IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Plaintiffs,

v.

Civil Action No. 22-C-556
[consolidated with Civil Action Nos. 22-C-557, 22-C-558, 22-C-559, and 22-C-560]

Honorable TERA L. SALANGO

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

Defendants.

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

On July 18, 2022, based upon the Verified Complaint, the parties' memoranda of law in support of and in opposition to Plaintiffs' Motion for Preliminary Injunction, supporting affidavits and exhibits, and the oral arguments of counsel presented that day, as well as the entire record in this case, this Court issued a bench order orally granting Plaintiffs' Motion for Preliminary Injunction and so ordered the entry of the preliminary injunction. For the reasons stated on the record, and consistent with the Findings of Fact and Conclusions of Law set forth below, the Plaintiffs' Motion for Preliminary Injunction is hereby **GRANTED**.

I. FINDINGS OF FACT

The following Findings of Fact are drawn from the Verified Complaint and the affidavits and exhibits submitted in support of Plaintiffs' Motion for Preliminary Injunction, which Defendants have not disputed.

A. The Parties To This Action.

1. On June 29, 2022, Plaintiffs Women's Health Center of West Virginia ("WHC"), Debra Beatty, Dr. John Doe, Danielle Maness, and Katie Quiñonez initiated this action challenging the enforceability of West Virginia Code Section 61-2-8 (the "Criminal Abortion Ban") and seeking injunctive and declaratory relief.

2. Plaintiff WHC is a nonprofit corporation organized under the laws of the State of West Virginia, and based in Charleston, Kanawha County. Prior to the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), WHC was the only outpatient health center offering abortion care in West Virginia. WHC provides a wide range of reproductive and sexual health services to patients, including testing and treatment for sexually transmitted infections, contraception services, HIV prevention services, cervical and breast-cancer screening, miscarriage management, and, until recently, abortion care. WHC sues on behalf of itself, its officers, its staff, and its patients.

3. Plaintiff Katie Quiñonez is the Executive Director of WHC. She provides executive leadership; creates, reviews, and operationalizes all personnel policies and procedures; develops and administers all program activities; represents WHC to the general public, legislators, and funders; manages personnel, property, and finances; and works with the Board of Directors.

4. Plaintiff Dr. John Doe is a board-certified family medicine physician licensed to practice in West Virginia, Pennsylvania, and New York. Dr. Doe works as a physician at WHC. Prior to *Dobbs*, Dr. Doe traveled to West Virginia to provide abortion care to WHC's patients. He

sues on his own behalf and on behalf of his patients.

5. Plaintiff Danielle Maness is an Independent Women's Health Nurse Practitioner, Certified Nurse-Midwife, and Advance Practice Registered Nurse. She is the Chief Nurse Executive at WHC. Ms. Maness is responsible for overseeing all clinical procedures and processes associated with abortion care at WHC, including managing all clinical staff.

6. Plaintiff Debra Beatty is a Licensed Independent Clinical Social Worker. Prior to *Dobbs*, Ms. Beatty worked as a counselor at WHC. In that capacity, she met with patients considering abortion to provide non-directional, professional counseling, and coordinated with clinical staff regarding the provision of care for patients who decided to proceed with an abortion.

7. Defendant Charles T. Miller is the Prosecuting Attorney for Kanawha County, located at 301 Virginia Street East, Charleston, West Virginia 25301. Defendant Miller has the authority to prosecute violations of the Criminal Abortion Ban in Kanawha County. *See* W. Va. Code § 7-4-1(a) ("The prosecuting attorney shall attend to the criminal business of the state in the county in which he or she is elected and qualified and when the prosecuting attorney has information of the violation of any penal law committed within the county, the prosecuting attorney shall institute and prosecute all necessary and proper proceedings against the offender."). Defendant Miller is sued in his official capacity.

8. Defendant Patrick Morrisey is the Attorney General of West Virginia, located at 1900 Kanawha Blvd. E, Charleston, WV 25305. The Attorney General has the authority to prosecute violations of the Criminal Abortion Ban if required to do so by the Governor. *See* W. Va. Code § 5-3-1. Defendant Morrisey is sued in his official capacity.

9. By this action, Plaintiffs seek judgment declaring the Criminal Abortion Ban unlawful and enjoining its enforcement.

B. Relevant History Relating To The Criminal Abortion Ban.

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

11. The Criminal Abortion Ban states:

> Any person who shall administer to, or cause to be taken by, a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than three nor more than ten years; and if such woman die by reason of such abortion performed upon her, such person shall be guilty of murder. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child.

W. Va. Code § 61-2-8.

12. After its enactment, multiple individuals—including physicians, partners of pregnant women, and a pregnant woman herself—were prosecuted under the Criminal Abortion Ban, under both direct and accomplice liability theories. (*See* Compl. ¶¶ 30–32 (collecting accounts of enforcement actions documented in West Virginia newspapers and cases); *see also* Stark Aff. Exs. 2–10.)

13. In 1973, the Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), which addressed the constitutionality of Texas's criminal abortion ban. *Roe* held that the Due Process Clause of the U.S. Constitution did not permit a ban on abortion prior to viability, and accordingly

did not permit a state criminal abortion statute that "excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved." *Id.* at 164.

14. Soon after *Roe* was decided, multiple state and federal courts recognized that the Criminal Abortion Ban was irreconcilable with *Roe*. *See, e.g.*, *Smith v. Winter & Browning*, No. 74-571-CH (S.D. W. Va. Apr. 17, 1975); *Roe v. West Virginia Univ. Hosp.*, No. 75-0524-CH (S.D. W. Va. Aug. 15, 1975); *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975); *Roe v. Winter*, No. 13,228 (W. Va. Cir. Ct. Kanawha County 1975).

15. The West Virginia Legislature never amended or expressly repealed the Criminal Abortion Ban.

C. West Virginia Statutes Regulating Legal Abortion Care.

16. After *Roe*, West Virginia's Legislature enacted a comprehensive non-criminal, statutory framework that revised the whole subject matter of abortion in West Virginia, setting forth the circumstances under which an abortion may be lawfully obtained. That modern statutory scheme irreconcilably conflicts with the Criminal Abortion Ban.

17. West Virginia law now addresses:

- ***Stage of Pregnancy***. West Virginia law permits abortions during the first "twenty-two weeks since the first day of the woman's last menstrual period ["LMP"]." W. Va. Code §§ 16-2M-2(7), 16-2M-4. Approximately 99% of abortions are performed within this time frame.[1]

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

- ***Abortion Methods***. For certain abortion methods, West Virginia law provides specific conditions that must be satisfied. *See, e.g.*, W. Va. Code § 30-3-13a(g)(5)

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

(medications used in a medication abortion be prescribed in person); W. Va. Code §16-2O-1 (certain procedures may not be used in second trimester abortions absent medical emergency or fetal demise).

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

- ***Parental Notification***. When the pregnant person seeking an abortion is an unemancipated minor, West Virginia law specifies that, in most circumstances, an abortion care provider must notify the parent or guardian of an unemancipated minor seeking an abortion within 48 hours before the abortion. *See* W. Va. Code § 16-2F-3.

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

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

18. West Virginia's contemporary statutory scheme regulating lawful abortion does not contain any criminal penalties for licensed medical professionals or patients. Instead, the West Virginia Legislature chose to provide only licensing penalties and civil liability for physicians and other licensed medical professionals who violate these modern provisions, and to exempt patients from any penalty, criminal or otherwise. The Legislature elected to impose criminal liability for violations only on individuals who are not physicians or other licensed professionals, and even then, the criminal liability is in the form of the misdemeanor offense of practicing medicine without a license. *See* W. Va. Code §§ 30-3-13(g), 16-2Q-1(k), 16-2O-1(c)(2), 16-2P-1(c)(2), 16-2M-6(b), 16-2F-8(b).

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

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

W. Va. Code § 61-2-30.

D. The Supreme Court's Decision In *Dobbs v. Jackson Women's Health Organization* And Its Impact On The Criminal Abortion Ban.

20. On June 24, 2022, the Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), overturning *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

21. In the weeks leading up to *Dobbs* and in the hours after the decision was issued, Defendant Morrisey and other officials issued public statements that have created uncertainty over the enforceability of the Criminal Abortion Ban, and reinforced Plaintiffs' fears that they face a credible threat of prosecution should they continue to provide abortion care in West Virginia. Through their public statements, Defendants and other officials expressed their concern that the Criminal Abortion Ban and the modern statutory regime cannot co-exist, and their belief that legislative action is required to alleviate the current discordance.

22. Initially, after a draft of the *Dobbs* opinion was leaked in May 2022, Attorney General Morrisey issued a statement suggesting that the Criminal Abortion Ban may no longer be good law: "When the Supreme Court's final opinion is published, we will weigh in more formally and work closely with the legislature to protect life in all stages as much as we legally can under

the law."[2] But approximately two weeks later, Attorney General Morrisey hedged his position, saying in a media interview, "[W]e have trigger laws, but some of the stuff that goes back to the 1920s or the 1800s, it's unclear how that would take effect. It all depends upon the actual text of the . . . decision [in *Dobbs*] presumably replacing *Roe* and then the State's Constitution and laws."[3]

23. On June 24, 2022, the day *Dobbs* was released, Defendant Attorney General Morrisey refused to directly answer the question whether abortion is still legal in West Virginia, stating: "I have been asked what the state of the law is in West Virginia regarding abortion. My response is very simple: you should not have one! Today, is a landmark day in our effort to protect babies."[4] He later said, "I'm going to issue a legal opinion articulating some of the challenges and the ways the Legislature and the governor can deal with this because I want to save as many lives as humanly possible. We know that because [the Criminal Abortion Ban] has not been on the books for a long time, a lot of people are going to challenge it."[5]

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

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

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

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

24. On June 29, 2022, Defendant Morrisey then issued a memorandum addressing "the consequences" of *Dobbs* "for West Virginia law," in which he wrote that the Criminal Abortion Ban "would . . . benefit from the Legislature's further attention," including because "courts might find that earlier enactments were impliedly repealed," and "strongly advised" the Legislature "to amend the laws in our State to provide for clear prohibitions on abortion that are consistent with *Dobbs*." (Suppl. Stark Aff. Ex. 13 ("Ex. 13") at 5, 9, 14.). In particular, the Attorney General recommended that the Legislature "focus on . . . specifying the acts that are subject to criminal prosecution and determining whether a woman should be subject to prosecution; [and] determining the nature of any exceptions," among other issues. (*Id.* at 14.) However, at oral argument counsel for Defendant Morrisey stated it was the Attorney General's position that the Criminal Abortion Ban was in effect and enforceable.

25. Governor Jim Justice similarly expressed uncertainty about the force of the Criminal Abortion Ban, stating in an interview shortly after *Dobbs*, "[T]here needs to be a lot more discussion with the legal team to see if what we have on the books is adequate or if there is a need to call a special session."[6] A few days later, Governor Justice told the public, "I will call a special session [of the Legislature] . . . . [W]e need to move for further and more detailed clarification. . . . The Legislature needs to amend this law to get absolute clarification in every way."[7] Governor Justice then followed up on these calls for legislative action during a public address, stating that

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

[7] Steven Allen Adams, *Justice: Special Session on Abortion Coming Soon*, The Intelligencer (June 30, 2022) (quotation marks omitted), https://www.theintelligencer.net/news/top-headlines/2022/06/justice-special-session-on-abortion-coming-soon/.

"[the Attorney General] is basically, you know, saying that the laws, and we do know this, the laws are archaic, they're ancient, and everything. We've got to do something. We've got to clean it up."[8]

26. Defendant Kanawha County Prosecuting Attorney Miller likewise believes that the law governing abortion in West Virginia "is in a state of flux" following *Dobbs* (Miller Ans. ¶ 14), and looks to a special session of the Legislature to "clarif[y] . . . current confusion about the enforceability of [the Criminal Abortion Ban]," "the status of the availability of abortion in West Virginia, and whether or not abortions are criminalized," (*id.* ¶ 4). At oral argument, counsel for Defendant Miller stated that the Prosecuting Attorney would fulfill his duty to enforce the laws on the books, at the same time acknowledging that reading the Criminal Abortion Ban in light of more modern laws regulating abortion, as well as other criminal laws, *see e.g.*, W. Va. Code § 61-2-30, creates ambiguity for prosecutors and defendants alike.

27. West Virginians for Life Executive Director Wanda Franz also issued conflicting statements. At one point, referring to the Criminal Abortion Ban, she said: "[W]e already have what's essentially a trigger law . . . We have a law on the books that has been suppressed by [*Roe v. Wade*] that will spring back if the Supreme Court decision is overturned."[9] But Franz also stated elsewhere, "There's no way I think that legislators would want to see criminalization of abortion in the way that [the Criminal Abortion Ban] provides for it. We've been working with our

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[8] West Virginia Public Broadcasting, *COVID Briefing*, at 32:47–32:51 (Jul. 8, 2022), *available at* https://www.youtube.com/watch?v=bdq4loiIXgw&t=1892s.

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

legislators for many years on legislation to protect life, and I think we're going to continue to work with them to try to address the problems that come with that old piece of legislation."[10]

28. Other West Virginia political figures have likewise issued conflicting statements regarding the Criminal Abortion Ban's durability. For example, State Senator Ryan Weld indicated that the Ban may no longer be enforceable, saying, "Look, [the Criminal Abortion Ban] hasn't been enforced in four decades or five decades. Most likely this is not enforceable because of that. This is a case where a law is on the books but wasn't enforced because it had been previously found to be unconstitutional."[11]

29. On the other hand, Mike Pushkin, West Virginia Democratic Party Chair, unambiguously stated after *Dobbs* was issued that it "will make all abortions illegal in West Virginia."[12]

30. Because of the threat of prosecution under the Criminal Abortion Ban, Plaintiffs have stopped providing abortion care in West Virginia. WHC has cancelled appointments and is turning away people seeking abortion care, which may include victims of rape or incest.

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

[11] Steven Allen Adams, *Old West Virginia Anti-Abortion Law Could Return to Life if High Court Overturns Roe v.* Wade, The Intelligencer (May 9, 2022), https://www.theintelligencer.net/news/top-headlines/2022/05/old-west-virginia-anti-abortion-law-could-return-to-life-if-high-court-overturns-roe-v-wade/.

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

31. As Defendants both conceded at oral argument, if Plaintiffs were to continue to provide or assist in the provision of abortion care, they would face possible criminal prosecution and licensure penalties for violating the Criminal Abortion Ban.

II. CONCLUSIONS OF LAW

32. This Court may issue a preliminary injunction upon a showing "of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 366, 844 S.E.2d 133, 137 (2020) (quoting *State ex rel. McGraw v. Imperial Mktg.*, 196 W. Va. 346, 352 n.8, 472 S.E.2d 792, 798 n.8 (1996)).

33. The Court **FINDS** and **CONCLUDES** that Plaintiffs have established the required showing for a preliminary injunction.

A. Plaintiffs Have Demonstrated A Likelihood of Success on the Merits.

1. Plaintiffs Are Likely To Succeed On The Merits Of Their Implied Repeal Claim.

34. The doctrine of implied repeal is well-settled in West Virginia law. Under the doctrine of implied repeal, a statute is considered repealed by later-enacted statutes in two circumstances: (1) if later-enacted statutes revise the whole subject matter of an earlier statute, or (2) if subsequent statutes are "repugnant" to an earlier statute. *See State v. Mines*, 38 W. Va. 125, 130, 18 S.E. 470, 471–72 (1893); Syl., *State v. Snyder*, 89 W. Va. 96, 108 S.E. 588 (1921); *id.* 89 W. Va. at 100–01, 108 S.E. at 589. Here, the Criminal Abortion Ban is irreconcilable with the modern statutory regime enacted by the West Virginia Legislature regarding abortion care and

thus must be considered impliedly repealed.

35. Contrary to the Attorney General's suggestion, the party arguing for implied repeal need not prove that legislators intended such a repeal, because the legislature "must be presumed to know the language employed in former acts, and, if in a subsequent statute dealing with the same subject it uses different language concerning that subject, it must be presumed that a change in the law was intended." *State v. General Daniel Morgan Post*, 144 W. Va. 137, 144, 107 S.E.2d 353, 358 (1959); *see also id.* Syl. 1, 144 W. Va. at 137, 107 S.E.2d at 354; *id.* 144 W. Va. at 144–45, 107 S.E.2d at 358 ("[T]he intention of the legislature is ascertained from the provisions of the statute by the application of sound and well established canons of construction. . . . The only mode in which the will of the legislature is spoken is in the statute itself. . . . The courts may not speculate as to the probable intent of the legislature apart from the words employed."). Otherwise, an implied repeal would be indistinguishable from an express repeal.

36. The West Virginia Supreme Court of Appeals has repeatedly found implied repeal in a variety of contexts. For example, in *State v. Hinkle*, the original statute—spanning five short sections—provided that a person who had the intent to sell or dispense narcotic drugs was guilty of a felony and should be sentenced to one to ten years in jail, while the later statute contained 28 sections that "in comprehensive manner, and in elaborate detail" addressed narcotic drugs, and provided that a violation of the statute was punishable by fine or imprisonment for not more than ten years. 129 W. Va. at 396–97, 41 S.E.2d at 108–09. As such, the court held that the subsequent, more comprehensive statute impliedly repealed the earlier one. *Id.* at 399, 41 S.E.2d at 110.

37. Similarly, in *Gibson v. Bechtold*, 161 W. Va. 623, 629, 245 S.E.2d 258, 261 (1978), the West Virginia Supreme Court of Appeals found that "1977 changes in the juvenile law relating to jurisdictional matters . . . effected fundamental changes in juvenile proceedings and [were]

intended as a substitute for all previous law pertaining to this subject matter." *Id; see also, e.g.*, *State v. Jackson*, 120 W. Va. 521, 525, 199 S.E. 876, 877–78 (1938) (finding that the later statute "cover[ed] the whole range and subject of licensing and regulating the real estate business" and thus impliedly repealed the earlier, less detailed licensing act); *Cunningham v. Cokely*, 79 W. Va. 60, 65–66, 90 S.E. 546, 548 (1916) ("It is obvious that the Primary Act, dealing comprehensively and fully with the matter of official nominations, was not intended to be amendatory of older statutes on the same subject or supplementary thereto, but as an elaborate and ample scheme for the selection of political nominees. So construed, it repeals by necessary implication section 18, c. 3, Code 1913, relating to conventions."); *id.* Syl., 90 S.E. at 547 ("When two statutes passed at different dates cover and fully provide for the same general subject, the subsequent one, not purporting to amend the earlier act, but manifestly intended to be a substitute therefor, is to be deemed and treated as the last legislative expression on that subject, and as operative to repeal the former statute by necessary implication.").

38. In *Snyder*, the Supreme Court of Appeals noted that later statutes will repeal the earlier one because they are "the last expression of the legislative will on the subject" and held that a divorce statute imposing criminal penalties for remarrying within a certain period impliedly repealed an earlier divorce statute exonerating such a person from criminal liability, as these differences were "too palpable to admit of their coexistence as the law." 89 W. Va. at 100-01, 108 S.E. at 589.[13]

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

39. The Court further recognizes that several other courts, applying virtually identical principles as those articulated under West Virginia jurisprudence, have concluded that pre-*Roe* criminal bans on abortion are impliedly repealed by post-*Roe* laws that comprehensively address the circumstances under which abortion care is legal.

40. In *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), for example, the Fifth Circuit determined that the statutes criminalizing abortion were later repealed by implication because "Texas regulates abortion in a number of ways," including through civil regulations on the availability of abortions for minors, health and safety regulations regulating clinics, and laws limiting the availability of Medicaid funding for abortion care. *Id.* at 849. The Fifth Circuit explained that there was "no way to enforce . . . [t]he Texas statutes that criminalized abortion" and the post-*Roe* statutes, and that the latter statutes were "intended to form a comprehensive scheme—not an addendum to the criminal statutes struck down in *Roe*." *Id.* According, the Fifth Circuit held the later provisions could not "be harmonized with provisions that purport to criminalize abortion" and thus struck down the earlier laws. *Id.*

41. Similarly, in *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980), a three-judge panel of the Eastern District of Arkansas held that a 1969 abortion law impliedly repealed a criminal abortion law from 1875, including because the later law "treat[ed] the subject of abortion in a much more comprehensive manner than Act 4 of 1875" had. *Id.* at 924. In doing so, the court underscored that the 1969 law "sets forth in detail the conditions which make abortion 'legal' and the restrictions which are placed on the performance of legal abortions." *Id.* (further noting that this "constitute[d]'" the most significant difference between the two acts"); *cf. State v. Black*, 188

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statutes provided conflicting requirements regarding notice of elections in newspapers and "the last statute controls").

Wis. 2d 639, 646 (Wis. 1994) (recognizing that statutes regulating abortion impliedly repeal an earlier criminal prohibition on abortion, noting that "any attempt to apply [Section 940.04(2)(a), a feticide law] to a physician performing a consensual abortion after viability would be inconsistent with the newer sec. 940.15 [an abortion law] which limits such action and establishes penalties for it"). *See also, e.g.*, *Weeks v. Connick*, 733 F. Supp. 1036, 1038 (E.D. La. 1990) (holding that Louisiana's criminal abortion ban was impliedly repealed by numerous subsequent laws, including ones that required informed consent, established reporting requirements, required parental or court consent for minors, and required physicians to keep certain abortion records, explaining that "it is *clearly inconsistent* to provide in one statute that abortions are permissible if set guidelines are followed and in another to provide that abortions are criminally prohibited") (emphasis added).

42. As in these cases, West Virginia's modern statutory regime governing lawful abortion clearly and irreconcilably conflicts with the Criminal Abortion Ban.

43. The Court **FINDS** and **CONCLUDES** Plaintiffs are likely to succeed on the merits of their implied repeal claim.

44. *First*, the Criminal Abortion Ban has been impliedly repealed by the modern, comprehensive, non-criminal framework for lawful abortion enacted by the Legislature. This modern, comprehensive scheme regulating abortion revised the whole subject matter of abortion in West Virginia and cannot be squared with the Criminal Abortion Ban. Whereas the 150-year-old, two-sentence Ban criminalizes virtually all abortion care, the modern statutory scheme provides for lawful abortion in West Virginia "in [a] comprehensive manner, and in elaborate detail." *Hinkle*, 129 W. Va. at 396–97, 41 S.E.2d at 108–09. Through these laws, the Legislature has replaced the draconian Criminal Abortion Ban with a comprehensive, detailed framework permitting abortion in West Virginia. This comprehensive framework is entirely incompatible

with the near-total Criminal Abortion Ban, and, indeed, would serve no purpose whatsoever were the Ban to remain in effect.

45. *Second*, West Virginia's modern statutory framework for abortion is in direct conflict with, and therefore repugnant to, the Criminal Abortion Ban in multiple respects. For one, the Criminal Abortion Ban allowed for pregnant people who obtain abortions to be criminally prosecuted. (Suppl. Stark Aff. Ex. 13 at 4, 14; Compl. ¶ 31.) Yet, as the Attorney General acknowledged in his post-*Dobbs* memorandum, multiple recently enacted abortion statutes expressly *forbid* imposing any penalty upon a pregnant person who obtains an abortion. (Suppl. Stark Aff. Ex. 13 at 8 (citing W. Va. Code §§ 16-2M-6(d), 16-2O-1(c)(4), 16-2P-1(c)(4), 16-2Q-1(1)).) A statute that made obtaining an abortion a felony cannot be reconciled with multiple later statutes expressly providing that no punishment (criminal or otherwise) shall be levied for obtaining an abortion. Similarly, under the Criminal Abortion Ban, a physician who performs an abortion at 12 weeks of pregnancy is subject to felony liability, whereas under a more recently enacted statute, the same physician who performs the same procedure at the same point in pregnancy is expressly permitted to do so. *See* W. Va. Code § 16-2M-4(a). And whereas a physician who performs an abortion at 23 weeks of pregnancy is subject to felony liability under the Criminal Abortion Ban, under the more recent statute, that physician is liable only for non-criminal discipline by the "applicable licensure board." W. Va. Code § 16-2M-6(a). These conflicts too create a legal impossibility. Moreover, the modern statutes provide for exceptions broader than life-saving care. *See, e.g.*, W. Va. Code § 16-2M-4(a) (allowing abortions after 22 weeks to avoid serious risks to health); *id.* § 16-2Q-1(b), (c) (allowing abortions "because of a disability" in cases involving medical emergencies or a nonviable fetus); *id.* § 16-2I-2 (waiving 24-hour informed consent requirement in cases involving medical emergencies).

46. After *Roe*, certain other state legislatures made clear their desire to wholly or significantly ban abortion by enacting trigger bans—*i.e.*, statutes providing that, upon *Roe*'s fall, abortion care would be prohibited.[14] West Virginia, however, did not enact a "trigger ban." Instead, it let the Criminal Abortion Ban languish while erecting a statutory scheme that revised the whole subject matter of abortion care in West Virginia and set out detailed rules for its lawful provision. This Court will not assume the role of a super legislature and declines the invitation to enact a trigger ban where the Legislature did not but could have.

47. If the Criminal Abortion Ban were deemed not to have been impliedly repealed (or, as explained below, rendered void for desuetude) and allowed to remain enforceable alongside the modern statutory regime governing lawful abortion care, serious constitutional due process and vagueness concerns would result. Plaintiffs would have no notice or ability to discern whether they would be subject to felony prosecution for providing abortion care or instead deemed to have acted within the bounds of the modern regime governing lawful abortion care. Plaintiffs' pregnant patients likewise would have no ability to discern whether they would be subject to felony prosecution for receiving abortion care or instead deemed exempt from liability under the modern regime. In turn, prosecutors would have free reign to arbitrarily decide when to levy felony charges pursuant to the Ban, and when to consider conduct as lawful under the modern statutes. If the Criminal Abortion Ban remains enforceable, the people of West Virginia will lack clear notice of what conduct is criminalized and of how the law will be applied. Ultimately, it simply does not

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[14] *See, e.g.*, Ark. Code Ann. § 5-61-301 (2019); Idaho Code § 18-622 (2020); Ky. Rev. Stat. § 311.722 (2019); La. Stat. Ann. §§ 40.87.7, 14.87.8, 40:1061 (2006); Miss. Code Ann. § 41-41-45 (2007); Mo. Rev. Stat. § 188.017(2) (2019); N.D. Cent. Code § 12.1-31-12 (2007); Okla. Stat. tit. 63, § 1-731.4 (2022) (to be codified); S.D. Codified Laws § 22-17-5.1 (2005); Tenn. Code Ann. § 39-15-213 (2019); Tex. Health & Safety Code § 170A.001-7 (2019); Utah Code Ann. § 76-7a-201 (2020); Wyo. Stat. Ann. § 35-6-102 (2022).

matter whether you are "pro-choice" or "pro-life"; every citizen in this State has a right to clearly know the laws under which they are expected to live. *See, e.g.*, Syl. Pt. 1, *State v. Bull*, 204 W. Va. 255, 257, 512 S.E.2d 177, 179(1998) ("A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." (quoting Syl. Pt. 1, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974))); *id.* at 263, 183 (explaining that "[c]laims of unconstitutional vagueness in criminal statutes are grounded in the [U.S. and West Virginia] due process clauses"); *United States v. Williams*, 553 U.S. 285, 304 (2008) (holding that a law is unconstitutionally vague when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited" and "is so standardless that it authorizes or encourages seriously discriminatory enforcement"). When the punitive weight of the West Virginia code is involved, Plaintiffs should not have to wonder whether their conduct falls on the right or the wrong side of the law. *See Jordan v. De George*, 341 U.S. 223, 230 (1951) (criminal laws receive the most exacting scrutiny because "[t]he essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct"). Principles of constitutional avoidance thus also recommend in favor of holding the Criminal Abortion Ban unenforceable.

48. Because West Virginia's "later acts regulating abortion are clearly inconsistent with a criminal prohibition of abortion," *Weeks*, 733 F. Supp. at 1038, Plaintiffs are likely to prevail on their claim that the Criminal Abortion Ban falls as impliedly repealed.

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

49. Even if the Criminal Abortion Ban were not impliedly repealed, it would be unenforceable because it is void for desuetude.

50. Courts in West Virginia have long recognized that penal statutes that have gone

unenforced for many years can be declared "void due to desuetude." *Comm. on Legal Ethics of the W. Virginia State Bar v. Printz*, 187 W. Va. 182, 188, 416 S.E.2d 720, 726 (1992). "Desuetude . . . is based on the concept of fairness embodied in the due process and equal protection clauses." *Id.* at 186, 416 S.E.2d at 724. When "a law prohibiting some act . . . has not given rise to a real prosecution" in many years, renewed use of that law would be unfair and therefore impermissible. *Id.* In discussing the core of the doctrine, the Supreme Court of Appeals explained:

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

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

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

52. The doctrine of desuetude has particular force in the realm of sexual and reproductive autonomy, where anachronistic criminal laws fall into disuse but may nonetheless remain on the books as a formal matter. In *State ex rel. Golden v. Kaufman*, 236 W. Va. 635, 647, 760 S.E.2d 883, 895 (2014), for instance, the West Virginia Supreme Court of Appeals held that a law prohibiting "criminal conversation" (*i.e.*, adultery), for which there had been no reported claims asserted since 1969—when a more recent statute abolished all civil actions for alienation of affections—"had lapsed into desuetude." *Id.* The U.S. Supreme Court reached a similar conclusion in *Poe v. Ullman*, 367 U.S. 497 (1961), holding that it need not consider whether Connecticut's statute proscribing the use of contraceptives was unconstitutional because the law had not been enforced for more than 75 years other than a single test case, despite the open, common, notorious sale of contraceptives in Connecticut drug stores. *Id.* at 501–02.

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

54. Here, each factor strongly favors the conclusion that the Criminal Abortion Ban is void for desuetude.

55. *First*, providing abortion care is *malum prohibitum*, not *malum in se*. "A crime that is *malum in se* is 'a crime or an act that is inherently immoral, such as murder, arson, or rape,' while a crime that is *malum prohibitum* is 'an act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.'" *Blake*, 213 W. Va. at 660 n.1, 584

S.E.2d at 516 n.1 (quoting Black's Law Dictionary 971 (7th ed. 1999)) (cleaned up). Whereas "*every* legal system has a prohibition on murder," Jens David Ohlin, 1 *Wharton's Crim. Law* § 1.6 (16th ed. 2021) (emphasis added), even after *Dobbs*, abortion care remains legal—and even constitutionally protected (as a matter of state law)—in many States. Indeed, it is inconceivable to imagine the Legislature setting up a comprehensive *non-criminal* regulatory scheme for committing arson and rape in the same way it has comprehensively regulated legal abortion for multiple decades. West Virginia's longstanding legislative decision to regulate abortion without criminal penalties in virtually all circumstances only underscores that abortion cannot be considered *malum in se*.

56. The Attorney General points in his briefing to the common law, but abortion care at all stages of pregnancy was not criminalized at common law. It was criminalized only after quickening, not before. *See, e.g.*, *State v. Cooper*, 22 N.J.L. 52, 55, 58 (1849). It was only later statutes, like the Criminal Abortion Ban here, that criminalized pre-quickening abortion—underscoring the *malum prohibitum* nature of the conduct.

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

58. *Third*, the Criminal Abortion Ban has not been enforced in fifty years—comparable to or far longer than the periods of disuse in other cases holding West Virginia statutes void for desuetude. *See Kaufman*, 236 W. Va. at 646, 760 S.E.2d at 894 (no enforcement for 45 years); *Blake*, 213 W. Va. at 661, 584 S.E.2d at 517 (no enforcement for 22 years); *Printz*, 187 W. Va. at 189, 416 S.E.2d at 727 (no enforcement for 54 years). Moreover, as detailed above, during the Criminal Abortion Ban's long period of disuse, the State has enacted a statutory regime governing

the lawful provision of abortion care, under which even State funds can be used for abortion care in certain circumstances.

59. For years, abortion care providers like Plaintiffs have relied on the ability to operate without fear of criminal sanction. Pregnant people in West Virginia likewise have sought abortion care with the understanding that the Criminal Abortion Ban would not be enforced against them or those who helped them access care. Against that background, initiating a criminal prosecution for providing abortion care would work tremendous unfairness.

60. The Court therefore **FINDS** and **CONCLUDES** that Plaintiffs are likely to succeed on their claim that the Criminal Abortion Ban is void for desuetude.

B. Plaintiffs Have Shown A Likelihood Of Irreparable Harm.

61. "[I]n order to obtain a preliminary injunction, a party must demonstrate the presence of irreparable harm." *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 367, 844 S.E.2d 133, 138 (2020) (citation omitted). Following *Dobbs*, a credible threat of prosecution under West Virginia's Criminal Abortion Ban has required Plaintiffs to cease all abortion care, causing grave and irreparable harm to Plaintiffs, their patients, WHC's staff, and all West Virginians.

62. *First*, as Defendants conceded at oral argument, Plaintiffs all face a credible threat of prosecution under the Ban, either directly or as accomplices, if WHC were to continue to provide abortion care and they were to continue to fulfill their responsibilities at WHC. *See, e.g.*, *Planned Parenthood Great Nw., Hawaii, Alaska, Indiana, & Kentucky, Inc. v. Cameron*, No. 3:22-cv-198-RGJ, 2022 WL 1597163, at *13 (W.D. Ky. May 19, 2022) ("[I]rreparable harm may be present where engaging in the prohibited conduct would result in the realistic possibility of felony

prosecution."); *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624, 631 (S.D. W. Va. 2013) ("The threat of prosecution . . . can constitute irreparable injury.").

63. For each Plaintiff, that threat is now self-evident and acute:

a. WHC and its officers, staff, and patients face possible criminal prosecution if WHC were to continue to provide abortion care. *See* W. Va. Code § 2-2-10(i) (providing that "[t]he word 'person' or 'whoever' includes corporations . . . , if not restricted by the context"); W. Va. Code § 61-2-8 (providing that the Criminal Abortion Ban applies to "[a]ny person"); W. Va. Code § 61-11-6 (providing for accomplice and accessory liability); W. Va. Code § 61-10-31 (providing for conspiracy liability against "[a]ny person"); Syl. Pt. 5, *State v. Childers*, 187 W. Va. 54, 55, 415 S.E.2d 460, 461 (1992) ("Officers, agents, and directors of a corporation may be criminally liable if they cause the corporation to violate the criminal law while conducting corporate business.").

b. Dr. Doe, who performed abortions as a physician at WHC, faces possible criminal prosecution if WHC were to continue to provide abortion care. (Doe Aff. ¶¶ 7, 9.)

c. Ms. Quiñonez, Executive Director of WHC, manages WHC's operations and faces possible criminal prosecution if WHC were to continue to provide abortion care. (Quiñonez Aff. ¶¶ 11, 21.)

d. Ms. Maness, WHC's Chief Nurse Executive, oversaw all clinical procedures and processing associated with abortion care at WHC, and faces

possible criminal prosecution if WHC were to continue to provide abortion care. (Maness Aff. ¶¶ 10–14, 17.)

e. Ms. Beatty, who served a counselor to patients seeking abortion care at WHC, faces possible criminal prosecution if WHC were to continue to provide abortion care. (Beatty Aff. ¶ 30.)

64. Moreover, Plaintiffs face the further threat of licensure penalties for providing abortion care in violation of West Virginia Code Section 61-2-8, which also constitutes irreparable harm. Under West Virginia law, licensure penalties flow from providing services beyond the scope permitted by law—thus jeopardizing WHC's business license, *see* W. Va. Code § 31E-13-1330(1)(B) (allowing dissolution of a corporation where the corporation "has continued to exceed or abuse the authority conferred upon it by law"); Dr. Doe's medical license, *see* W. Va. Code § 30-3-14(c)(15), Ms. Maness's nursing license, *see* W. Va. Code § 30-7-11(a)(2), and Ms. Beatty's social worker license, W. Va. Code § 30-30-26(g)(2).

65. *Second*, shutting down WHC's abortion services is already causing WHC to suffer the irreparable harm of losing its ability to continue its operations. *See, e.g.*, *Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981) (acknowledging "[t]he right to continue a business" and affirming finding of irreparable injury where plaintiff sought to "preserve its existence and its business" (citation omitted)); *Planned Parenthood Sw. Ohio Region v. Hodges*, 138 F. Supp. 3d 948, 960 (S.D. Ohio 2015) (recognizing "the inability to operate an ongoing business for an unknown period of time constitutes irreparable harm that cannot be fully compensated by monetary damages"); *Sogefi USA, Inc. v. Interplex Sunbelt, Inc.*, 538 F. Supp. 3d 620, 630 (S.D. W. Va. 2021) (finding business being forced to shut down results in harm that "is likely to be immediate and irreparable"); *Hughes v. Cristofane*, 486 F. Supp. 541, 544 (D. Md.

1980) (inability to feasibly operate under a new law irreparably harms the plaintiff); *North Carolina v. Dep't of Health, Educ., & Welfare*, 480 F. Supp. 929, 939 (E.D.N.C. 1979) (finding irreparable harm where loss of critical funding would "inject an air of unpredictability" into future planning and budgeting).

66. Abortion care accounts for 40% of WHC's annual revenue, and WHC will have no choice but to reduce its staff if it is forced to stop providing this care. (Quiñonez Aff. ¶ 23.) Indeed, WHC has already stopped employing physicians and counselors who are wholly dedicated to abortion care. (*Id.*) And as seen in other states, restricting abortion care can lead to permanent clinic closures, even if restrictions ultimately are lifted, because restarting an abortion care practice can present significant logistical and financial challenges. (*Id.* ¶ 24.)

67. *Third*, WHC will suffer further irreparable harm absent a preliminary injunction because being forced to stop providing abortion care "perceptibly impair[s]" its work and frustrates its mission of providing reproductive health care that respects patients' choices. *League of Women Voters of U.S. v.* Newby, 838 F.3d 1, 8 (D.C. Cir. 2016); *see also Action NC v. Strach*, 216 F. Supp. 3d 597, 642 (M.D.N.C. 2016) ("An organization has been harmed if the defendant's actions 'perceptibly impaired' the organization's programs, making it more difficult to carry out its mission."); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013) (recognizing that even a "temporary gap of 'unknown duration' in which abortions would be unavailable supports a finding of irreparable harm"); (Quiñonez Aff. ¶ 25).

68. *Finally*, enforcement of the Criminal Abortion Ban will cause irreparable harm to pregnant people in West Virginia who wish to terminate their pregnancies. Forcing patients to remain pregnant inflicts serious physical, emotional, and psychological consequences that alone constitute irreparable harm. (*See* Quiñonez Aff. ¶ 27; Doe Aff. ¶ 48.) Because WHC performed

virtually all abortions in West Virginia, these patients will now be forced to travel out of state to obtain the care they need, seek to end their pregnancies outside of the medical system and risk criminal prosecution, or remain pregnant and give birth against their will. (*See, e.g.*, Doe Aff. ¶ 49; Beatty Aff. ¶ 33; McCabe Aff. ¶¶ 16–17.) Whichever path they take, pregnant people will suffer: traveling out of state imposes costs and logistical challenges that many pregnant people cannot bear; forcing someone to remain pregnant can cause lasting physical and psychological harm; and ending a pregnancy outside the medical system puts a person's health at risk, and also puts them at risk of prosecution. (*See, e.g.*, Doe Aff. ¶¶ 49–50; Beatty Aff. ¶¶ 33–34.) Plaintiffs and their patients, including those who are impregnated as a result of a rape or incest, are already suffering irreparable harm in the absence of an injunction. On the other hand, Defendants will suffer no injury from this preliminary injunction that they have not suffered from the prior half century of non-enforcement of the Criminal Abortion Ban.

69. The irreparable harm that pregnant people face through enforcement of the Criminal Abortion Ban is more than sufficient to warrant injunctive relief. *See, e.g.*, *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health*, 896 F.3d 809, 832 (7th Cir. 2018) ("Even an extended delay in obtaining an abortion can cause irreparable harm by resulting in the progression of a pregnancy to a stage at which an abortion would be less safe[.]" (quotation marks omitted)), *judgment vacated on other grounds*, 141 S. Ct. 184 (2020); *Van Hollen*, 738 F.3d at 795–96 (affirming finding of irreparable harm to pregnant people where they would be subjected to weeks of delay and the "nontrivial burden" of traveling hundreds of miles to abortion clinics); *Harris v. Bd. of Supervisors,* 366 F.3d 754, 766 (9th Cir. 2004) (noting that plaintiffs demonstrated irreparable harm by establishing likelihood of suffering pain and medical complications from delayed medical care); Note, *Medford v. Levy*, 31 W. Va. 649, 8 S.E.

302, 308 (1888) (recognizing that "injury to health is special and irreparable" and "justif[ies] the interference of equity").

70. Accordingly, the Court **FINDS** and **CONCLUDES** that Plaintiffs have satisfied the irreparable harm prong of the preliminary injunction standard.

C. The Balance of Equities And The Public Interest Strongly Favor A Preliminary Injunction.

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

72. The Court further **FINDS** and **CONCLUDES** that there is a strong public interest in ensuring continued access to abortion care. "[P]ublic policy supports an injunction when there would be a disruption to medical services or a patient's continuity of care." *Cameron*, 2022 WL 1597163, at *15; *see also Hampton Univ. v. Accreditation Council for Pharm. Educ.*, 611 F. Supp. 2d 557, 569 (E.D. Va. 2009) (public interest particularly affected when a case "implicates concerns about public health"); *Sogefi USA, Inc.*, 535 F. Supp. 3d at 555 ("Potential harm to non-parties . . . also weighs in favor of injunctive relief." (citation omitted)). If the Criminal Abortion Ban is not enjoined, pregnant people in West Virginia who wish to terminate their pregnancies—including children and other victims of sexual assault—will be forced to remain pregnant and give birth

against their will, travel out of state to seek care, or attempt to self-induce an abortion, putting themselves at risk of prosecution. Defendants entirely ignore these harms to pregnant people, and instead invoke an interest in protecting "the unborn child." (AG Br. 26). Defendants will suffer no injury from this preliminary injunction that they have not already suffered from the prior half century of non-enforcement of the Criminal Abortion Ban. It is simply inequitable to allow the State of West Virginia to maintain conflicting laws on its books. Moreover, the Legislature already accounted for and balanced the State's interest in protecting fetal life when it enacted the current statutory regime governing abortion care. Allowing the Criminal Abortion Ban to remain in effect would disrupt the balance the Legislature struck in this regard.

D. Plaintiffs Have No Other Adequate Remedy.

73. The Court **FINDS** and **CONCLUDES** Plaintiffs have no other remedy to protect their interests and avoid the irreparable harm addressed above, other than this action and the corresponding requests for declaratory and injunctive relief.

For the foregoing reasons, and for the reasons stated on the record on July 18, 2022, when the Court issued a bench order granting Plaintiffs' Motion for Preliminary Injunction, the Court hereby **GRANTS** Plaintiffs' Motion for Preliminary Injunction.

Wherefore, the Court hereby **ORDERS** as follows:

A. Defendants, their employees, agents, and successors in office, and all those acting in concert with them, are hereby **ENJOINED** from enforcing the Criminal Abortion Ban, W. Va. Code § 61-2-8, or from taking any enforcement action premised on a violation of W. Va. Code § 61-2-8 that occurred while such relief was in effect.

B. The security requirement of W. Va. R. Civ. P. 65(c) is waived.

C. Counsel shall contact the Court to establish a scheduling Order for further adjudication of this matter.

The objections of the Defendants are noted and preserved for the record. The Clerk is directed to send a certified copy of this Order to all counsel of record.

IT IS SO ORDERED.

ENTERED July 20, 2022

HONORABLE TERA L. SALANGO
CIRCUIT JUDGE

STATE OF WEST VIRGINIA.
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 20 DAY OF July 2022
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
L. Aller

Date: 7-20-22
Certified copies sent to:
✓ counsel of record
___ parties
___ other _____ (please indicate)
by:
___ certified/1st class mail
___ fax
___ hand delivery
___ interdepartmental
Other directives accomplished: ✓email
B. Cleveland
Deputy Circuit Clerk