

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Plaintiffs,

Civil Action No. ____

Honorable ____

v.

VERIFIED COMPLAINT

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.

INTRODUCTION

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

2. For the past half century, however, the Criminal Abortion Ban has lain dormant, and has been replaced by a modern, comprehensive statutory regime that recognizes and regulates the provision of *legal* abortion in West Virginia. Among other things, this contemporary regime creates an informed consent process for abortion, authorizes the use of public funds for abortion

under certain circumstances, and permits most pre-viability abortions, all without imposing any criminal penalties on providers or patients. Plaintiffs—the Women’s Health Center of West Virginia (“WHC”) and several of its staff—have relied on this non-criminal, regulatory scheme enacted by the Legislature to provide lawful abortion care to thousands of pregnant people in West Virginia.¹

3. Despite (and/or perhaps because of) the creation of this comprehensive scheme, the Criminal Abortion Ban was never explicitly, legislatively repealed.

4. Now, in the aftermath of the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, 2022 WL 2276808, 597 U.S. ____ (2022), overturning *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and in the absence of clarification by this Court, the Criminal Abortion Ban threatens felony charges against anyone in West Virginia who “administer[s],” “cause[s],” or “use[s] any means” to produce an abortion. Numerous statements by public officials and others in recent weeks—in addition to generating confusion about whether the Ban is enforceable—have reinforced Plaintiffs’ fears that they face a credible threat of criminal prosecution if they continue to provide abortion care in West Virginia.

5. This lawsuit challenges any enforcement of the Criminal Abortion Ban as contrary to state law, and seeks declaratory and injunctive relief preventing its use.

6. First, West Virginia’s modern, comprehensive statutory regulation of abortion impliedly repealed the Criminal Abortion Ban, which would otherwise criminalize virtually all

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

abortion care in West Virginia. Because the Criminal Abortion Ban directly conflicts with this modern statutory regime and would render it meaningless, the Ban may not be enforced.

7. *Second*, and in the alternative, the Criminal Abortion Ban has fallen into desuetude—*i.e.*, longstanding non-enforcement of a criminal statute despite open violations of its terms. The Criminal Abortion Ban has not been enforced in over half a century, during which time many pregnant people have relied on the ability to lawfully access abortion care in West Virginia. Reviving an obsolete criminal law that has long gone unused and is contrary to modern practice would be inconsistent with fundamental notions of fairness.

8. *Third*, the Criminal Abortion Ban is unconstitutionally vague because in multiple respects 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.

9. The ongoing and irreparable harm caused by the Criminal Abortion Ban is stark. The threat of prosecution under the Criminal Abortion Ban in the aftermath of *Dobbs* already has forced WHC to stop providing abortions, cancel appointments, and turn away people seeking essential medical care. The consequences for WHC’s physicians, staff, and patients, and for families and communities across West Virginia, are devastating. Pregnant people denied an abortion will be faced with serious burdens and harms: some may attempt to end their pregnancies on their own, outside the medical system, risking criminalization if they are discovered; others may attempt to travel hundreds, if not thousands, of miles out of state to seek care, at great personal burden and expense, as well as delay, which increases the risk both from the ongoing pregnancy and the abortion itself; and still others will be prevented from obtaining an abortion at all, and will be forced to carry a pregnancy to term and give birth against their will, putting at risk their health and lives, threatening their stability and security, and denying them autonomy and dignity.

10. Accordingly, Plaintiffs bring this action to restrain enforcement of the Criminal Abortion Ban and declare it invalid under West Virginia law.

JURISDICTION AND VENUE

11. The Circuit Court of Kanawha County has jurisdiction under W. Va. Code § 51-2-2 both at law and in equity.

12. Venue is proper under W. Va. Code § 56-1-1 because the claims herein arise in Kanawha County, where Plaintiff WHC is located.

13. This Court may issue an injunction because the requested injunction concerns claims arising in Kanawha County, *see* W. Va. Code § 53-5-3, and because of its general authority to award an injunction, *see* W. Va. Code § 53-5-4. It may issue declaratory relief pursuant to W. Va. Code § 55-13-1.

PARTIES

A. Plaintiffs

14. Plaintiff Women’s Health Center of West Virginia (“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*, 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 and its officers, staff, and patients now face possible criminal prosecution and licensure penalties for providing abortions in violation of the Criminal Abortion Ban. *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”); 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”); 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.”). WHC sues on behalf of itself, its officers, its staff, and its patients.

15. 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. Ms. Quiñonez faces possible criminal prosecution for direct, accomplice, accessory, and/or conspiracy liability under the Criminal Abortion Ban if WHC were to continue to provide abortion care.

16. 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 approximately twice per month to provide abortion care to WHC’s patients. He sues on his own behalf and on behalf of his patients. If WHC were to continue to provide abortion care, Dr. Doe would face possible criminal prosecution for direct liability under the Criminal Abortion Ban, as well as suspension or revocation of his medical license, *see* W. Va. Code § 30-3-14(c)(15).

17. 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. If WHC were to continue to provide abortion care, Ms. Maness would face possible criminal prosecution for direct, accomplice, accessory, and/or conspiracy liability under the Criminal Abortion Ban, as well as suspension or revocation of her nursing licenses, *see* W. Va. Code § 30-7-11(a)(2).

18. 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. If WHC were to continue to provide abortion care, Ms. Beatty would face possible criminal prosecution for direct, accomplice, accessory, and/or conspiracy liability under the Criminal Abortion Ban, as well as suspension or revocation of her social worker license, *see* W. Va. Code § 30-30-26(g)(2).

B. Defendants

19. 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.

20. Defendant Patrick Morrissey is the Attorney General of West Virginia, located at 1900 Kanawha Blvd. E, Charleston, West Virginia 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 Morrissey is sued in his official capacity.

FACTUAL ALLEGATIONS

I. The Enactment And Enforcement Of West Virginia’s Criminal Ban On Abortion.

A. Abortion Prior To Quickening Generally Was Not Criminalized Under The Common Law, But Anti-Abortion Legislation Became Increasingly Common In The Mid-Nineteenth Century.

21. West Virginia’s Criminal Abortion Ban came about as a host of anti-abortion legislation swept across the United States in the mid-nineteenth century.

22. Prior to these legislative efforts, abortion of an unquickened fetus generally was not a punishable offense under the common law. “Quickening” has been described as the point at which the pregnant person first perceives fetal movement, and it typically takes place “near the midpoint of gestation, late in the fourth or early in the fifth month, though it could and still does vary a good deal from one woman to another.” James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 3 (Oxford Univ. Press. 1978) (“*Abortion in America*”). After quickening, destruction of a fetus was considered a crime, but generally was punished less harshly than murder. *Id.*

23. By the 1840s, safe abortions had become significantly more accessible, including because they were advertised in the popular press and there was a “flourishing business in abortifacient medicines.” *Id.* at 46–49, 52.

24. From the 1840s until the 1870s, a “dramatic upsurge in abortion rates” took place, mainly among white, married, Protestant, middle- and upper-class women “who either wished to delay their childbearing or already had all the children they wanted.” *Id.* at 45–46.

25. In response, an anti-abortion movement gained prominence, which advocated for greater abortion restrictions and harsher criminal penalties. Certain physicians and medical writers blamed women’s “self-indulgence” and “social extravagance” in seeking abortions, claiming that abortion was undermining marital relationships because “a willingness to abort signified a wife’s rejection of her traditional role as housekeeper and child raiser.” *Id.* at 108.

26. At the same time, legislatures in the nineteenth century—a time when states could deny women the right to vote—passed numerous other laws reflecting the view that women were appropriately destined for the home and childrearing. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (noting that “statute books gradually became laden with gross, stereotyped distinctions between the sexes,” including prohibitions on women holding office, serving on juries, and suing in their own names, and on married women holding or conveying property and serving “as legal guardians of their own children”); *Nevada Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (surveying “the history of the many state laws limiting women’s employment opportunities” and noting they “frequently subjected women to distinctive restrictions”); *Taylor v. Louisiana*, 419 U.S. 522, 533 (1975) (noting that women could not serve on juries).

B. West Virginia Enacts The Criminal Abortion Ban.

27. In 1849, the Virginia General Assembly passed a criminal abortion ban, which West Virginia adopted through its constitution when it became a state in 1863. *See* Va. 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 The Code of West Virginia Comprising Legislation to the Year 1870*, at 678, available at <https://bit.ly/3a4capO>.

28. West Virginia then amended its statute in 1882, which version remains part of the West Virginia Code today. The Criminal Abortion Ban now states:

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

W. Va. Code § 61-2-8. The Criminal Abortion Ban contains exceptions only for abortions performed to save the life of the pregnant person or for measures taken to save the embryo or fetus. *Id.* (“No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child.”).

29. There is no available legislative history surrounding the enactment of the Criminal Abortion Ban because West Virginia does not maintain robust legislative records. See David W. Frame, West Virginia University College of Law, *Parental Notification and Abortion: A Review and Recommendation to West Virginia’s Legislature*, 85 W. Va. L. Rev. 943, 963 (1983) (noting that West Virginia does “not maintain records of legislative history (*e.g.*, hearings, committee reports, and floor debates)”).

C. West Virginia Enforces The Criminal Abortion Ban Against A Range of Actors.

30. Beginning in the late nineteenth century, West Virginia newspapers reported abortion prosecutions against a wide range of actors. Some reported examples include:

- In September 1891, William Porter, Jr. was charged “with giving medicine to Mary Imer, to procure an abortion.”²

² A Serious Charge, The Wheeling Daily Reg., Mar. 5, 1892, at 6, <https://chroniclingamerica.loc.gov/lccn/sn86092518/1892-03-05/ed-1/seq-6/>.

- In March 1894, “Mrs. Susan Mulvey, accused of procuring an abortion on Ethel Cooper, and indicted jointly with James Bachmann for that crime, was tried to a jury” and convicted.³
- On January 6, 1913, a grand jury returned true bills, including, “State vs. Dr. H.P. Campbell, felony, abortion[.]”⁴
- On March 8, 1913, a jury was continuing deliberations in a case “against William Arm and Dr. B.F. Bone, who were indicted on a charge of attempting to commit abortion[.]”⁵
- On May 5, 1916, a jury found that “Gertrude Kemple came to her death from blood poisoning which resulted from a criminal operation performed upon her by Dr. B.H. Stillyard . . . with intent to procure and produce an abortion[.]”⁶

31. Prosecutions for violating the Criminal Abortion Ban were not limited to those who performed abortions. The State also prosecuted other individuals who might be viewed as criminal “accomplices.” Some examples included:

- On September 27, 1877, “Mrs. Samuel Motto was arrested as an accomplice in producing [her own] abortion,” which another woman—Ida Meredith—allegedly performed “by means of wire and a pencil.”⁷
- On November 7, 1879, Dr. David Parkinson, a dentist, was arrested in connection with “a charge of procuring or aiding in procuring an abortion.”⁸

³ *Susan Mulvey Guilty*, *Wheeling Daily Intelligencer*, Mar. 29, 1894, at 4, <https://chroniclingamerica.loc.gov/lccn/sn84026844/1894-03-29/ed-1/seq-5/>.

⁴ *True Bills*, *Wheeling Intelligencer*, Jan. 7, 1913, at 12, <https://chroniclingamerica.loc.gov/lccn/sn86092536/1913-01-07/ed-1/seq-12/>.

⁵ *No Decision Yet*, *Wheeling Intelligencer*, Mar. 8, 1913, at 2, <https://chroniclingamerica.loc.gov/lccn/sn86092536/1913-03-08/ed-1/seq-2/>.

⁶ *Coroner’s Jury Holds Colored Doctor Responsible for Death*, *Wheeling Intelligencer*, May 6, 1916, at 5, <https://chroniclingamerica.loc.gov/lccn/sn86092536/1916-05-06/ed-1/seq-5/>.

⁷ *Feminine Follies*, *Wheeling Daily Reg.*, Sept. 28, 1877, at 4, <https://chroniclingamerica.loc.gov/lccn/sn84026847/1877-09-28/ed-1/seq-4/>.

⁸ *Brief Mention*, *Wheeling Daily Intelligencer*, Nov. 8, 1879, at 1, <https://chroniclingamerica.loc.gov/lccn/sn84026844/1879-11-08/ed-1/seq-4/>.

- On February 20, 1894, “Sue Mulby, charged with aiding in procuring an abortion upon Miss Cooper[,]” was granted bail in the sum of \$1,000.⁹
- In 1888, George Troung was indicted for “procuring an abortion” on the ground that he paid Dr. G.W. Kelly \$15 for “medicine which he gave to the girl, Lulu Miller,” where “afterwards the crime was committed by mechanical means.”¹⁰
- In March 1894, in the *Mulvey* case described above, James Bachmann was indicted “for alleged complicity” for accompanying Ethel Cooper to her abortion procedure.¹¹

32. Beyond such press coverage, decisions of the West Virginia Supreme Court also describe prosecutions under the Criminal Abortion Ban through the late 1960s. *See, e.g., State v. Lilly*, 47 W. Va. 496, 500, 35 S.E. 837, 838 (1900) (affirming prosecution of pregnant woman’s partner, who administered drugs for the “purpose of producing a miscarriage” and was present to dispose of the fetus); *Scott v. Harshbarger*, 116 W. Va. 300, 180 S.E. 187 (1935) (granting writ of habeas corpus based on a defective indictment charging defendant with carrying out an abortion); *State v. Lewis*, 133 W. Va. 584, 57 S.E.2d 513 (1949) (affirming conviction of doctor for murder, as directed by Criminal Abortion Ban, after performing an abortion during which the patient died and noting that nurse was also indicted); *State v. Evans*, 136 W. Va. 1, 66 S.E.2d 545 (1951) (affirming conviction of doctor for allegedly performing failed abortion, where baby was delivered months later but died shortly afterward); *State v. Davis*, 139 W. Va. 645, 81 S.E.2d 95 (1954) (reversing conviction of doctor for aiding and abetting an abortion by allegedly referring teenager to two people who performed the procedure because of insufficient evidence); *cf. Syl. Pt. 1–2*,

⁹ *Admitted to Bail*, *Wheeling Reg.*, Feb. 21, 1894, at 5, <https://chroniclingamerica.loc.gov/lccn/sn86092518/1894-02-21/ed-1/seq-5/>.

¹⁰ *Dr. G.W. Kelly*, *Wheeling Daily Intelligencer*, Apr. 18, 1888, at 4, <https://chroniclingamerica.loc.gov/lccn/sn84026844/1888-04-18/ed-1/seq-4/>.

¹¹ *Susan Mulvey Guilty*, *Wheeling Daily Intelligencer*, Mar. 29, 1894, at 4, <https://chroniclingamerica.loc.gov/lccn/sn84026844/1894-03-29/ed-1/seq-5/>.

Willis v. O'Brien, 151 W. Va. 628, 153 S.E.2d 178 (1967) (holding that murder case could be tried in county where pregnant woman died from an illegal abortion, even though defendant was not physically present in that county when the death occurred).

II. The Criminal Abortion Ban Is Deemed Irreconcilable With *Roe v. Wade*.

33. 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, like West Virginia's, "excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved." *Id.* at 164.

34. Soon after *Roe* was decided, numerous state and federal courts recognized that West Virginia's Criminal Abortion Ban was irreconcilable with *Roe*.

35. For example, in *Smith v. Winter & Browning*, No. 74-571-CH (S.D. W. Va. Apr. 17, 1975), a three-judge panel dismissed an action challenging the constitutionality of the Criminal Abortion Ban, holding that the Ban "[fell] within . . . *Roe v. Wade*" and there therefore "exist[ed] no substantial constitutional question" for the court to decide. *Smith v. Winter & Browning*, No. 75-1710 (4th Cir. Oct. 14, 1975) (quoting three-judge-panel opinion). While that case was on appeal to the Fourth Circuit, another court in the Southern District of West Virginia held, in an action challenging a public hospital's policy prohibiting elective abortions, that the Criminal Abortion Ban was "invalid, void, and without force and effect, under decisions of the United States Supreme Court." *Roe v. West Virginia Univ. Hosp.*, No. 75-0524-CH (S.D. W. Va. Aug. 15, 1975) (as quoted in *Smith v. Winter & Browning*, No. 75-1710 (4th Cir. Oct. 14, 1975)). Following that ruling, the parties in *Smith* agreed to dismiss the appeal.

36. The Fourth Circuit also concluded that the Criminal Abortion Ban was unenforceable in *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975). There, a plaintiff sought declaratory and injunctive relief challenging a state hospital’s policy of “prohibiting abortions except those done for the purpose of saving the life of the mother,” as the hospital believed the Criminal Abortion Ban required. *Id.* at 640. The Fourth Circuit held that the plaintiff had adequately demonstrated irreparable harm for purposes of obtaining a preliminary injunction, reasoning that “*Roe v. Wade* and *Doe v. Bolton*, 410 U.S. 179 . . . (1973) establish beyond argument that denial under color of law of the right to abort, implicit in the right to be let alone, constitutes irreparable injury.” *Doe*, 529 F.2d at 644.¹² Citing *Roe* and *Bolton*, the Fourth Circuit added that “[t]he West Virginia criminal abortion statute is unconstitutional beyond question.” *Id.* at 644; *see also id.* at 645 (“reiterat[ing]” that the hospital’s “anti-abortion policy and the West Virginia criminal abortion statute upon which the policy rests [are] irreconcilable with *Roe v. Wade* and *Doe v. Bolton* and therefore unconstitutional”). The Fourth Circuit remanded the case to the district court to issue an injunction directing the hospital to “ignore the unconstitutional state statute and abandon its policy, and instead, admit patients seeking abortions on the same basis as patients seeking other surgical procedures of similar difficulty and involving to a similar extent the use of hospital facilities, all in accord with the command of *Roe*.” *Id.* at 645.

¹² In *Doe v. Bolton*, 410 U.S. 179 (1973), issued the same day as *Roe v. Wade*, the Supreme Court held that several aspects of Georgia’s abortion law were unconstitutional, including Georgia’s requirement that all abortions be performed at certain accredited hospitals, that a patient obtain approval from the hospital’s abortion committee, that two Georgia-licensed physicians concur with the pregnant person’s own physician that an abortion is appropriate, and that the person obtaining an abortion be a resident of Georgia. *See id.* at 194–201.

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

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

III. Contemporary West Virginia Law Recognizes And Regulates Legal Abortion.

39. Over the past twenty years, West Virginia has enacted a comprehensive statutory framework that recognizes and regulates abortion as one of many legal medical procedures performed by a licensed physician with the patient’s consent. Through these laws, West Virginia exhaustively sets forth the circumstances under which an abortion may be lawfully obtained and performed in West Virginia. With only one exception (a law that is no longer in effect, *see infra* note 13), none of these laws contain criminal penalties for licensed medical professionals or patients.

40. ***Patient Consent.*** As it does with other medical procedures or treatments, *see, e.g.*, W. Va. Code § 16-11-1 (sterilization), § 16-51-3(5) (use of investigational drugs and devices), § 16-4-10 (diagnosing and treating minors for sexually transmitted infections), the West Virginia Legislature set forth specific provisions regulating consent to abortion. Under West Virginia Code § 16-2I-1 *et seq.*, a pregnant person provides “voluntary and informed consent” for abortion when, at least 24 hours prior to obtaining an abortion, the physician or licensed health care professional to whom the responsibility has been delegated by the physician, gives the patient specific information, either by telephone or in person. *Id.* § 16-2I-2. Pregnant persons seeking abortion care also must be provided with the option to view their ultrasound images. *Id.* § 16-2I-2(c). These requirements are waived in medical emergencies. *Id.* § 16-2I-2; *see also id.* § 16-2I-5

(encouraging but not requiring a physician to inform the patient of the medical basis for deeming an abortion necessary due to medical emergency). A physician who willfully fails to obtain voluntary and informed consent is subject to licensing penalties, but not criminal liability. *Id.* § 16-2I-8.

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

42. The law also specifies the conditions under which certain second trimester abortion procedures may be used; namely, that, except in medical emergencies, certain procedures may only be used after fetal demise has occurred. W. Va. Code § 16-2O-1. Physicians who intentionally or recklessly perform or induce abortions in violation of these conditions are subject to civil penalties and potentially licensure penalties. *Id.* §§ 16-2O-1(c)(1), (3). This provision does not impose any criminal penalties on physicians performing abortions in violation of these conditions. *Id.* § 16-2O-1(c)(1)(2).¹³ Nor does it impose any penalties on any pregnant person

¹³ Roughly a quarter-century ago, West Virginia’s Legislature sought to impose criminal liability on physicians who performed a different procedure—a so-called “partial birth” abortion, providing that doing so constituted a felony punishable by up to two years’ imprisonment and/or a fine up to \$50,000. See W. Va. Code § 33-42-8. That law was immediately enjoined as unconstitutional, and the State did not appeal. See *Daniel v. Underwood*, 102 F. Supp. 2d 680 (S.D. W. Va. 2000). Its criminal penalty provision was and is an outlier in West Virginia’s legislative scheme regulating abortion; no other statute concerning abortion, other than the dormant Criminal Abortion Ban itself, imposes criminal penalties on licensed health care providers. In any event, WHC has never utilized this method.

upon whom an abortion is performed or induced. *Id.* § 16-2O-1(c)(1)(4).¹⁴

43. **Stage of Pregnancy.** West Virginia law permits abortions during the first “twenty-two weeks since the first day of the woman’s last menstrual period [“LMP”],” W. Va. Code §§ 16-2M-2(7), 16-2M-4, which is when approximately 99% of abortions are performed.¹⁵ Abortions may still be performed after this period if “there exists a nonmedically viable fetus” or if terminating the pregnancy is necessary “to avert [the pregnant person’s] death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function.” W. Va. Code § 16-2M-4(a). Physicians who intentionally or recklessly perform abortions outside this time period where an exception does not apply are subject to civil penalties and potentially licensure penalties, but not criminal penalties. *Id.* § 16-2M-6(a). This provision does not impose any penalties on any pregnant person upon whom an abortion is performed or induced. *Id.* § 16-2M-6(d).

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

¹⁴ The “partial-birth abortion” ban, *see supra* note 13, likewise foreclosed any prosecution of the pregnant person. *See* W. Va. Code § 33-42-8(c).

¹⁵ *See* Katherine Kortsmits et al., *Abortion Surveillance System – United States, 2019*, Centers for Disease Control and Prevention 70(9):1-29 (Nov. 26, 2021), <https://www.cdc.gov/mmwr/volumes/70/ss/pdfs/ss7009a1-H.pdf>. (“*Abortion Surveillance System*”). In 2022, the West Virginia Legislature considered but did not pass a bill that would have limited abortion to fifteen weeks LMP absent a medical emergency or severe fetal abnormality. *See* https://www.wvlegislature.gov/bill_status/bills_history.cfm?year=2022&sessiontype=RS&input=4004.

provision does not impose any penalties on any pregnant person upon whom an abortion is performed or induced. *Id.* § 16-2Q-1(l).

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

46. ***State Reporting.*** The Legislature further mandates that the West Virginia Department of Health and Human Resources collect a range of anonymized statistical and demographic information about abortions and abortion patients in West Virginia. For example, any physician who performs an abortion shall annually report, among other things, the gestational age of the fetus; the pregnant person's age and state and county of residence; the type of procedure performed; the method of payment used; and "whether birth defects were known, and if so, what birth defects." W. Va. Code § 16-5-22(a)(1)-(6); *see also id.* § 16-2M-5 (similar); *id.* § 16-2I-7 (requiring reporting of information connected to the provision of informed consent); *id.* § 16-2F-

6 (requiring reporting of information connected to the provision of abortion care to unemancipated minors). The Legislature has taken care to ensure that its reporting requirements do not compromise the privacy of abortion providers or persons who decide to terminate. *Id.* § 16-2I-7(e) (requiring Department of Health and Human Resources to “prevent any of the information from [collected] from being included in the public reports that could reasonably lead to the identification of any physician who performed or treated an abortion, or any female who has had an abortion”); *id.* § 16-5-22(a)(7) (protecting patient privacy); *id.* § 16-2M-5(c) (same); *id.* § 16-2F-6(b) (same).

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

48. ***Licensure Penalties and Civil Liability.*** In enacting the legal framework described above, West Virginia replaced its Criminal Abortion Ban on virtually all abortions with a comprehensive scheme that recognizes and regulates the lawful provision of abortion care; provides only licensing penalties and civil liability for physicians and other licensed medical professionals (save for one long-enjoined outlier, *see supra* note 13); and never subjects pregnant people, let alone their partners or family members who assist them in obtaining an abortion, to any

penalty. Only individuals who are not physicians or other licensed professionals whose actions are deemed to constitute the misdemeanor offense of practicing medicine without a license are subject to criminal liability. *See* W. Va. Code §§ 30-3-13(g), 16-2Q-1(k), 16-2O-1(c)(2), 16-2P-1(c)(2), 16-2M-6(b), 16-2F-8(b).

49. In addition to shifting from an outright criminal ban to a scheme focused on civil liability for physicians and no liability for patients, 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.

* * *

50. In short, over the last twenty years, West Virginia law replaced the Criminal Abortion Ban with a comprehensive, contemporary legislative regime that recognizes abortion as lawful and regulates the manner in which abortions may be lawfully performed.

IV. For Decades, Pregnant People Have Safely Accessed Legal Abortion In West Virginia.

51. For the last fifty years, people in West Virginia, including several Plaintiffs, have relied on legal abortion as central to their equality, dignity, autonomy, bodily integrity, and health.

A. Abortion Is Safe, Essential Health Care That People In West Virginia Have Relied On For Decades.

52. Abortion is one of the safest medical procedures available in the United States, and far safer than continuing a pregnancy to term. In terms of mortality and morbidity, abortion is substantially safer than remaining pregnant or giving birth. Whereas the risk of death for childbirth is 8.8 per 100,000, it is just 0.7 per 100,000 for a legal abortion.¹⁶

53. There are two main methods of abortion: medication abortion and procedural abortion.

54. Medication abortion typically involves the patient ingesting a combination of two prescription drugs approved by the U.S. Food and Drug Administration: mifepristone and misoprostol. The patient first takes the mifepristone and then, usually twenty-four to forty-eight hours later, takes the misoprostol, after which they expel the contents of the uterus in a manner similar to an early miscarriage.

55. Prior to *Dobbs*, WHC provided medication abortion from 4.0 weeks through 11.0 weeks LMP. WHC would prescribe and dispense both pills—mifepristone and misoprostol—to the patient in-person. The patient would take the mifepristone at WHC and then later take the misoprostol at home or another setting of their choosing.

56. Procedural abortion is sometimes referred to as “surgical abortion,” though that is a misnomer, as procedural abortion is a brief procedure that involves no incision or general anesthesia.

57. Prior to *Dobbs*, WHC provided procedural abortion from 4.0 weeks through 17 weeks and 6 days LMP.

¹⁶ See Nat’l Academies of Scis., Eng’g, and Med, *The Safety and Quality of Abortion Care in the United States* 74–75 (2018).

58. Abortion is also very common. Prior to *Dobbs*, approximately one in four women in the United States had an abortion.¹⁷

59. In 2021, WHC performed 1,304 abortions. Of those, 693 were medication abortions and 611 were procedural abortions. 26% (363) occurred before 6 weeks LMP; 53% (694) occurred between 6 weeks and 9 weeks 6 days LMP; 10% (134) occurred between 10 weeks and 11 weeks 6 days LMP; 5% (66) occurred between 12 weeks and 13 weeks 6 days LMP; 4% (47) occurred between 14 weeks and 16 weeks LMP; and none occurred after 17 weeks LMP. The vast majority of patients—87% (1129)—were from West Virginia, and the remainder were from other states, largely Ohio and Kentucky.

60. In the first five months of this year (January 1, 2022 through May 31, 2022), WHC performed 556 abortions. Of those, 302 were medication abortions and 254 were procedural abortions. 26% (142) occurred before 6 weeks LMP; 55% (305) occurred between 6 weeks and 9 weeks 6 days LMP; 12% (66) occurred between 10 weeks and 11 weeks 6 days LMP; 4% (23) occurred between 12 weeks and 13 weeks 6 days LMP; 3% (14) occurred between 14 weeks and 16 weeks LMP; 0.7% (4) occurred between 16 weeks 1 day and 16 weeks and 6 days LMP; and 0.4% (2) occurred between 17 weeks and 17 weeks 6 days. As in 2021, the vast majority of patients who received abortion care in the first five months of 2022—79% (442)—were from West Virginia.

61. People in West Virginia decide to terminate their pregnancies for a variety of personal reasons, including familial, medical, and financial.

¹⁷ Guttmacher Inst., *Abortion Is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates* (Oct. 19, 2017), <https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates>.

62. Some pregnant people have abortions because they conclude that it is not the right time to have a child or add to their families. For example, some decide to end a pregnancy because of their conviction that they lack the necessary financial resources, sufficient partner or familial support, or stability; their age; or their desire to pursue their education or career. Some are concerned that adding a child to their family will make them less able to adequately provide and care for their existing children, whereas others have decided they do not want to have children at all. Nearly 65% of people who had an abortion in West Virginia in 2019 already had at least one child.¹⁸

63. Some pregnant people seek abortions to preserve their lives or their physical, psychological, and/or emotional health, or because of a fetal diagnosis; some because they have become pregnant as a result of incest or rape; and some because they are experiencing intimate partner violence and worry that remaining pregnant and/or having a child will put them at greater risk of violence, further tether them to an abusive partner, or subject a child to an abusive environment.

64. Ultimately, the decision to terminate a pregnancy is motivated by a combination of diverse, complex, and interrelated factors that are intimately related to the individual's values and beliefs, culture and religion, health status and reproductive history, familial situation, and resources and economic stability.

65. Many people who seek abortion care are poor or low-income. Approximately 40% of WHC patients have Medicaid as their health insurance.

¹⁸ *Abortion Surveillance System*, <https://www.cdc.gov/mmwr/volumes/70/ss/pdfs/ss7009a1-H.pdf>.

66. Racial minorities also disproportionately seek abortion care. For example, in 2019, Black people obtained nearly 13% of abortions provided in West Virginia,¹⁹ although Black people make up just 3.9% of the State’s population.²⁰ As noted elsewhere, racial minorities also face disproportionately high rates of maternal mortality and comorbidities that increase the health risks associated with pregnancy.

B. Pregnancy Significantly Impacts A Person’s Health, Finances, And Life Trajectory.

67. In light of the physical, financial, and other personal impacts of pregnancy and childbirth, whether to become or remain pregnant is an extraordinarily consequential decision.

68. While pregnancy can be a cause for celebration for many people, every pregnancy is a major medical experience involving profound physiological changes, even when the patient is healthy and the pregnancy uncomplicated. These changes can have a lasting effect on a pregnant person’s health and wellbeing. The physiological impacts of pregnancy are even greater for those with underlying medical conditions, such as diabetes, hypertension, and obesity, all of which are common in West Virginia.

69. The risk of death associated with childbirth is approximately fourteen times higher than that associated with abortion.²¹

70. Maternal mortality is a particularly acute problem in the United States. In 2019, 754 people died of maternal causes in the United States—a significant increase from the 658 who

¹⁹ *Id.*

²⁰ U.S. Census Bureau, *QuickFacts West Virginia*, <https://www.census.gov/quickfacts/WV> (last accessed June 28, 2022).

²¹ Elizabeth Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119(2) *Obstetrics & Gynecology* 215, 216 (Feb. 2012).

died in 2018.²² The U.S. has the highest maternal mortality rate of all high-income countries, and the difference is not marginal—the maternal mortality rate here is more than double that of most other high-income countries.²³

71. Pregnancy-related deaths in the United States are disproportionately high among people of color. In 2019, the maternal mortality rate was 44 per 100,000 live births for Black people as compared to 17.9 for non-Hispanic White people.²⁴

72. From the onset of pregnancy, every patient is at risk of complications. Pregnancy-related complications are much more common than abortion-related complications.²⁵

73. Even an uncomplicated pregnancy affects a person’s entire physiology and stresses most major organs.

74. A pregnant patient’s lungs must work harder to breathe, and the pregnancy puts pressure on the lungs, leaving many patients feeling chronically out of breath. During pregnancy, the heart pumps 30–50% more blood; as a result, the kidneys become enlarged, and the liver produces more clotting factors, which raises the risk of blood clots or thrombosis. Pregnant patients are highly likely to experience gastrointestinal symptoms like nausea and vomiting. In

²² Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2019*, Centers for Disease Control & Prevention 3 (Apr. 2021) (“*Maternal Mortality Rates*”), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality-2021/E-Stat-Maternal-Mortality-Rates-H.pdf>.

²³ Roosa Tikkanen et al., *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, The Commonwealth Fund (Nov. 18, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries>.

²⁴ *Maternal Mortality Rates*, <https://www.cdc.gov/nchs/data/hestat/maternal-mortality-2021/E-Stat-Maternal-Mortality-Rates-H.pdf>.

²⁵ Elizabeth Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119(2) *Obstetrics & Gynecology* 215, 216 (Feb. 2012).

severe cases, these symptoms can cause dehydration requiring treatment with IV fluids and medications.

75. Patients who suffer from chronic conditions such as asthma, cardiac conditions, diabetes, gallbladder disease, hypertension, immunological conditions, lung disease, and thyroid disease are more likely to experience pregnancy complications.

76. These consequences of pregnancy can cause discomfort, pain, stress, and anxiety, and can make daily activities, including work and family responsibilities, difficult and exhausting.

77. In addition, health conditions such as preeclampsia, deep-vein thrombosis, and gestational diabetes may arise for the first time during pregnancy.

78. Many pregnant people seek emergency department care at least once during their pregnancy. One study found that 49% visited the emergency department at least once, and 23% visited twice or more. Patients with comorbidities such as diabetes, hypertension and obesity—all of which are experienced at increased rates in West Virginia—are more likely to present to the emergency department for urgent or non-urgent care.²⁶

79. Ectopic pregnancy is a common pregnancy complication. An ectopic pregnancy occurs when a fertilized egg implants anywhere other than in the endometrial lining of the uterus. An ectopic pregnancy is, by definition, nonviable. If an ectopic pregnancy ruptures, the pregnant person can die.²⁷

²⁶ Shayna D. Cunningham et al., *Association Between Maternal Comorbidities and Emergency Department Use Among a National Sample of Commercially Insured Pregnant Women*, 26 Acad. Emergency Med. 940, 941-42 (2017); see also West Virginia Dep’t of Health & Human Resources, Div. of Health Promotion & Chronic Disease, *Fast Facts* (2018), https://dhhr.wv.gov/hpcd/data_reports/Pages/Fast-Facts.aspx.

²⁷ Multiple abortion bans enacted in the years following *Roe v. Wade* expressly exempted treatment for ectopic pregnancy, regardless whether the condition had yet become life-threatening. See, e.g., Ala. Code Ann. § 26-23H-3(1) (clarifying that “abortion” as used in the ban “does not include a procedure or act to terminate the pregnancy of a woman with an ectopic pregnancy”); Ohio Rev.

80. Pregnant patients also remain at risk for miscarriage throughout their pregnancy. Approximately 17% of pregnant patients miscarry. Especially when it occurs later in pregnancy, miscarriage carries risk of infection, hemorrhage, and other complications.

81. Pregnancy and/or the postpartum period can also trigger the emergence or recurrence of mental health conditions.

82. Research indicates that at least one in eight pregnant people in the general population will experience a mental health disorder during pregnancy.²⁸ Low-income people are at even higher risk.²⁹ And these numbers reflect only those mental health disorders that are diagnosable; they do not encompass pregnant people whose mental health is negatively impacted by the physiological changes and psychosocial stressors associated with pregnancy, but whose symptoms do not rise to the level of a DSM-V diagnosis.

83. Managing a mental health condition during pregnancy can be complicated. A pregnant person regulating a mental health condition with medication that carries teratogenic risks may have to decide whether to discontinue or modify their medication regimen in order to avoid risking harm to the fetus, thereby significantly increasing the likelihood that they will experience a recurrence of mental illness.³⁰

Code Ann. § 2919.191 (stating that ban “appl[ies] only to intrauterine pregnancies”); Act. H.B. 481 § 4, 155th Gen. Assemb., Reg. Sess. (Ga. 2019) (exempting “[r]emoving an ectopic pregnancy” from definition of abortion). The Criminal Abortion Ban makes no such exception.

²⁸ See, e.g., S. Meltzer-Brody et al., *A Prospective Study of Perinatal Depression and Trauma History in Pregnant Minority Adolescents*, 208(3) Am. J. of Obstetrics & Gynecology 211.el (2013).

²⁹ S. Meltzer-Brody, *New Insights Into Perinatal Depression: Pathogenesis and Treatment During Pregnancy and Postpartum*, 13(1) Dialogues in Clinical Neuroscience 89, 90 (2011).

³⁰ See, e.g., L.S. Cohen et al., *Relapse of Major Depression During Pregnancy in Women Who Maintain or Discontinue Antidepressant Treatment*, 295(5) J. of the Am. Med. Ass’n 499, 504 (2006) (study finding that 68% of people with major depression who discontinued medication

84. Although many maternal deaths are attributable to physical complications, such as cardiovascular disease, preeclampsia, and postpartum hemorrhage, recent studies have estimated that a sizable portion of maternal deaths—up to 15%—are due to self-harm attributable to mental health issues associated with pregnancy and childbirth, including postpartum depression.³¹

85. Childbirth too is a serious medical event. During labor and delivery, 20% of the pregnant person’s blood flow is diverted to the uterus, placing them at risk of hemorrhage or even death. To try to protect against hemorrhage, the body produces more clotting factors, which leads to an increased risk of blood clots or embolisms. Labor and delivery can involve unexpected adverse events, including transfusion, perineal laceration, ruptured uterus, and unexpected hysterectomy. Vaginal delivery can lead to injury, such as to the pelvic floor, with possible long-term consequences, including incontinence. Delivery by cesarean section occurs in one-third of pregnancies, and involves an open abdominal surgery requiring hospitalization and carries risk of hemorrhage, infection, and injury to internal organs.

86. Pregnancy and childbirth are costly. Even for those pregnant patients with insurance, there are often significant out-of-pocket costs. And for those without insurance, the costs of pregnancy and childbirth can be so great that they severely impact a family’s financial

during pregnancy experienced a relapse); A.C. Viguera et al., *Risk of Recurrence in Women with Bipolar Disorder During Pregnancy: Prospective Study of Mood Stabilizer Discontinuation*, 164(12) *Am. J. of Psychiatry* 1817, 1819-20 (2007) (study finding that 88.5% of pregnant people with bipolar disorder who discontinued medication suffered a relapse).

³¹ See, e.g., Kimberly Mangla et al., *Maternal Self-Harm Deaths: An Unrecognized and Preventable Outcome*, 221(4) *Am. J. of Obstetrics & Gynecology* 295 (2019); Nicole Davis & David Goodman, *Data Brief from 14 U.S. Maternal Mortality Review Committees, 2008-2017*, Centers for Disease Control & Prevention (2019), <https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/mmr-data-brief.html> (finding that 9% of maternal deaths for which a cause of death was identified were attributable to mental health conditions, and that “the leading underlying cause of death among non-Hispanic White women was mental health conditions”).

security for the long term. West Virginia does not require employers to provide paid pregnancy leave.

87. Childrearing is also expensive, both in terms of costs and lost wages. In West Virginia, employers are not required to provide paid parental leave. At most, employees who satisfy certain requirements can qualify for 12 weeks of *unpaid* leave following the birth of a child. *See* W. Va. Code § 21-5D-4.

88. Ensuring infant health is also more difficult in West Virginia than elsewhere in the country. Whereas in 2020 the infant mortality rate in the United States was 5.4 deaths per 1,000 live births, it was 7.5 deaths per 1,000 live births in West Virginia.³² In 2019, West Virginia had the fourth highest rate of preterm births (*i.e.*, babies born prior to 37 weeks gestation) in the country and the ninth highest rate of babies born with a low birthweight (*i.e.*, less than 5 lbs. 8 oz.).³³

V. Post-*Dobbs*, The Criminal Abortion Ban Creates Fear Of Prosecution.

89. On June 24, 2022, the Supreme Court issued its decision in *Dobbs*, holding that “*Roe* and *Casey* must be overruled.” *Dobbs*, No. 19-1392, slip op. at 5, 2022 WL 2276808 at *7.

90. As set forth herein, the Criminal Abortion Ban was impliedly repealed by West Virginia’s comprehensive, contemporary regime for lawful abortion, and/or is void for desuetude, having not been enforced for decades and instead openly violated. However, absent relief from this Court, Plaintiffs cannot continue to provide abortion care in West Virginia for fear of criminal prosecution under the Criminal Abortion Ban.

³² Centers for Disease Control & Prevention, *Infant Mortality* (last reviewed June 22, 2022), <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm>; Centers for Disease Control & Prevention, *West Virginia* (last reviewed Mar. 15, 2022), <https://www.cdc.gov/nchs/pressroom/states/westvirginia/wv.htm>.

³³ *Id.*

91. In the weeks leading up to *Dobbs* and in the hours after the decision in *Dobbs* was issued, West Virginia’s Attorney General and others made public statements creating both significant confusion over the enforceability of the Criminal Abortion Ban, and palpable concern that individuals involved in abortion care—and even patients themselves—may face prosecution under the Ban.

92. 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.”³⁴ 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.”³⁵

93. On June 24, 2022, the day *Dobbs* was released, Attorney General Morrisey—the chief legal officer for the State of West Virginia—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,

³⁴ 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.”).

³⁵ Newsmax, *Roe: Politics of Life*, Interview with Attorney General Patrick Morrisey (May 17, 2022), https://www.youtube.com/watch?v=D_xB7yXXSI0.

is a landmark day in our effort to protect babies.”³⁶ 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.”³⁷

94. Governor Jim Justice similarly expressed uncertainty about the force of the Criminal Abortion Ban, stating in an interview, “[T]here needs to be a lot more discussion with the legal team to see if what we have on the books is adequate or if there is a need to call a special session.”³⁸

95. West Virginians for Life Executive Director Wanda Franz, who has long been a leader in the anti-choice movement at a national level and has played a critical role in crafting anti-choice legislation in West Virginia, also issued conflicting statements. At one point, referring to the Criminal Abortion Ban, she said: “[W]e already have what’s essentially a trigger law . . . We have a law on the books that has been suppressed by [*Roe v. Wade*] that will spring back if the

³⁶ Patrick Morrissey (@MorrisseyWV), Twitter (June 24, 2022, 11:41 a.m.), <https://twitter.com/MorrisseyWV/status/1540359576930983938>.

³⁷ 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/>.

³⁸ 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/>.

Supreme Court decision is overturned.”³⁹ But Franz also stated elsewhere, “There’s no way I think that legislators would want to see criminalization of abortion in the way that [the Criminal Abortion Ban] provides for it. We’ve been working with our legislators for many years on legislation to 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.”⁴⁰

96. 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.”⁴¹

97. 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.”⁴²

³⁹ 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>.

⁴⁰ 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/>.

⁴¹ 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/>.

⁴² 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>.

VI. Plaintiffs Face The Threat Of Prosecution Under The Criminal Abortion Ban And, Along With Pregnant People In West Virginia, Are Experiencing Grave Harm.

98. Following *Dobbs*, the credible threat of prosecution under West Virginia's Criminal Abortion Ban has forced WHC to cease all abortion care. This has caused grave harm to WHC, its staff, its patients, and all West Virginians.

99. Plaintiffs all fear that if WHC continued to provide abortion care and they fulfilled their job duties in connection with that care that they could be prosecuted under the Criminal Abortion Ban.

100. Plaintiff Katie Quiñonez, the Executive Director of WHC, manages WHC's administrative, financial, and clinical operations, works with the Board of Directors, and is responsible for developing, implementing, and reviewing WHC's policies and procedures. She fears that if WHC continued to provide abortion care after *Dobbs*, she could face criminal prosecution under the Criminal Abortion Ban, either directly or as an accomplice. She has the same fear for WHC and its officers, directors, and staff.

101. Plaintiff Dr. John Doe, a physician at WHC, fears that if he provides abortion care at WHC or anywhere in West Virginia after *Dobbs*, he could face criminal prosecution for a direct violation of the Criminal Abortion Ban and lose his medical licenses. The Criminal Abortion Ban forces him to choose between denying essential health care to his patients and thus breaking the Hippocratic Oath and violating the criminal code.

102. Dr. Doe also fears the consequences of utilizing the Criminal Abortion Ban's exception for life-saving care. Given the harsh criminal penalties imposed by the Ban, he is afraid to interpret the language as encompassing anything beyond an immediate or imminent threat to the life of the patient. Physicians and health care professionals are capable of considering the nuances of patient care and determining what constitutes "life-saving care," such that Dr. Doe

would feel more comfortable exercising his medical judgment regarding when care is necessary to save a life if that provision were enforced by licensing boards comprised of other medical professionals. However, he is concerned that the elected law enforcement officials in West Virginia who would enforce the Criminal Abortion Ban, who have made their anti-abortion views publicly known, do not have the requisite medical or professional training and experience to be able to determine what constitutes life-saving care and so might bring criminal charges arbitrarily.

103. Dr. Doe is also distressed at how narrow and inadequate the Criminal Abortion Ban's life-saving-care exception is. A broad range of serious health conditions that can result in significant, life-altering health consequences short of death can lead some people to seek abortion care, but the Criminal Abortion Ban does not allow for abortion care in such situations.⁴³

104. The Criminal Abortion Ban also affects Dr. Doe's employment. Now that WHC has stopped providing abortion care, it will no longer employ him as an abortion provider.

105. Plaintiff Danielle Maness, the Chief Nurse Executive at WHC, was responsible for overseeing all clinical procedures and processes associated with abortion prior to *Dobbs*. She fears that if WHC continued to provide abortion care after *Dobbs*, she could face criminal prosecution under the Criminal Abortion Ban, either directly or as an accomplice, and could lose her nursing license.

106. Plaintiff Debra Beatty provided non-directional, professional counseling to patients seeking abortion care at WHC. She fears that if WHC continued to provide abortion care after

⁴³ As one maternal fetal medicine physician who specializes in high-risk pregnancies and performs abortions recently asked in a *New York Times* article regarding the vagueness of life-saving-care exceptions: "How almost dead does someone need to be? . . . Am I to just watch someone bleed to death? Or provide the care and then be reported and go to jail? I don't know." Jack Healy, *With Roe Set to End, Many Women Worry about High-Risk Pregnancies*, N.Y. Times (June 20, 2022), <https://www.nytimes.com/2022/06/20/us/abortion-high-risk-pregnancy.html>.

Dobbs, she could face criminal prosecution under the Criminal Abortion Ban, either directly or as an accomplice, and could lose her social work license.

107. The Criminal Abortion Ban compromises Ms. Beatty's ability to fulfill her professional obligations to her patients, rendering her unable to have open and honest conversations with them about their desire to obtain abortion care.

108. The Criminal Abortion Ban also affects Ms. Beatty's employment at WHC. Now that WHC has stopped providing abortion care, it will no longer employ her as a counselor for patients receiving abortion care.

109. Shutting down WHC's abortion services is already causing WHC to suffer in numerous ways. These harms will only increase the longer the Criminal Abortion Ban remains in effect.

110. Abortion care accounts for 40% of WHC's annual revenue. Being forced to stop performing abortions because of the threat of criminal prosecution will leave WHC with a significant budget deficit. WHC has only budgeted enough to keep on full-time staff through the end of 2022.

111. Already, WHC has had to lay off counselors, physicians, and nurse anesthetists who were dedicated to supporting WHC's abortion patients, and may have to do further layoffs in the future.

112. As seen in other states, restricting abortion care can lead to permanent clinic closures, even when the restrictions ultimately are vacated.⁴⁴ That is so because restarting an

⁴⁴ See Abigail Abrams, *Abortion Clinics Are Rapidly Closing. Many Won't Come Back*, Time (Dec. 2, 2020), <https://time.com/5916746/abortion-clinics-covid-19/>; Ashley Lopez, *Despite Supreme Court Win, Texas Abortion Clinics Still Shuttered*, KHN (Nov. 18, 2019), <https://khn.org/news/despite-supreme-court-win-texas-abortion-clinics-still-shuttered/>.

abortion care practice can present significant logistical and financial challenges. For example, it is very difficult to recruit out-of-state physicians to come to West Virginia to provide abortion care. Now that WHC has had to stop employing its current providers for that purpose, there is no guarantee WHC will be able to recruit them or others to return to WHC in the future. The longer WHC remains unable to provide abortion care because of the Criminal Abortion Ban, the more difficult it will be for WHC eventually to resume providing that care should the threat of prosecution be lifted.

113. Having to stop providing abortion care is also frustrating WHC's ability to fulfill its mission, which is to provide reproductive health care that respects patients' choices. Being unable to provide abortion care is extremely distressing to Plaintiffs.

114. Enforcement of the Criminal Abortion Ban will also cause irreparable harm to pregnant individuals in West Virginia who wish to terminate their pregnancies. WHC was the only outpatient abortion clinic in West Virginia and provided nearly all abortion care in West Virginia.

115. On June 24, 2022, the day *Dobbs* was issued, WHC staff had to contact approximately 60 to 70 patients to cancel appointments for abortion care that had been scheduled for the coming weeks. Some patients broke down in tears and were sobbing so hard they could not speak. Some were so stunned they did not know what to say. Some patients did not understand. One 21-year-old woman whose upcoming appointment was cancelled told the New York Times that she was "in shock when she learned her appointment was canceled, crying so much that she got a headache."⁴⁵ Some staff members at the Center cried so hard at having to make these calls

⁴⁵ Nicholas Bogel-Burroughs, *Women Who Had Their Abortions Cancelled Are Now Scrambling*, N.Y. Times (June 25, 2022), <https://www.nytimes.com/2022/06/25/us/abortions-canceled-roe-wade.html>.

that they were unable to continue working.

116. Pregnant people who otherwise would have accessed care at WHC now must either travel out of state to obtain the care they need; seek to end their pregnancies outside of the medical system, and risk prosecution under the Criminal Abortion Ban; or remain pregnant and give birth against their will.

117. Traveling out of state to obtain abortion care requires financial means and the ability to overcome logistical challenges. Individuals need to schedule an appointment, gather the resources to pay for the abortion and related costs, and arrange transportation to a clinic, and possibly time off work (often without paid sick leave) and childcare. For pregnant people with low incomes, inflexible jobs, and/or lack of childcare, travel is an especially great burden. Travel also delays care, pushing some pregnant people past the point at which they can obtain an abortion, and forcing others to undergo a more complicated procedure with increased risks.⁴⁶ Moreover, as more and more clinics like WHC are forced to close, the clinics that remain open will be flooded with increased demand that they may not have capacity to handle. Thus, even pregnant West Virginians who have the means to travel may still be unable to access care.

118. Forcing a person to remain pregnant against their will causes emotional and psychological harm.

119. Pregnant people who are denied an abortion experience worse outcomes in multiple respects than similarly situated pregnant people who desire and are able to obtain an abortion. For

⁴⁶ Although abortion is extremely safe, delays in performing an abortion increase the risk of a pregnant person's health and well-being, as the risk associated with an abortion procedure increases the later it is performed.

example, those who are denied an abortion experience a “large and persistent . . . increase in financial distress,” including more past-due debt, bankruptcy, and eviction.⁴⁷

* * *

120. The Criminal Abortion Ban is a relic of a bygone era—one fundamentally out of step not only with the way pregnant people in West Virginia approach their pregnancies today, but also with the West Virginia Code itself. Yet Plaintiffs and others are experiencing grave harm from the threat now posed by enforcement of the Criminal Abortion Ban—harm that grows more acute every day. This Court should declare the Criminal Abortion Ban unlawful, enjoin its enforcement, and restore West Virginia’s clear, legislative choice to permit abortion care.

CLAIMS FOR RELIEF

COUNT I

Declaratory Judgment – Implied Repeal

121. Plaintiffs incorporate all preceding paragraphs of the Complaint as if set forth fully herein.

122. West Virginia has recognized the doctrine of repeal by implication in two circumstances.

123. First, if a later statute “makes full and complete provision touching the subject common to both” it and the earlier statute, courts have found the earlier statute impliedly repealed. *State v. Mines*, 38 W. Va. 125, 130, 18 S.E. 470, 471 (1893); *see also id.* Syl. Pt. 3 (“A subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute for it, though it contains no express words to that effect, must, on principles of law as well as in reason and common sense, operate a repeal of the former law.” (citing *Herron v. Carson*, 26 W.

⁴⁷ See Miller, Wherry, Greene Foster, *The Economic Consequences of Being Denied an Abortion* 36 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26662, Jan. 2022).

Va. 62 (1885)); Syl. Pt. 1, *State v. Hinkle*, 129 W. Va. 393, 393, 41 S.E.2d 107, 107 (1946) (similar).

124. Second, if subsequent statutes are “repugnant” to an earlier statute, the later statutes will repeal the earlier one because they are “the last legislative declaration upon the subject.” Syl., *State v. Snyder*, 89 W. Va. 96, 108 S.E. 588 (1921); *see also id.* at 589 (explaining that if older and newer statutory provisions “cannot stand together, . . . the later law must prevail as the last expression of the legislative will on the subject”).

125. Under both of these standards, the antiquated Criminal Abortion Ban is unenforceable. The numerous, detailed, and comprehensive statutes regulating the lawful provision of abortion care that the West Virginia Legislature has enacted in recent decades have superseded and are fundamentally inconsistent with the Criminal Abortion Ban, and therefore impliedly repealed W. Va. Code § 61-2-8.

COUNT II

Declaratory Judgment – Desuetude

126. Plaintiffs incorporate all preceding paragraphs of the Complaint as if set forth fully herein.

127. Under West Virginia law, the doctrine of desuetude provides that criminal laws are void when, *inter alia*, they have not been enforced for extended periods of time. *See Comm. on Legal Ethics of the W. Va. State Bar v. Printz*, 187 W. Va. 182, 416 S.E.2d 720 (1992).

128. Under the doctrine of desuetude, a criminal statute becomes void where: (1) the conduct the statute prohibits is “*malum prohibitum* and not *malum in se*,” (2) there “has been open, notorious and pervasive violation of the statute for a long period,” and (3) there “has been a conspicuous policy of nonenforcement of the statute.” Syl. Pt. 3, *Printz*, 187 W. Va. at 183, 416 S.E.2d at 721.

129. The conduct that the Criminal Abortion Ban prohibits is *malum prohibitum*, not *malum in se*.

130. The Criminal Abortion Ban has been openly, notoriously, and pervasively violated for nearly fifty years. Plaintiff WHC has been providing abortion care and publicly advertising its services to people in need of abortion care since 1976.

131. There is a conspicuous policy of nonenforcement of the Criminal Abortion Ban and, to the contrary, West Virginia law has a comprehensive, contemporary regime regulating abortion care and recognizing it as lawful.

132. Plaintiffs' desuetude claim is brought in the alternative to their implied repeal claim.

COUNT III
Deprivation of Procedural Due Process
Void for Vagueness
West Virginia Constitution Art. III, Sec. 10

133. Plaintiffs incorporate all preceding paragraphs of the Complaint as if set forth fully herein.

134. Article III, Section 10 of the West Virginia Constitution provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.”

135. A constitutional vagueness claim against a criminal statute under West Virginia law is “grounded in the constitutional due process clauses” of the Fourteenth Amendment of the U.S. Constitution and Article III, Section 10 of the West Virginia Constitution, and also “implicate[s]

the provisions of” Article III, Section 14 of the West Virginia Constitution.⁴⁸ *State v. Bull*, 204 W. Va. 255, 261–62, 512 S.E.2d 177, 183–84 (1998). “The basic requirements” of these provisions “are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided.” *Id.* at 262 (citation omitted). The “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.” *Id.*

136. As written, the Criminal Abortion Ban both lacks sufficient definiteness to provide fair notice to ordinary people, including Plaintiffs, of the full range of conduct criminalized (beyond the actual performance of an abortion), and to prevent arbitrary and discriminatory enforcement.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court take these actions:

A. Immediately issue a temporary restraining order and/or preliminary injunction, and later a permanent injunction, restraining Defendants, their employees, agents, and successors in office, and all those acting in concert with them, from enforcing the Criminal Abortion Ban, W. Va. Code § 61-2-8, or from taking any enforcement action premised on a violation of W. Va. Code § 61-2-8 that occurred while such relief was in effect.

B. Enter a judgment declaring the Criminal Abortion Ban, W. Va. Code § 61-2-8:

a. impliedly repealed; and/or

⁴⁸ Article III, Section 14 of the West Virginia Constitution states in relevant part: “In all such trials [of crimes and misdemeanors], the accused shall be fully and plainly informed of the character and cause of the accusation.”

- b. void for desuetude; and/or
 - c. a violation of Article III, Section 10 of the West Virginia Constitution;
- C. Award Plaintiffs reasonable attorneys' fees and costs;
- D. Grant such other and further relief as the Court deems just and proper.

PLAINTIFFS
By Counsel
Dated: June 29, 2022

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**Applications for pro hac vice admission of out-of-state counsel pending*