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June 29, 2022

MEMORANDUM CONCERNING THE EFFECTS OF *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

In *Dobbs v. Jackson Women's Health Organization*,[1] the United States Supreme Court overturned both *Planned Parenthood of Southeastern Pennsylvania v. Casey*[2] and *Roe v. Wade*,[3] returning "the authority to regulate abortion … to the people and their elected representatives."[4] This memorandum describes the details of that decision, its consequences for existing West Virginia law, and its potential effects on future abortion-related legislation.[5]

The *Dobbs* Decision

Dobbs concerns a Mississippi statute that "generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as 'viable' outside the womb."[6] After that time, the Mississippi law allows abortions only "in a medical emergency or in the case of a severe fetal abnormality."[7] According to the Supreme Court, the Mississippi Legislature passed the statute after noting an international consensus against nontherapeutic abortions beyond twelve weeks, documenting various stages of important fetal development occurring before fifteen weeks, and finding that a particularly "barbaric" abortion procedure was used in "most" abortions after fifteen weeks.[8]

Applying *Roe* and *Casey*, a Mississippi federal district court found this statute infringed on the Fourteenth Amendment due process rights of women to obtain an abortion.[9] "Viability mark[ed] the earliest point at which the State's interest in fetal life [was then thought to be] constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[10] And the

[1] No. 19-1392, slip op. at 69 (S. Ct. June 24, 2022).
[2] 505 U.S. 833 (1992).
[3] 410 U.S. 113 (1973).
[4] *Dobbs*, slip op. at 69.
[5] *See* Syl. pt. 4, *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2002) (explaining that it is one of the "inherent constitutional functions of the Office of the Attorney General" to "express his legal view on matters of State legal policy generally").
[6] Slip op. at 4.
[7] *Id.* at 6 (quoting Miss. Code §41-41-191(4)(b) (2018)).
[8] *Id.* at 6-7.
[9] *See generally Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536 (S.D. Miss. 2018).
[10] *Id.* at 539 (quoting *Casey*, 505 U.S. at 860).

statute reached pre-viability abortions.[11] Therefore, the statute was unconstitutional. The U.S. Court of Appeals for the Fifth Circuit affirmed.[12]

The Supreme Court reversed, holding that the Mississippi statute was constitutional. Three justices dissented, while Chief Justice Roberts concurred only in the judgment.

The Court concluded that the Fourteenth Amendment's reference to "liberty" does not establish any right to obtain an abortion. Thus, "laws regulating or prohibiting abortion are not subject to heightened scrutiny" but are instead "governed by the same standard of review as other health and safety measures."[13] Justice Alito and the justices who joined him concluded that a right to obtain an abortion was neither "deeply rooted in the Nation's history and tradition,"[14] nor "implicit in the concept of ordered liberty."[15] Consequently, substantive due process rights do not embrace abortion. And unlike other due process rights that the Court had separately recognized, abortion was said to implicate a unique State interest: "a State's interest in protecting prenatal life."[16] In the Court's view, that difference justified more latitude for the States.[17]

The Court further determined that neither *Roe* nor *Casey* should be upheld. "*Roe* was … egregiously wrong and deeply damaging," while "*Casey* perpetuated its errors."[18] In both decisions, the Court had relied on reasoning detached from "text, history, or precedent."[19] Courts had since found the precedents unworkable, as *Casey* "provided no clear answer" to central questions built into both cases.[20] And "*Roe* and *Casey* ha[d] led to the distortion of many important but unrelated legal doctrines," such as third-party standing doctrine, severability analysis, constitutional avoidance, First Amendment principles, and more.[21] Nor did the decisions engender any real reliance interests; abortion was said to be an "unplanned activity" that does not allow for "reliance" in the concrete sense, and the abstract forms of reliance cited in *Casey* were insufficient.[22] Lastly, though *Casey* anticipated that respect for *Roe* would build the Court's legitimacy and quiet the fight around abortion, it had proven to do the opposite.[23]

The Court thus concluded that "rational-basis review is the appropriate standard" for constitutional challenges to abortion statutes.[24] "It follows that the States may regulate abortion for legitimate reasons, … [and] courts cannot substitute their social and economic beliefs for the judgment of legislative bodies."[25] Courts must strongly presume that such laws are valid, and they

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[11] *See id.* at 540.
[12] *See Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 274, 277 (5th Cir. 2019).
[13] *Dobbs*, slip op. at 11.
[14] *Id.* at 25.
[15] *Id.* at 30-31.
[16] *Id.* at 38.
[17] *Id.*
[18] *Id.* at 44.
[19] *Id.* at 45.
[20] *Id.* at 58 (discussing *Casey*, 505 U.S. at 878).
[21] *Id.* at 63.
[22] *Id.* at 64-65.
[23] *Id.* at 67-68.
[24] *Id.* at 77.
[25] *Id.* (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963)) (cleaned up).

must sustain them if there is any "rational basis on which the legislature could have thought it would serve legitimate state interests."[26] Many interests might afford such a rational basis, including "respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability."[27]

The Mississippi statute satisfied rational-basis review. The Court noted how the Mississippi Legislature had made specific findings that "recount the stages of 'human prenatal development' and assert the State's interest in 'protecting the life of the unborn.'"[28] The Court also reiterated how the Legislature had described the dilation-and-evacuation procedure "typically" used in post-15-week abortions: "a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession" when used for non-therapeutic or elective reasons.[29] According to the Court, "[t]hese legitimate interests provide a rational basis for the Gestational Age Act."[30]

In a separate concurrence, Justice Kavanaugh tried to further delineate the decision's effect. He stressed that "the Court's decision … *does not outlaw* abortion throughout the United States."[31] Instead, "all of the States may evaluate the competing interests and decide how to address this consequential issue."[32] But he noted the view of at least some justices that "an exception to a State's restriction on abortion would be constitutionally required when an abortion is necessary to save the life of the mother."[33]

The dissenting justices believed that the decision places few limits on state abortion regulation. "Under the majority's ruling," wrote Justices Breyer, Sotomayor, and Kagan, a State could ban abortion "from the moment of fertilization."[34] States could enact laws "extending to all forms of abortion procedure, including taking medication in one's own home."[35] They could enact laws without exceptions for women who were victims of rape or incest.[36]

Existing West Virginia Law Post-*Dobbs*

West Virginia has many existing laws concerning abortion. Several address the process of

[26] *Id.*
[27] *Id.* at 78.
[28] *Id.* (quoting Miss. Code § 41-41-191(2)(b)(i)).
[29] *Id.* (quoting Miss. Code § 41-41-191(2)(b)(i)(8)).
[30] *Id.*
[31] *Id.* at 3 (Kavanaugh, J., concurring) (emphasis in original).
[32] *Id.* at 4.
[33] *Id.* at 4 n.2 (citing *Roe*, 410 U.S. at 173 (Rehnquist, J. dissenting)).
[34] *Id.* at 2 (Breyer, Sotomayor, and Kagan, J.J., dissenting).
[35] *Id.*; *but see id.* at 36-37 (stating that it is an open question whether "a State [can] interfere with the mailing of drugs used for medication abortions").
[36] *Id.* at 2.

obtaining an abortion and related matters.[37] This memorandum focuses on laws prohibiting specific acts of abortion.

*Pre-*Roe *Criminal Abortion Statute*

Enacted in 1849 and never repealed since, West Virginia Code § 61-2-8 provides that "[a]ny 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," commits a felony punishable by three to ten years in prison.[38] The statute covers persons who perform abortions and, at least arguably, women who seek them. It contains an exception: It does not cover acts "done in good faith, with the intention of saving the life of such woman or child."[39] And "intent is an integral part of the crime of abortion."[40]

As a criminal statute, the law must be enforced by the prosecutor for the county in which the abortion occurred.[41]

Unlike many pre-*Roe* criminal abortion bans, Section 61-2-8 is not presently subject to an injunction. In 1975, the U.S. Court of Appeals for the Fourth Circuit held that Section 61-2-8 was "unconstitutional beyond question" under *Roe*.[42] The Fourth Circuit thus ordered the district court to "immediately issue [a preliminary] injunction to require [a Charleston-area] hospital to ignore the unconstitutional state statute."[43] The district court did so.[44] But several years later, the district court entered a judgment dismissing *Doe* without entering a permanent injunction.[45] Because "[a] preliminary injunction imposed according to the procedures … dissolves *ipso facto* when a final judgment is entered in the cause,"[46] no continuing injunction exists in *Doe* (or any other case[47]) as to Section 61-2-8.

The Fourth Circuit's decision in *Doe* also does not otherwise prevent the statute's enforcement today. When a court "invalidates a law as unconstitutional, the Court of course does

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[37] *See* W. Va. Code § 9-2-11 (excluding payments for abortions from state Medicaid programs); *id.* § 16-2B-2 (excluding abortion from family-planning initiatives operated by local boards of health); *id.* § 16-2I-1, *et seq.* (requiring certain forms of informed consent, creating education sources, providing for privacy in court proceedings, and requiring physicians to report on abortions); *id.* § 30-14-12d(g)(5) (prohibiting physicians from prescribing "any drug with the intent of causing an abortion" via telemedicine); *id.* § 49-1-206 (excluding abortion from certain definitions in the West Virginia Child Welfare Act); *id.* § 49-8-3 (barring parents and guardians from delegating the performance or inducement of an abortion for the child).

[38] *See also* W. Va. Code § 62-9-5 (prescribing form of indictment for crime of abortion).

[39] W. Va. Code § 61-2-8.

[40] *State v. Evans*, 136 W. Va. 1, 9 (1951).

[41] *See Willis v. O'Brien*, 151 W. Va. 628, 632, 153 S.E.2d 178, 181 (1967).

[42] *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644 (4th Cir. 1975) (citing *Roe*, 410 U.S. at 117-18 & n.2).

[43] *Id.* at 645.

[44] *See* Order, *Doe v. Charleston Area Med. Ctr., Inc.*, No. 74-516 (S.D. W. Va. Dec. 19, 1975), Dkt. 25.

[45] *See* Order, *Doe v. Charleston Area Med. Ctr., Inc.*, No. 74-516 (S.D. W. Va. Sept. 7, 1982), Dkt. 36.

[46] *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093 (9th Cir. 2010).

[47] Two other cases said the law was unconstitutional, but neither entered an injunction. *See Roe v. W. Va. Univ. Hosp.*, No. 75-0524-CH (S.D. W. Va. Aug. 15, 1975); *Smith v. Winter & Browning*, No. 74-571-CH (S.D. W. Va. Apr. 17, 1975).

not formally repeal the law."[48] Rather, "the offending provision formally remains on the statute books (at least unless [the legislature] also formally repeals it)."[49] Now that the basis for the Fourth Circuit's declaration is gone, the West Virginia statute may "spring back to life" and "regain [its] vitality."[50]

Challengers have already filed a suit to enjoin this law in Kanawha County Circuit Court. They argue that the statute has been impliedly repealed, that the doctrine of desuetude applies given the lack of recent enforcement, and that the provisions are unconstitutionally vague. Assuredly, we have strong arguments against this challenge. But the statute would still benefit from the Legislature's further attention.

Women's Access to Healthcare Act

In the Women's Access to Healthcare Act, the Legislature enacted additional criminal penalties for a "partial-birth abortion"—that is, "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."[51] In particular, any person who "knowingly performs a partial-birth abortion and thereby kills a human fetus" is guilty of a felony punishable by a fine and up to two years in prison.[52] The statute does not apply where the abortion was "necessary to save the life of a mother when her life is endangered by a physical disorder, illness or injury."[53] Nor may it be used to prosecute a woman for "having a partial-birth abortion … or conspiring to violate the provisions of [the] section."[54]

The Legislature has not repealed these provisions, but the U.S. District Court for the Southern District of West Virginia has enjoined the Governor and the Prosecuting Attorney of Kanawha County (in their official capacities) from enforcing them.[55] Relying on *Roe*, *Casey*, and the Supreme Court's subsequent decision in *Stenberg v. Carhart*,[56] the district court in 2000 concluded that the law was unconstitutional given that it failed to provide an exception for the

[48] *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2351 n.8 (2020) (cleaned up).
[49] *Id.*
[50] Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in A Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611, 614-15 (2007); *see also* Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 285 n.63 (1999) ("[T]here is near unanimity among courts and commentators that an invalidated statute simply becomes dormant, ready to be enforced as soon as a court finds that it is no longer invalid.").
[51] W. Va. Code. § 33-42-3(3); *see also id.* § 33-42-3(5) ("'Vaginally delivers a living fetus before killing the fetus' means deliberately and intentionally delivering into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure that the physician or person delivering the living fetus knows will kill the fetus, and kills the fetus.").
[52] *Id.* § 33-42-8(a).
[53] *Id.*
[54] *Id.* § 33-42-8(c).
[55] *See Daniel v. Underwood*, 102 F. Supp. 2d 680, 686 (S.D. W. Va. 2000).
[56] 530 U.S. 914 (2000).

health of the mother and unduly burdened "a woman's right to previability abortion."[57] That injunction remains in place today.[58]

Neither the Governor nor the Prosecuting Attorney of Kanawha County may enforce Section 33-42-8 unless the Southern District of West Virginia lifts the injunction. But Federal Rule of Civil Procedure 60(b)(5) permits a "party or its legal representative" to file a motion asking a court to lift its injunction when "applying it prospectively is no longer equitable." And "[i]t is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show a significant change … in law."[59] *Dobbs* constitutes such a change. As such, if the Governor requests it, the Attorney General will move to dissolve or vacate the injunction against Section 33-42-8.[60]

Other Prescriptive Statutes

In more recent years, the Legislature has passed a series of abortion-related bills further prescribing what types of abortions could be performed in the State of West Virginia. None of these bills have been subject to a successful legal challenge, and all are presently in effect.

The *Parental Notification of Abortions Performed on Unemancipated Minors Law* states that "[a] physician may not perform an abortion upon an unemancipated minor until notice of the pending abortion as required by [the statute] is complete."[61] The notification requirements do not apply where the physician certifies that a "medical emergency" exists.[62] A medical emergency arises from "a condition that, on the basis of a reasonably prudent physician's reasonable medical judgment, so complicates the medical condition of a pregnant female that it necessitates the immediate abortion of her pregnancy without first determining gestational age to avert her death or for which the delay necessary to determine gestational age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions."[63]

The *Pain-Capable Unborn Child Protection Act* bars abortion past the unborn child's "pain capable gestational age"—measured as 22 weeks after first day of the woman's last menstrual period or 20 weeks after fertilization.[64] It includes the same emergency exception as the parental-notification statute.[65] It also allows for an abortion where a reasonably prudent physician determines that a "nonmedically viable fetus" exists.[66] But when one of these exceptions applies,

[57] *Daniel*, 102 F. Supp. 2d at 684-86.
[58] *See* 42 AM. JUR. 2D INJUNCTIONS § 275 ("A permanent injunction is issued primarily to prevent future acts of harm and, unless specified otherwise in the order, is unlimited in duration.").
[59] *Agostini v. Felton*, 521 U.S. 203, 215 (1997).
[60] *See* W. Va. Code § 5-3-2.
[61] *Id.* § 16-2F-3.
[62] *Id.* § 16-2F-5(a).
[63] *Id.* § 16-2F-2(2) (citing W. Va. Code § 16-2M-2(5)). No medical emergency arises from self-harm. *Id.* § 16-2M-2(5).
[64] *Id.* § 16-2M-2(7).
[65] *Id.* § 16-2M-4(a).
[66] *Id.*

"the physician shall terminate the pregnancy in the manner which, in reasonable medical judgment, provides the best opportunity for the fetus to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the patient or of the substantial and irreversible physical impairment of a major bodily function of the patient than would other available methods."[67]

The *Unborn Child Protection from Dismemberment Abortion Act* prohibits any person from "perform[ing], or attempt[ing] to perform, a dismemberment abortion."[68] It contains the same exception for medical emergencies as the preceding acts,[69] and "does not prevent an abortion by any other method for any reason including rape and incest."[70]

The *Born-Alive Abortion Survivors Protection Act* requires a physician who "performs or attempts to perform an abortion that results in a child being born alive" to "[e]xercise the same degree of reasonable medical judgment to preserve the life and health of the child as a physician would render to any other child born alive at the same gestational age," and "[e]nsure that the child born alive is immediately transported and admitted to a hospital."[71] Anyone with knowledge of a physician's failure to comply with this section "shall report the failure to the applicable licensing board."[72]

The *Unborn Child with Down Syndrome Protection & Education Act* provides that a "licensed medical professional" may not "perform or attempt to perform or induce an abortion, unless the patient acknowledges that the abortion is not being sought because of a disability" or "intentionally perform or attempt to perform or induce an abortion of a fetus, if the abortion is being sought because of a disability."[73] Like the Pain-Capable Act, this statute includes two exceptions: abortion may proceed in the case of a "medical emergency" (defined in the same way as the preceding statutes) or "a nonmedically viable fetus."[74]

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[67] *Id.* § 16-2M-4(b).

[68] *Id.* § 16-2O-1(b). A dismemberment abortion "means, with the purpose of causing the death of an unborn child, purposely to dismember a living unborn child and extract him or her one piece at a time from the uterus through use of clamps, grasping forceps, tongs, scissors or similar instruments that, through the convergence of two rigid levers, slice, crush or grasp a portion of the unborn child's body to cut or rip it off." *Id.* § 16-2O-1(a)(3). Although many similar laws in other states had been enjoined under *Roe* and *Casey*, *see EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 792-93 (6th Cir. 2020), West Virginia's statute has not been.

[69] W. Va. Code § 16-2O-1(a)(4), (b) (citing W. Va. Code § 16-2M-2(5)). Again, no medical emergency arises from self-harm. *Id.* § 16-2O-1(b).

[70] *Id.* 16-2O-1(d)(1).

[71] *Id.* § 16-2P-1(b)(1). To be "born alive" means "the complete expulsion or extraction from its mother of the fetus, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion." *Id.* § 16-2P-1(a)(3).

[72] *Id.* § 16-2P-1(b)(2).

[73] *Id.* § 16-2Q-1(b), (c).

[74] *Id.* § 16-2Q-1(a) (citing W. Va. Code § 16-2I-1)).

The five preceding statutes include similar definitional provisions, penalty provisions, and exceptions. For instance, each defines abortion in the same way.[75] Consequences for violating any of these sections include licensed medical professionals being "subject to discipline from the applicable licensure board for that conduct," or, if not a licensed medical professional, being deemed to have engaged in the unauthorized practice of medicine," a criminal offense.[76] And each clarifies that "[n]o penalty may be assessed against any patient upon whom an abortion is performed or attempted to be performed."[77]

Reconciling the Statutes

West Virginia courts will construe statutes—at least "where it is possible to do so"—"to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions."[78] Thus, a court applying an abortion statute may read it "as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part."[79] "Statutes which relate to the same subject matter should be read and applied together."[80] And as part of that task, "[i]t is always presumed that the legislature will not enact a meaningless or useless statute."[81] "Even where two statutes are in apparent conflict, the Court must, if reasonably possible, construe such statutes so as to give effect to each."[82]

In applying abortion-related statutes, West Virginia courts will very likely resort to a variety of tools to harmonize them. Courts might favor one statute over another because the former is thought to be more specific.[83] Courts might give precedence to more recent statutes over older ones.[84] Courts might apply limiting constructions; for example, the exceptions and protections

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[75] *See id.* §§ 16-2F-2(1), 16-2M-2(1), 16-2O-1(1), 16-2P-1(a), 16-2Q-1(a) (defining abortion as "the use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a female known to be pregnant and with intent to cause the expulsion of a fetus other than by live birth"). The same sections all provide that the definition does not reach "intrauterine contraceptive devices, other contraceptive devices, or other generally medically accepted contraceptive devices, instruments, medicines or drugs for a female who is not known to be pregnant and for whom the contraceptive devices, instruments, medicines or drugs were prescribed by a physician solely for contraceptive purposes and not for the purpose of inducing or causing the termination of a known pregnancy." *Id.*

[76] *Id.* §§ 16-2F-8, 16-2M-6(a)(b), 16-2O-1(c)(1), (2), 16-2P-1(c)(1), (2), 16-2Q-1(j), (k).

[77] *Id.* §§ 16-2M-6(d), 16-2O-1(c)(4), 16-2P-1(c)(4), 16-2Q-1(l).

[78] *Charleston Gazette v. Smithers*, 232 W. Va. 449, 468, 752 S.E.2d 603, 622 (2013) (quoting *State v. Williams*, 196 W. Va. 639, 641 (1996)).

[79] Syl. pt. 4, *Sheena H. ex rel. Russell H. ex rel. L.H. v. Amfire, LLC*, 235 W. Va. 132, 136, 772 S.E.2d 317, 321 (2015) (quoting Syl. pt. 5, in part, *State v. Snyder*, 64 W. Va. 659 (1908)).

[80] Syl. pt. 4, *Bradford v. W. Virginia Solid Waste Mgmt. Bd.*, 246 W. Va. 17, 866 S.E.2d 82, 89 (2021) (quoting Syl. pt. 3, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108 (1975)).

[81] *Cmty. Antenna Serv., Inc. v. Charter Commc'ns VI, LLC*, 227 W. Va. 595, 604, 712 S.E.2d 504, 513 (2011) (quoting Syl. pt. 4, *State ex rel. Hardesty v. Aracoma–Chief Logan No. 4523, Veterans of Foreign Wars*, 147 W. Va. 645 (1963)).

[82] *In re R.S.*, 244 W. Va. 564, 573, 855 S.E.2d 355, 364 (2021) (quoting Syl. Pt. 4, in part, *State ex rel. Graney v. Sims*, 144 W. Va. 72 (1958)) (cleaned up).

[83] *Miller v. WesBanco Bank, Inc.*, 245 W. Va. 363, 379, 859 S.E.2d 306, 322 (2021).

[84] *Wiley v. Toppings*, 210 W. Va. 173, 175, 556 S.E.2d 818, 820 (2001).

often seen in more recent enactments might be extended to other provisions that lack them.[85] Or courts might find that earlier enactments were impliedly repealed.

The Attorney General stands ready to defend these statutes to their fullest extent. But courts may apply them in unexpected ways. For that reason, the Legislature is advised to re-enact a comprehensive framework governing abortions to avoid any potential variances among prohibitions, definitions, scope, exceptions, or otherwise.

Future West Virginia Law Post-*Dobbs*

The West Virginia Legislature will have many factors to weigh when considering future abortion-related laws—the scope of the State's restrictions, relevant exceptions, enforcement mechanisms, and more. For instance, the Legislature will need to weigh whether to include criminal or civil enforcement measures, or a combination. The Legislature will need to decide whether to impose penalties on the provider, the pregnant mother, or both. (As discussed above, most of the State's existing laws target a medical provider's conduct, but not the pregnant woman's.) The Legislature will also need to consider the wisdom of decentralized criminal enforcement as opposed to (or in addition to) any statewide enforcement mechanism. And it will need to be aware of how current federal laws might affect West Virginia's discretion in this area.

This memorandum focuses on two of the more pressing questions surrounding potential legislation: the constitutional framework and the potential for challenges based on federal preemption grounds.

State and Federal Constitutions

The West Virginia Constitution is unequivocal: "Nothing in [it] secures or protects a right to abortion or requires the funding of abortion."[86] The West Virginia Constitution therefore does not affect whether and how the Legislature can regulate abortion within the State.

Dobbs also gives the West Virginia Legislature broad latitude under the United States Constitution to enact abortion-related laws throughout all stages of pregnancy. As a federal constitutional matter, "laws regulating or prohibiting abortion are not subject to heightened scrutiny."[87] Instead, like "other health and welfare laws" they will now be subject only to rational basis review.[88]

Rational basis is a highly deferential standard. Reviewing courts may not strike down a state law under this standard of review "if there is any reasonably conceivable state of facts that

[85] *See, e.g.*, *State v. Louk*, 237 W. Va. 200, 210, 786 S.E.2d 219, 229 (2016) (Benjamin, J., concurring) (explaining why the criminal child-neglect statute must exclude the unborn because it would otherwise permit women to be prosecuted for killing their unborn children, something the Legislature had indicated it did not wish to do in many other provisions).
[86] W. VA. CONST. ART. VI, § 57.
[87] *Dobbs*, slip op. at 11.
[88] *Id.* at 77.

could provide a rational basis" for the legislature's decision.[89] These laws "bear[] a strong presumption of validity,"[90] and courts may not second-guess the legislature's judgment "no matter how unwisely [they] may think a political branch has acted."[91] Those challenging the law bear the burden "to negate every conceivable basis which might support it."[92] And "conceivable" means exactly that: "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[93] Although legislative findings could certainly strengthen the legal defense for any law the West Virginia Legislature might enact in *Dobbs*'s wake, a State "has no obligation to produce evidence to sustain the [statute's] rationality" and "need not actually articulate at any time [its] purpose or rationale."[94] Usually even "rational speculation unsupported by evidence or empirical data" will do.[95]

The *Dobbs* majority's discussion of the rational basis standard spans just three paragraphs, but it doubles down on these principles. It emphasizes that "courts cannot substitute their social and economic beliefs for the judgment of legislative bodies," even if "the laws at issue concern matters of great social significance and moral substance."[96] Rather, courts "must" sustain abortion-related laws under rational basis review as long as "the legislature *could have thought* that it would serve legitimate state interests."[97]

The majority also lists six interests it deems "legitimate": "respect for and preservation of prenatal life at all stages of development"; "protection of maternal health and safety"; "elimination of particularly gruesome or barbaric medical procedures"; "preservation of the integrity of the medical profession"; "mitigation of fetal pain"; and "prevention of discrimination on the basis of race, sex, or disability."[98] Though this list is not exhaustive, each of the six factors appears to presumptively satisfy constitutional review. And they will cover a lot of ground when it comes to abortion-related laws: One or more of these interests reasonably could have motivated the Legislature when it passed every one of the existing West Virginia abortion laws discussed above.

All that said, *Dobbs*'s highly permissive approach to state abortion laws does not necessarily mean that the federal constitution places *no* limits on the West Virginia Legislature's options. The strongest constitutional counterargument to any law passed by the Legislature derives from a pregnant woman's life interest: Any state abortion restriction must include an exception for abortions performed to save the pregnant woman's life. When the Court discusses the Nation's history of abortion laws it notes that even the most stringent pre-*Roe* laws almost always contained

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[89] *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).
[90] *Id.* at 314 (cleaned up); *see also, e.g.*, *Heller v. Doe*, 509 U.S. 312, 319 (1993) (explaining that under rational basis review, a law "neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity").
[91] *Beach Commc'ns*, 508 U.S. at 314 (cleaned up).
[92] *Id.* at 315 (cleaned up).
[93] *Id.* (quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).
[94] *Heller*, 509 U.S. at 320 (cleaned up); *see also Beach Commc'ns*, 508 U.S. at 315 (the "absence of legislative facts … has no significance in rational-basis analysis" (cleaned up)).
[95] *Heller*, 509 U.S. at 320 (cleaned up).
[96] *Dobbs*, slip op. at 77.
[97] *Id.* (emphasis added).
[98] *Id.* at 78; *see also, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (describing other Court-sanctioned state interests, including keeping "a bright line that clearly distinguishes abortion and infanticide").

exceptions for life. The "overwhelming consensus" before *Roe* was to prohibit abortion "unless done to save or preserve the life of the mother."[99] Thus, the Court would likely approach the threshold constitutional question differently if faced with an abortion restriction without a life exception. On that point, Justice Kavanaugh's concurrence cites Justice Rehnquist's dissent in *Roe* itself, which "indicated that an exception to a State's restriction on abortion would be constitutionally required when an abortion is necessary to save the life of the mother."[100]

More generally, a very strong Due Process Clause argument exists for requiring a life exception given the Clause's express bar on "depriv[ing] any person of *life* … without due process of law."[101] It is difficult to imagine a reviewing court finding even a rational basis for an absolute ban on abortion: It is not reasonable to trade the woman's life for potential life or the life of an unborn child. So while there might be other potential constitutional limits on States' post-*Dobbs* discretion, at a minimum any laws in this space must protect the pregnant woman's life.

Preemption Under Federal Law

Just hours after the Court released *Dobbs*, U.S. Attorney General Merrick Garland issued a statement suggesting that States, by virtue of federal law, would not have full discretion to regulate certain abortifacients.[102] In particular, General Garland noted the Food and Drug Administration "approved the use of the medication Mifepristone," a common abortifacient also known as Mifeprex.[103] He then announced that States "may not ban … based on disagreement with the FDA's expert judgment about its safety and efficacy."[104]

Federal regulation of mifepristone has evolved over the years. FDA first approved Mifeprex in 2000; it later assigned it to a safety program—known as a Risk Evaluation and Mitigation Strategy ("REMS")—that FDA sometimes "require[s] for certain medications with serious safety concerns to help ensure the benefits of the medication outweigh its risks."[105] Among other things, the REMS allowed dispensing of mifepristone only after counseling was administered

[99] *Dobbs*, slip op. at 24 (cleaned up).
[100] *Id.*, slip op. at 4 n.2 (Kavanaugh, J., concurring) (citing *Roe*, 410 U.S. at 173).
[101] U.S. CONST. art. XIV, cl. 1 (emphasis added).
[102] *See* Attorney General Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women's Health Organization*, DOJ (June 24, 2022), https://bit.ly/3HWwnu4. Mifepristone is a synthetic steroid issued either to treat certain adults with "endogenous Cushing syndrome," under the trade name Korlym, or, as relevant here, to cause "the medical termination of intrauterine pregnancy through 70 days gestation" when taken in combination with another medication called misoprostol. *Mifepristone*, RXLIST, https://bit.ly/3QPopH7 (listing trade names Mifeprex, Korlym, RU486); *see Mifepristone*, NHS, https://bit.ly/3AcLygP (listing trade name Mifegyne); *see also Misoprostol*, RXLIST, https://bit.ly/2X3GTqS (listing trade name Cytotec). The combination of oral mifepristone and oral misoprostol is "the most common type of medical abortion," and is "usually taken within seven weeks of the first day" of the mother's last period: the "[m]ifepristone [] blocks the hormone progesterone, causing the lining of the uterus to thin and preventing the embryo from staying implanted and growing," and then, taken "hours or days later," "[m]isoprostol [] causes the uterus to contract and expel the embryo through the vagina." *Medical Abortion*, MAYO CLINIC, https://mayocl.in/2RLBxNN; *see also Medical Abortion*, CLEVELAND CLINIC, https://cle.clinic/3u7wNbm (a medical or medication abortion "end[s] a pregnancy" without "requir[ing] surgery" by using "mifepristone and misoprostol" to "stop[] the growth of the pregnancy and then caus[e] the lining of the uterus to shed").
[103] Garland, *supra* note 102.
[104] *Id.*
[105] *Risk Evaluation and Mitigations Strategies | REMS*, FDA, https://bit.ly/39ZH0ji.

and "only in certain healthcare settings, specifically clinics, medical offices, and hospitals (referred to as the 'in-person dispensing requirement')."[106] But in 2021, "the [new] Biden FDA … announc[ed] that it would" suspend its enforcement of the [in-person dispensing] requirement and allow for "mail distribution of mifepristone via 'enforcement discretion' regarding pandemic-context in-person protocols."[107] By the end of the year, the Biden FDA had made the rollback permanent: "[C]ertified pharmacies"—not just "certified clinicians"—could now "mail mifepristone pills" to consumers.[108]

West Virginia state law already limits how abortifacients may be handled. West Virginia's telehealth restrictions, for example, say that "[a] physician or health care provider" of allopathic or osteopathic medicine "may not prescribe any drug with the intent of causing an abortion."[109] And in many statutes, "abortion" includes "the use of any instrument, *medicine, drug*, or any other substance or device with intent to terminate the pregnancy of a female known to be pregnant and with intent to cause the expulsion of a fetus other than by live birth."[110] The mifepristone-misoprostol medicine regime, although not explicitly referenced, arguably falls within these definitions.

Challengers are likely to contend that statutes targeting the drug are preempted. No law *expressly* grants FDA preemption authority over pharmaceuticals in the way that General Garland has suggested, so such challengers would necessarily argue in favor of "implied preemption." Implied preemption arises when (1) Congress regulates an area through "exclusive governance … inferred from a framework of regulation so pervasive" that there is "no room for the States to supplement it" or from a "federal interest ... so dominant" that it should "be assumed to preclude enforcement of state laws on the same subject"; (2) "compliance with both federal and state regulations is a physical impossibility"; or (3) "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[111] It is "a

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[106] *Questions and Answers on Mifeprex*, FDA, https://bit.ly/3nl3QVt; *Reproductive Rights—Medication Abortion—FDA Lifts In-Person Dispensing Requirement for Mifepristone Abortion Pill—Update to FDA Risk Evaluation and Mitigation Strategy for Mifepristone on Dec. 16, 2021, Eliminating In-Person Dispensing Requirement*, 135 HARV. L. REV. 2235, 2236 (2022) ("REMS Update").

[107] REMS Update at 2238.

[108] *Id.*; *see also The Availability and Use of Medication Abortion*, KAISER FAMILY FOUNDATION, https://bit.ly/3buVtEc ("In April of 2022, Danco Laboratories and GenBioPro (the two manufacturers of mifepristone) are expected to submit proposed protocols to the FDA to describe how they certify pharmacies … Pharmacies may be able to dispense mifepristone by late 2022.").

[109] W. Va. Code §§ 30-3-13a(g)(5), 30-14-12d(g)(5); *see also* W. Va. Code R. § 11-15-8.4 ("A telehealth provider may not, based solely upon a telemedicine encounter, prescribe any drug with the intent of causing an abortion."). As noted above, the same definition governs sections of the West Virginia Code that ban abortions beyond 20 weeks after fertilization, dismemberment abortions, and abortions sought because of a disability, *see* W. Va. Code §§ 16-2M-2(1), 16-2O-1(1), 16-2Q-1(a); require physicians to treat an aborted child born alive, *see id.* § 16-2P-1(a); and require the mother to give the voluntary and informed consent to the abortion with advance notice of certain considerations "[i]f a chemical abortion"—that is, "the use or prescription of an abortion-inducing drug dispensed with the intent to cause an abortion"—"involving the two-drug process of mifepristone is initiated and then a prostaglandin such as misoprostol is planned to be used at a later time." *Id.* § 16-2I-1.

[110] W. Va. Code § 16-2F-2(1).

[111] *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quotations omitted).

high threshold" to preempt a state law.[112] Courts presume that "the historic police powers of the States" shall not be superseded "unless that was the clear and manifest purpose of Congress."[113]

Preemption challenges of this kind are rarely litigated. One of the only examples involved a Massachusetts attempt to "ban the prescribing, dispensing, and administration of extended-release hydrocodone bitartrate (Zohydro) despite its approval by the FDA."[114] There, a federal district court enjoined the state ban, finding that it would "undermine the FDA's ability to make drugs available to promote and protect the public health."[115] Massachusetts then sought to impose onerous regulations on the *use* of the drug, including a requirement that physician try other medications before resorting to Zohydro. The district court enjoined these and other restrictions, too, finding again that they amounted to a ban of the FDA-approved drug.[116] Massachusetts was eventually forced to modify its regulations to permit use of the drug so long as a physician considered alternatives.[117]

Despite this (lone) contrary precedent, West Virginia would have many defenses in a preemption challenge to the statute.

Most obviously, the State retains the police power to regulate how drugs may be used by medical professionals.[118] So, if the State only regulates particular means and manners of uses, the State should be on sounder footing—especially because nothing in the Food, Drug, and Cosmetic Act reflects a congressional purpose to abrogate traditional police powers. After all, "state jurisdiction is reserved for medical practice—the activities of physicians and other health care professionals—and federal jurisdiction for medical products, including drugs."[119] "[S]tate and local regulation of health and safety matters can constitutionally coexist with federal regulation."[120] If Congress "wanted to preempt all state regulation of medication distribution and safety, it could have done so, but did not."[121]

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[112] *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011).
[113] *Arizona*, 567 U.S. at 400.
[114] Patricia J. Zettler & Ameet Sarpatwari, *State Restrictions on Mifepristone Access—The Case for Federal Preemption*, 386 New Eng. J. Med. 705, 706 (2022), https://www.nejm.org/doi/full/10.1056/NEJMp2118696 (citing *Zogenix, Inc. v. Patrick*, No. CIV.A. 14-11689-RWZ, 2014 WL 3339610, at *3 (D. Mass. July 8, 2014), *vacated in part*, No. CIV.A. 14-11689-RWZ, 2014 WL 4273251 (D. Mass. Aug. 28, 2014).
[115] *Zogenix, Inc. v. Patrick*, No. CIV.A. 14-11689-RWZ, 2014 WL 1454696, at *2 (D. Mass. Apr. 15, 2014).
[116] *Zogenix*,, 2014 WL 3339610, at *5.
[117] *Zogenix*, 2014 WL 4273251, at *3.
[118] *See Gonzales v. Oregon*, 546 U.S. 243, 270-71 (2006); *Whalen v. Roe*, 429 U.S. 589, 603 (1977); *Robinson v. California*, 370 U.S. 660, 664 (1962).
[119] Patricia J. Zettler, *Pharmaceutical Federalism*, 92 IND. L.J. 845, 849 (2017).
[120] *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 716 (1985).
[121] Memo. In Supp. of Motion to Dismiss, *Genbiopro, Inc. v. Dobbs*, 2020 WL 13268125 (S.D. Miss.) (citing *Wyeth v. Levine*, 555 U.S. 555, 575 (2009) (allowing state laws that require greater drug warnings than those required under the FDA regulation); *but see PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011) ("it is the special, and different, regulation of generic drugs that allowed the generic drug market to expand, bringing more drugs more quickly and cheaply to the public," "[b]ut different federal statutes and regulations may, as here, lead to different pre-emption results"); *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 487 (2013) ("We reject this 'stop-selling' rationale as incompatible with our pre-emption jurisprudence. Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability.").

Further, the Massachusetts federal court seemed to have misunderstood the purposes of the FDA. FDA does not exist to provide for freer access to drugs; it exists to ensure that only safe and effective drugs will enter the market.[122] Means and manner regulations of abortifacients can be consistent with those (properly articulated) goals,[123] especially where drugs remain available for other appropriate uses.[124] And more aggressive regulation of a particular drug would seem to advance safety goals, not undermine them.[125]

In addition, asserting that the FDA possesses plenary authority over any medication it might touch gives inadequate respect to the State's interests in general. "Scholars have criticized a more expansive approach to preemption, arguing that it gives insufficient attention to states' rights and that it is an unprincipled grouping together of federal choices to set a regulatory 'floor' with what is effectively a 'ceiling.'"[126] "[A] state's ability to ban a drug can [also] reflect local concerns that are not adequately captured by the FDA's risk-benefit analysis."[127] And ultimately, federal preemption would give the power to regulate to unelected bureaucrats, rather than the "people's representatives" that *Dobbs* preferred.[128]

These responses are but some of the reasons that federal preemption should not be read broadly to restrain States like West Virginia from regulating in this area. The Attorney General will be prepared to aggressively defend against any and all claims of federal preemption by asserting these and other arguments.

Conclusion

An 1849 law criminalizing the provision of abortion for a health-care provider, and arguably the woman, is on the books and enforceable. So are many other abortion-related statutes.

However, the West Virginia Legislature is strongly advised to amend the laws in our State to provide for clear prohibitions on abortion that are consistent with *Dobbs*. A legislative session will need to focus on several crucial areas: specifying the acts that are subject to criminal prosecution and determining whether a woman should be subject to prosecution; determining the nature of any exceptions; addressing how the Legislature may wish to define the scope of medical practice related to restrictions or eliminations of the use of abortifacients; development of a

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[122] 21 U.S.C. §393(b)(2).

[123] *See* Lars Noah, *State Affronts to Federal Primacy in the Licensure of Pharmaceutical Products*, 2016 MICH. ST. L. REV. 1, 8 (2016) ("Congress crafted the current version of the licensing scheme for new drugs in order to *prevent* the introduction of unsafe or ineffective pharmaceutical products, and, when it did so, the legislation included language that appeared to preserve state authority.").

[124] *See* Greer Donley, *Early Abortion Exceptionalism*, 107 CORNELL L. REV. 627, 702-03 (2022) (discussing mifepristone's use in incomplete or missed miscarriages).

[125] *Cf.* REMS Update, *supra* note 106 ("The REMS sets a federal regulatory floor, but states can be more restrictive.").

[126] Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1767–68 (2009).

[127] *See* Thomas A. Costello, *Quitting Cold Turkey?: Federal Preemption Doctrine and State Bans on FDA-Approved Drugs*, 26 WM. & MARY BILL RTS. J. 839, 852 (2018).

[128] Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 756 (2008) ("Even when directed by presidential executive order to consider the federalism implications of their actions, agencies have generally sought to avoid such an obligation."); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 870 (2008) (unelected agency staffers' "[a]gency action ... evades both the political and the procedural safeguards of federalism")).

stronger enforcement regime to ensure that laws are uniformly applied in all counties, including appropriate civil tools to deter lawbreaking; and assessing the need for additional changes in the law regarding reporting or other matters.

As the Legislature considers the many issues raised in this memorandum, we stand ready to defend the present suit against the 1849 abortion statute and take action upon a request from the Governor to petition the U.S. District Court for the Southern District of West Virginia to lift the current injunction against West Virginia's partial-birth abortion law. We stand ready, too, to defend any of the other existing laws on the books. We will continue to provide counsel in response to this landmark decision and changing legal landscape, as well as to update the Legislature and Governor about ongoing developments in the courts.