey*, 529 F.3d 1267, 1270 (10th Cir. 2008) (citing *United States v. Morgan*, 222 U.S. 274, 281 (1911)); *see also State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 752-53, 278 S.E.2d 624, 631 (1981) (observing that prosecutorial discretion of criminal statutes, like the Act, belongs to the attorney prosecuting the case). No such will is evident here. The *Roe*-era laws contain no "phrase limiting the [prosecuting officer's] powers." *Bialek*, 529 F.3d at 1271 (noting statute did not limit power of U.S. Attorney General to "independent[ly] [] investigate and prosecute" certain

crimes). This Court should recognize the harmony between the *Roe*-era laws and the Act by allowing the State to tailor its enforcement method to each situation presented.

2. The *Roe*-era laws contain no "plain and clearly apparent" legislative intent to repeal the Act.

Notwithstanding any conflict analysis, this Court does not "adjudge a statute to have been repealed by implication unless a legislative intent to repeal or supersede the statute *plainly and clearly appears*." *Rice*, 205 W. Va. at 285 (emphasis added) (quoting *State ex rel. Thompson v. Morton*, 140 W. Va. 207, 212, 84 S.E.2d 791, 795 (1954)). To discern legislative intent, this Court begins with the laws' "history." *In re Sorsby*, 210 W. Va. 708, 713, 559 S.E.2d 45, 51 (2001). "[H]istorical details"—including a law's context and enactment history—help show the "primary difficulty" or mischief that the Legislature sought to address. *In re Sorsby*, 210 W. Va. at 714; *see* Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967, 990-99 (2021). The 1870 Act aimed to stop abortion. By passing *Roe*-era civil laws, the Legislature intended to limit abortion by addressing the new mischief of *Roe*—which required certain abortions and kept the State from enforcing its Act. *See Charleston Area Med. Ctr., Inc.*, 529 F.2d at 644. There is no suggestion that the Legislature intended its *Roe*-era laws to repeal the Act and provide *less* protection for the unborn.

Take first the enactment history. West Virginia adopted the earliest version of the Act in 1863. *See* Va. Code tit. 54, ch. 191, § 8 (1849); W. Va. Const. art. XI § 8 (1862). The State consistently enforced this Act to protect all unborn human life until *Roe* prevented the State from doing so in 1973. Appx. 0010-0013 (Compl. ¶¶ 30-32); *see Charleston Area Med. Ctr., Inc.*, 529 F.2d at 644. After *Roe*, the Legislature had two options: (1) do nothing and allow all abortions, or (2) enact new laws that protect women and unborn children under the new constitutional regime. The State did the latter. Appx. 0015-0020 (Compl. ¶¶ 39-49). This history is critical. It shows that the newer civil laws aimed to mitigate *Roe*'s mischief, *not* to repeal the State's earlier pro-life

protection. *See Smith v. Townsend*, 148 U.S. 490, 494 (1893) (To "ascertain the reason" for a law, courts should consider "the history of the times when it was passed."); *Rice*, 205 W. Va. at 285 (The Legislature is presumed to know the "constitutional" context in which it legislates.). In other words, *Roe*-era civil laws were meant to circumscribe abortions that *Roe* required. *See* Paul Benjamin Linton, *Overruling Roe v. Wade: The Implications for the Law*, 32 Issues L. & Med. 341, 349 (2017) (affirming implied repeal does not apply here).

Legislative history confirms this. For example, *Roe*'s prohibition consumed the Legislature's focus while it debated the Pain-Capable Unborn Child Protection Act. "Lawmakers spent a significant amount of time questioning … legal counsel … on whether it was constitutional." Appx. 0047-0049 (Joel Ebert, *Abortion bill bound for Senate floor*, Charleston Gazette-Mail (Feb. 19, 2015), https://bit.ly/3OgmwB2). Some lawmakers proposed amendments that would limit protections for unborn life and, in their view, "make the legislation more in-line with the constitution," while others opposed such amendments, seeking to "protect the unborn" as much as possible. Appx. 0050-0052 (Joel Ebert & Whitney Burdette, *Pain Capable bill up for vote on Wednesday*, Charleston Gazette-Mail (Feb. 10, 2015), https://bit.ly/3IBue7w). Reflecting these sentiments, one lawmaker said he favored "legislation … that could pass at the court level." Appx. 0053-0055 (Whitney Burdette, *House passes ban on abortion after 20 weeks*, Charleston Gazette-Mail (Feb. 11, 2015), https://bit.ly/3ITi2zf). Another argued "the Legislature has a duty to protect life" instead. *Id.* The Legislature chose greater protections for the unborn, rejected the amendments, and passed the legislation.

During debates, the Governor had repeatedly affirmed his pro-life conviction but expressed concern that the proposed law "was unconstitutional" based on legal advice. Appx. 0056-0059 (Joel Ebert, *Abortion bills have support in Legislature*, Charleston Gazette-Mail (Jan. 21, 2015),

https://bit.ly/3IB77Kh). So he vetoed the Act. *See* Appx. 0060-0063 (Whitney Burdette, *Gov. Tomblin again vetoes abortion ban bill*, Charleston Gazette-Mail (Mar. 3, 2015), https://bit.ly/3PAplOR (citing "constitutional concerns" for veto despite commitment to "life")). The Legislature overrode his veto. *See* Appx. 0064-0066 (Associated Press, *W.VA. Lawmakers Nix Veto, Put 20-week Abortion Ban Into Law*, West Virginia Public Broadcasting (Mar. 6, 2015), https://bit.ly/3uKxcRi). In sum, lawmakers were pushing *Roe*'s constraints to protect life. Such context shows that, far from trying to overrule the 1870 Act, the Legislature was trying to supplement it within *Roe*'s restrictions. *Cf. Holy Trinity Church v. United States*, 143 U.S. 457, 463 (1892) (A statute's meaning may be "found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."). That is why opponents of the civil regulations described them contemporaneously as "drafted and promoted nationwide by organizations and individuals *interested in banning abortions*." Ron Hutchinson, *Judge says abortion law flawed*, Charleston Daily Mail, 1998 WLNR 767785 (June 12, 1998) (emphasis added).

Even if the *Roe*-era civil laws somehow conflict with the 1870 Act, this Court must "determine which statute is controlling." *In re Sorsby*, 210 W. Va. at 713. Because implied repeal "cannot arise out of supposed legislative intent [not] expressed," *State ex. rel Marcum v. Wayne Cnty. Ct.*, 90 W. Va 105, 110 S.E.2d 482, 484 (1922) ("Unexpressed intention does not suffice."), the controlling statute must reflect the true and obvious "legislative intent" from history. *State ex rel. Bibb v. Chambers*, 138 W. Va. 701, 717, 77 S.E.2d 297, 306 (1953). The West Virginia Legislature has consistently sought to protect unborn human life. Given that *Roe* is now overruled, the "primary difficulty" or mischief that the civil laws addressed "no longer exists." *In re Sorsby*, 210 W. Va. at 714. And the Court should reject Plaintiffs' invitation to "continu[e] … th[at] mischief"

here. *Heydon's Case*, 76 Eng. Rep. 637, 638 (1584); *accord* syl. pt. 2, *Shipley v. Jefferson Cnty. Ct.*, 72 W. Va. 656, 78 S.E.2d 792, 792 (1913) ("A statute is always construed in the light of its purpose and the evil it was designed to remedy."); *State v. Patachas*, 96 W. Va. 203, 122 S.E.2d 545, 546 (1924) (same); *see also* Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. at 1005-07. Recency should never prevail over a legislature's consistent and manifest resolve to protect life.

Plaintiffs' disfavored implied-repeal rule does not apply here. *Roe*-era civil laws were not "evidently intended" to repeal the Act. Syl. 1, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353, 354 (1959). Quite the opposite, the Legislature enacted those laws to quell *Roe*'s mischief of preventing the Act's enforcement. Other courts have concluded this in similar challenges and refused to find implied repeal. *E.g. People v. Higuera*, 244 Mich. App. 429, 436-37 (Mich. Ct. App. 2001) (By enacting *Roe*-era regulations, "the Legislature intended to regulate … abortions permitted by *Roe* [ ] and did not intend to repeal" an earlier ban.); *State v. Black*, 526 N.W.2d 132, 135 n.2 (Wis. 1994).

Plaintiffs' cited cases are not helpful. *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004), was conclusory and made a "remarkable error" by relying in part on a post-*Roe* administrative regulation to support the implied repeal of a statute. Linton, 32 Issues L. & Med. At 349. Most important, *McCorvey* never considered the legislating enactment history, including the impact of *Roe*, as relevant to legislative intent.

Weeks v. Connick, 733 F. Supp. 1036 (E.D. 1990), suffers the same flaw. It rejected any analysis of legislative intent to repeal Louisiana's criminal law via its civil abortion statutes, whereas West Virginia law *requires* such a consideration. *Compare id.* at 1039 *with* Syl. Pt. 3, *Wayne Cnty. Ct.*, 90 W. Va. at 105.

Most inapposite is *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980), which considered two conflicting statutes both enacted pre-*Roe*. In such a situation, the concept of legislating around *Roe* was not even in play. After all, the Arkansas Legislature would have been aware that it was legislating against the background of an enforceable statute that could be repealed in whole or in part, not legislating against the background of a U.S. Supreme Court decision that (erroneously) circumscribed state authority.

In sum, Petitioners asks this Court to allow the State to enforce a 150-year-old Act rendered temporarily unenforceable by a now-overruled court ruling, an Act the Legislature never expressed a clear intent to repeal.[2] Plaintiffs are unlikely to succeed on their implied-repeal claim.

B. The Act is not void for desuetude.

West Virginia is the loneliest of outliers when it comes to desuetude—the idea that a statute is effectively repealed by implication due to nonuse. Indeed, West Virginia appears to be the only state that holds the view. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, p. 337 (Thompson/West 2012). The U.S. Supreme Court explains why it (and the other 49 states) reject it: "The failure of the executive branch to enforce a law does not result in its modification or repeal" because "[t]he repeal of laws is as much a legislative function as their enactment." *John R. Thompson Co.*, 346 U.S. at 113-14 (citing *Louisville & N.R. Co. v. United States*, 282 U.S. 740, 759 (1931), and *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950)). This Court should use this opportunity to bring West Virginia in line with the rest of the country and hold "that only the [L]egislature has the power both to enact and to disenact statutes." *Reading Law*, p. 339.

[2] Plaintiffs' references to post-*Dobbs* statements by West Virginia public officials are legally irrelevant to legislative intent in enacting post-*Roe* civil abortion statutes.

But even under existing law, desuetude is inapplicable here. The doctrine only applies in West Virginia where (1) a law proscribes acts that are *malum prohibitum*, (2) there has been "open, notorious, and pervasive violation of the statute for a long period," and (3) there is has been a "conspicuous policy of nonenforcement." Syl. Pt. 3, *Comm. On Legal Ethics of the W. Virginia State Bar v. Printz*, 187 W. Va. 182, 186, 416 S.E.2d 720, 724 (1992). And no matter whether abortion qualifies as a crime that is inherently immoral, such as those prosecuted at common law, *see State ex rel. Canterbury v. Blake*, 213 W. Va. 656, 660, 584 S.E.2d 512 (2003) (quoting Black's Law Dictionary 971 (7th ed. 1999)—something the *Dobbs* opinion establishes conclusively, *see Dobbs*, 142 S. Ct. at 2248-2256—it is not possible for Plaintiffs to satisfy elements two or three of the test.

To begin, there have been no "open, notorious, and pervasive violations" of the 1870 Act. Plaintiffs do not claim that such violations happened before *Roe*; their contention is that such violations followed *Roe*. But after the United States Court of Appeals for the Fourth Circuit held the Act "unconstitutional beyond question" under *Roe* in *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644 (4th Cir. 1975), performing an abortion in West Virginia was no longer a violation of the Act at all. *Roe* and *Charleston Area Med. Ctr., Inc.* protected such actions.

For the same reason, it is impossible to say there has been a "conspicuous policy of non-enforcement." No West Virginia executive official had the constitutional authority to enforce the 1870 Act after *Roe*. That is why Plaintiffs and the trial court cite no cases about desuetude in which the period of non-enforcement was due to a court decision that was later overruled. Instead, Plaintiffs' cases involved laws that were *wittingly* unenforced by officials tasked with their enforcement. *E.g., State ex rel. Golden v. Kaufman*, 236 W. Va. 635, 646, 760 S.E.2d 883, 894 (2014); *Blake*, 213 W. Va. at 661; *Printz*, 187 W. Va. at 189. It is more appropriate to say that there was a *court-*

enforced barrier to the Act's enforcement, and no West Virginia case has ever used such a situation to judicially repeal a validly enacted law by invoking desuetude. Put another way, the prevention of a state law's enforcement due to a federal court decision is *not* policy but an "application of [a] remedy" after the "determination of the law arising upon [ ]" "the truth of the fact." *Dostert*, 166 W. Va. at 749. If this Court is going to entertain disfavored desuetude arguments at all, it should not allow the doctrine's use to take overruled court decisions and make them permanent by repealing temporarily enjoined legislation.[3]

II. Plaintiffs suffer no irreparable harm without an injunction.

Plaintiffs must show "irreparable harm" to warrant a preliminary injunction. *Ne. Nat. Energy LLC v. Panchira Energy LLC*, 243 W. Va. 362, 367, 844 S.E.2d 133, 138 (2020). Plaintiffs say they suffer such harm because (1) they have a right to perform abortions, (2) they suffer economic and missional harm, and (3) women do not have access to their abortions. None constitute irreparable injury.

First, because West Virginia provides no constitutional right to abortion, W. Va. Const. art. VI, § 57, Plaintiffs have no legally protected interest in performing abortions. In the court below, Plaintiffs cited cases holding that abortion providers suffer irreparable harm when they cannot exercise a constitutionally protected right to perform an abortion. *E.g. Planned Parenthood v. Great Nw., Hawaii, Alaska, & Kentucky, Inc. v. Cameron*, No. 3:22-cv-198-RGB, 2022 WL 1597163, at *10-13 (W.D. Ky. May 19, 2022). But those cases were decided when *Roe* was law. After *Dobbs*, no federally protected right to abortion exists—so Plaintiffs suffer no legal injury.

[3] The trial court also suggested the Act violated due process because it is vague. But Respondents did not even raise that issue in their motion for preliminary injunction, and there is no merit to the proposition. No West Virginia court held the Act vague in its 100-year enforcement history before *Roe* and, as noted above, nothing in the post-*Roe* civil regulations makes the Act vague.

Second, Plaintiffs say they suffer economic harm because the Act jeopardizes their business. They also say that the Act thwarts their mission. These arguments fail because even purported liberty interests in earning a "livelihood in [a] lawful calling, and [pursuing a] lawful trade or a vocation [are] … routinely rejected [under the West Virginia Constitution.]" *Morrisey*, 239 W. Va. at 642. Such an injury is not irreparable anyway. Like the labor unions in *Justice v. W. Virginia AFL-CIO*, Plaintiffs can simply adjust to the law, prioritizing their other services, including gynecological and support services. 24 W. Va. 205, 866 S.E.2d 613, 628 (2021). Only 40% of the Center's revenue came from abortions. Plaintiffs can recoup income by other means.

Third, Plaintiffs have no standing to assert irreparable harm on behalf of all pregnant women seeking an abortion. For representative standing, Plaintiffs must (1) have suffered an injury themselves; (2) have a close relationship to pregnant women, and (3) show some hindrance to third parties' ability to protect their own interest. *Kanawha Cnty. Pub. Libr. Bd. v. Bd. of Educ. of Cnty. of Kanawha*, 231 W. Va. 386, 398, 745 S.E.2d 424, 436 (2013). Plaintiffs fail at the start. As detailed above, they suffer no personal injury. And pregnant women can vindicate their own rights. *E.g. Roe*, 410 U.S. at 120. Because Plaintiffs suffer no irreparable harm, this Court should immediately stay the preliminary injunction entered below.

III. The State and its citizens will suffer immense irreparable harm if this Court does not stay the lower court's preliminary injunction.

Conversely, the State and general public have a compelling interest in ensuring that constitutional laws are properly enforced. "This Court does not sit as a superlegislature, commission to pass upon the political, social, economic, or scientific merits of statutes" lawfully considered by the Legislature. Syl. pt. 1, *Morrisey*, 239 W. Va. 633. Validly adopted laws should be enforced. That's especially true for the Act, a criminal law designed to protect unborn human life. Indeed, criminal law enforcement is constitutionally required. Syl. pt. 6, *Dostert*, 278 S.E.3d at 624; W.

Va. Const. art. 3, §§ 2, 6, 8, 17. And the State has the highest interest in protecting society's most vulnerable members. *E.g.*, Syl. pt. 4, *State ex. rel. K.M. v. W. Va. Dep't of Health & Hum. Res.*, 212 W. Va. 783, 575 S.E.2d 393 (2002) (The Legislature "has a moral and legal responsibility to provide for the poor."). There is no one more vulnerable than an unborn child. The State has an overwhelming interest in ensuring its ability to protect them through the Act.

The lower court's injunction irreparably harms that interest. Plaintiff Women's Health Center operates 42 hours a week. Women's Health Center of West Virginia homepage, Hours, https://bit.ly/3cfOq2q (last visited July 19, 2022) (showing hours as "Monday-Thursday: 8am-5:15pm" and "Friday: 8am-1pm"). At its 2021 rate, the Center performs at least one abortion every two hours it is open. Appx. 0022 (Compl. ¶ 59 (Center performed over 1,300 abortions in 2021)). So, every week the lower court's injunction is in place, 25 innocent, unborn children will lose their lives. Each of those deaths irreparably harms the State's interest in protecting all unborn human life within its borders. West Virginia has waited 50 years to be allowed to once again fulfill its moral commitment to protect the unborn. This Court should stay the lower court's preliminary injunction immediately and allow the State to enforce the Act while this suit is litigated on appeal.

CONCLUSION

Plaintiffs failed to show they deserve the requested injunction enjoining W. Va. Code § 61-2-8. The State respectfully asks this Court to immediately stay the lower court's injunction pending resolution of this appeal.

Respectfully submitted,

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Petitioner,

By Counsel,

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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.

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