IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-576

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

Petitioner,

v.

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

Respondents.

Appeal from the Circuit Court of Kanawha County

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

OPENING BRIEF OF PETITIONER

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ASSIGNMENTS OF ERROR

1. The lower court incorrectly held that Respondents-Appellees were likely to succeed on their implied repeal claim. The West Virginia Legislature never intended to repeal W. Va. Code § 61-2-8 (the "Act")—which protects unborn life except to save the mother's life—by passing civil laws to regulate abortions after the U.S. Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973). The Legislature has consistently sought to balance the requirements of *Roe* with protecting human life under law; it did not intend to undermine that protection by continuing to enact pro-life regulations after *Roe*.

2. The lower court also incorrectly held that Respondents were likely to succeed on their desuetude claim. The Act was consistently enforced from 1870, when it was enacted by the Legislature, through 1973, when *Roe* forbade states from enforcing such laws. Nonenforcement of the Act after court rulings that rendered it unenforceable suggests respect for the judiciary, not a witting refusal to enforce the Act. This Court has never applied desuetude in such a situation.

3. The lower court incorrectly addressed Respondents' due process claim and held that the Act is unconstitutionally vague. In moving for a preliminary injunction, Respondents did not brief their due process claim. And the Act is not vague in any event. Insofar as it is considered beside the *Roe*-era civil laws, there is no conflict, and even if there were, the 1870 Act should be preserved.

4. Finally, the lower court incorrectly held that the balance of equities and public interest favor entering an order preliminarily enjoining the Act's enforcement. Respondents showed no irreparable injury because they have no legally protected right to perform abortions, have no protected economic liberty interest, and West Virginia mothers can vindicate their own rights. In

contrast, the State suffers extreme irreparable harm. Every week the lower court's injunction is in effect, 25 unborn children will lose their lives—children the Act is meant to protect

INTRODUCTION

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

First, implied repeal is strongly disfavored. That is especially true here, where (1) the *Roe*-era civil laws and the Act can be harmonized, and (2) the Legislature showed no clear intent to repeal the Act. As to the former, nothing in the *Roe*-era civil laws compels what the Act forbids. All the State's laws proscribe similar conduct and complement each other in that the civil statutes attack the lesser offense of reckless abortions in addition to certain intentional ones. The State can enforce under either criminal or civil laws, as allowed in many regulatory areas. As to intent, the Legislature enacted the newer civil laws in response to *Roe*—which kept the State from enforcing the Act. It makes no sense to say that, by enacting protections that would protect the unborn and

their mothers post-*Roe*, the Legislature demonstrated an obvious intent to repeal an Act that provided yet greater protection for those same individuals. All the laws shared the same legislative purpose.

Second, West Virginia appears to be the only state in the nation that holds desuetude can invalidate an enacted law. The U.S. Supreme Court and other states reject this doctrine because the "failure of the executive branch to enforce a law does not result in its modification or repeal." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113–14 (1953) (citations omitted). This Court should abandon the doctrine. And desuetude should not apply here regardless. The State did not enforce the Act after *Roe* because federal law prevented it from doing so—not because of a witting policy decision. If the Court keeps the doctrine, it should not allow the doctrine to take overruled court decisions and make their holdings permanent by repealing temporarily enjoined legislation. That would punish faithful executives and proliferate bad law.

Repeal-by-implication and desuetude were the only grounds the Respondents raised in support of their request for a preliminary injunction. Yet the trial court gratuitously added due process and vagueness as a third reason for invalidating the 1870 Act. Respondents did not brief that claim in their motion below, so this Court should disregard it. In addition, the due-process theory fails on the merits. The Act is clear: it has proscribed abortion for over 150 years. Yet the lower court held that the Act violates due process for vagueness, not because of its terms, but because people may not know which law may be enforced against them—the Act or the newer, civil laws. That is not an occasion of vagueness that violates due process. While particular case of performing an abortion may violate more than one law, that does not mean the laws do not provide fair notice of wrongdoing. Indeed, no matter whether laws create doubt as to which law may be enforced or

what penalties may be imposed, due process is satisfied because the overlapping Act and civil laws clearly define the conduct prohibited and the punishment allowed.

The stakes here are sky-high. Every day the lower court's injunction remains in effect, 4 unborn children will lose their lives. And that injunction is based on faulty legal theories, including one Respondents did not even brief below. The Attorney General asks this Court to reverse.

BACKGROUND

For 173 years, West Virginians have sought to protect unborn human life. In 1849, the Virginia General Assembly passed a law protecting unborn life, which West Virginia adopted through its Constitution when it became a state in 1863. *See* VA. CODE tit. 54, ch. 191, § 8 (1849); W. VA. CONST. art. XI § 8 (1862). In 1870, West Virginia affirmatively adopted a nearly identical statute, later amended to become the Act codified as W. Va. Code § 61-2-8. Appendix Record (AR) 0009-0010 (Compl. ¶¶ 27-28). This Act forbids "any person" from administering "any drug or other thing, or us[ing] any means, with intent to destroy [an] unborn child," which does "destroy [the] child"—unless the "act is done in good faith, [to] sav[e] the life of [the] woman or child." W. VA. CODE § 61-2-8. Violators face "not less than three nor more than ten years" in prison. *Id.*

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

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

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

The Legislature never repealed the Act. Indeed, it *refused* to do so multiple times. For example, in 2010, the Legislature passed Senate Bill 457, which repealed many "outmoded criminal" laws. S.B. 457, 79th Leg., Reg. Session (W. Va. 2010), https://bit.ly/3ooPdBb. This repeal did not nix the Act, but it did do away with nine sections *within the same article*. *Id.* (repealing W. VA. CODE §§ 61-2-17, 61-2-18, 61-2-19, 61-2-20, 61-2-21, 61-2-22, 61-2-23, 61-2-24 and 61-2-25). And Governor Manchin signed it into law. *Id.* The Legislature obviously intended to keep W. Va. Code § 61-2-8 (but not other laws nearby) in case *Roe* was overturned. The Legislature again acted consistently with this intent a few years later. In 2018, House Bill 4264 was proposed. This bill sought to expressly repeal W. Va. Code § 61-2-8. H.B. 4264, 85th Leg., Reg. Session (W. Va. 2018), https://bit.ly/3BdqNSV. Some lawmakers urged this bill because a federal court had "declared [the Act] unconstitutional." *Id.* But it died in committee.

Last month, the U.S. Supreme Court overturned *Roe*, allowing states to again enforce rational laws protecting unborn human life. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2283-84 (2022). This worried Respondents, who are West Virginia abortion providers. AR 0005-0007 (Compl. ¶¶ 14-18). Respondent Women's Health Center of West Virginia is the lone outpatient abortion provider in the state. AR 0005-0006 (Compl. ¶ 14). Abortions make up 40% of its business. AR 0035 (Compl. ¶ 110). But the Center also does other work. For example, it provides many sexual health services, including testing and treatment for sexually transmitted infections, miscarriage management, contraception, and more. AR 0005-0006 (Compl. ¶ 14). After

Dobbs, Respondents stopped performing abortions because their conduct was illegal again under the Act. AR 0033-0038 (Compl. ¶¶ 98-119). Respondents wanted to restart their abortion practice and challenge the Act as impliedly repealed, void for desuetude, and unconstitutionally vague. AR 0041-0042 (Compl., Prayer for Relief). Their Complaints also seek a preliminary and permanent injunction. *Id.*

On June 29, Respondents moved for a preliminary injunction, arguing they were likely to succeed on their implied-repeal and desuetude claims. AR 0047-0205. The Attorney General responded. AR 0206-0238. Plaintiffs filed a reply. AR 0239-0303. And at a hearing on July 18, the lower court ruled from the bench—preliminarily enjoining the Defendants from enforcing the Act. AR 0304-0350. The lower court held that Respondents were likely to succeed on their implied-repeal and desuetude claims. AR 0345-0348. In the lower court's view, the Legislature enacted the *Roe*-era civil laws to repeal the Act, despite the Legislature's consistent aim to protect unborn life and without specifying at what point and by which *Roe*-era statute this intention manifested. *Id.* Then, the court said the Act was void for desuetude, *id.*, even though the only reason for nonenforcement was that federal law prevented the State from doing so—not because of a witting policy choice. The court should have stopped there. But it went on to address Respondents' due process claim. *Id.* Respondents did not brief this argument as a basis for the preliminary injunction. AR 0047-0205. Yet the trial court still held that the Act was unconstitutionally vague because, when viewed beside the civil laws, people may not know which law will be enforced against them. AR 0347. The trial court even enquired whether Respondents were seeking a preliminary or permanent injunction at the hearing, even though briefing and argument was on preliminary relief only, which Respondents did note at that time. AR 0345.

The Attorney General orally moved to stay the injunction. AR 0349. The lower court did not rule on this request but directed the parties to brief it. *Id.* The briefing on this motion was completed on July 20, 2022, but the lower court has not decided it. AR 0351-0370. The Attorney General also moved this Court to immediately stay the lower court's injunction, and he requested its expedited review. *See* Motion for Emergency Stay and Motion for Expedited Review, Case No. 22-576 (W. Va. July 19, 2022). These requests remain pending. On July 20, the lower court entered a written order for its preliminary injunction decision—an order drafted by Respondents with only minimal changes by the court. AR 0371-0400. The Attorney General filed his notice of appeal the same day, and seeks urgent relief to prevent the grave harm of 25 children losing their lives each week the injunction is in place. This Court should reverse and dissolve the injunction.

ARGUMENT SUMMARY

History shows unequivocally that West Virginia has consistently sought to protect unborn human life. This is evidenced by the 1870 Act and the Legislature's consistent refusals to repeal it, and also by the Legislature's more recent, post-*Roe* civil enactments protecting women and unborn human life. Yet the lower court enjoined the 1870 Act, holding that the post-*Roe* enactments somehow nullified the 1870 Act and that the 1870 Act was essential "disenacted" by virtue of the 49 years *Roe* prevented the Act's enforcement. The Attorney General now seeks to reverse that egregious ruling. Respondents are unlikely to prevail on the merits, and they suffer no irreparable harm. Conversely, the Attorney General is likely to win, and he and the public suffer the gravest of irreparable harms—the loss of 25 innocent lives per week while the trial court's injunction remains in effect. This Court should reverse and dissolve the injunction.

First, Respondents are unlikely to succeed on the merits of their claims. The Legislature did not impliedly repeal the Act by enacting civil laws to regulate *Roe*-required abortions. Those

laws do not conflict. The Legislature set up multiple enforcement schemes—a criminal law that punishes abortions performed with specific intent, and civil laws that regulate even reckless abortions. The State via its officials and agencies is able to act under either. Notwithstanding any conflict analysis, nothing suggests that the Legislature intended its *Roe*-era laws to repeal the Act and provide *less* protection for the unborn. History confirms this. The Legislature refused to expressly repeal the Act only a few years ago. And when it repealed many outmoded criminal laws over 10 years ago, the Legislature did not repeal the Act even though it nixed nine neighboring provisions. The enactment history also suggest the Legislature had no clear intent to impliedly repeal the 1870 Act when it passed *Roe*-era civil laws. Instead, history shows that the Legislature acted consistently to protect life within legal limits.

Next, the Act is not void for desuetude. That doctrine is inapplicable here, and this Court should discard it. It appears that West Virginia is the only state that applies the desuetude doctrine, and the executive branch's failure to enforce a law should not mean its repeal; the decision to repeal laws is as much a legislative function as their enactment. This Court should use this opportunity to bring West Virginia in line with the rest of the country. But even under existing law, desuetude is inapplicable here. There have been no open, notorious, and pervasive violations of the Act. Nor has there been a conspicuous policy of nonenforcement. No West Virginia executive official had the constitutional authority to enforce the 1870 Act after *Roe*. Respondents and the trial court cite no cases about desuetude in which the period of non-enforcement was due to a court decision that was later overruled. Instead, Respondents' cases involved laws that were wittingly unenforced by officials tasked with their enforcement. That did not happen here.

Finally, the 1870 Act does not violate due process. Respondents did not brief this argument below, so this Court should disregard it. And the Act does not violate due process anyway. Its

terms are clear. Yet the lower court held that the Act is vague on the logic that, when it is read with the *Roe*-era civil laws, people cannot know which law will be enforced against them. Such uncertainty is allowed. While performing an abortion may violate both the Act and civil laws, that does not detract from the notice afforded by each. Indeed, no matter whether the laws create uncertainty as to which law may be enforced or what penalties (attendant to the different statutes) may be imposed, so long as the overlapping provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of due process are satisfied. The Act and the civil laws pass that test here, and enjoining the Act is inconsistent with the Legislature's intent to protect unborn life.

Second, Respondents suffer no irreparable injury. To begin, Respondents say they cannot perform abortions. But because neither the West Virginia nor United States Constitution provides a right to abortion, Respondents have no legally protected interest in performing them. Next, Respondents say they suffer economic harm because the Act jeopardizes their business. They also say the Act thwarts their mission. But these arguments fail too. Even purported liberty interests in lawful vocations are routinely rejected. And such injury is not irreparable anyway. Only 40% of the Center's revenue came from abortions. Respondents can recoup income by other means. Finally, Respondents say women have no access to their abortions. But Respondents have no standing to assert irreparable harm on behalf of all pregnant West Virginia women seeking an abortion. Respondents have suffered no injury themselves, and pregnant West Virginia women can vindicate their own rights.

Third, the State and its citizens have a compelling interest in enforcing the 1870 Act. Valid laws should be enforced. Indeed, criminal law enforcement is constitutionally required. And the State has the highest interest in protecting society's most vulnerable members. Every week the

lower court's injunction remains in effect, 25 unborn children will lose their lives. Each of those deaths irreparably harms the State's interest in protecting precious unborn life.

The balance of hardship test favors the Attorney General. He is likely to succeed on the merits—not Respondents. And West Virginia has much more to lose if the lower court's injunction remains in place. The Attorney General asks this Court to reverse the lower court and dissolve its injunction immediately. Countless unborn lives depend on it.

ORAL ARGUMENT STATEMENT

The Attorney General asks this Court to set oral argument in this matter as soon as possible. The issues raised here are critically important to the public and deserve an immediate hearing.

STANDARD OF REVIEW

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

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

ARGUMENT

I. Respondents are unlikely to succeed on the merits of their implied-repeal, desuetude, and due process claims.

To obtain a preliminary injunction, Respondents must prove they are likely to succeed on the merits of their claims. *Morrisey*, 239 W. Va. at 638, 804 S.E.2d at 888. They cannot do that here. The Legislature did not impliedly repeal the Act by enacting civil laws to protect unborn life after *Roe*; the State consistently enforced the Act before federal law prevented it from doing so; and Respondents did not brief their due process argument as a basis for preliminary relief making them an improper foundation for such relief here.

A. The Act was not impliedly repealed when the Legislature enacted new civil laws to regulate abortion in response to *Roe*.

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

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

The lower court held that the State's post-*Roe* civil laws "revised the whole subject matter of abortion in West Virginia," and "irreconcilably conflict[ ]" with the 1870 Act. AR 0386. This

holding is wrong and turns in part on an outdated standard. First, the lower court cites *State v. Mines* to suggest that implied repeal may apply when a later law is "repugnant" to the earlier one and revises the "whole subject matter" of an earlier statute. 38 W. Va. 125, 130, 18 S.E. 470, 471-72 (1893); AR 0382-0383. But this Court has recently collapsed the implied-repeal doctrine into a single question: whether an "irreconcilable" conflict exists between the earlier and later law. *See, e.g.*, Syl. pt. 1, *Brown*, 155 W. Va. at 657, 186 S.E.2d at 841; Syl. pt. 7, *Rice v. Underwood*, 205 W. Va. 274, 276-77, 217 S.E.2d 751, 753-54 (1998). No such conflict exists here.

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

Most important, nothing in the *Roe*-era laws compels what the Act forbids. All the State's laws proscribe similar conduct and "complement each other in that the civil statute[s] attack[ ] the lesser offense" of reckless abortions in addition to certain intentional ones. *United States v. Hansen*, 566 F. Supp. 162, 164-65 (D.D.C. 1983); *compare, e.g.*, W. VA. CODE § 61-2-8 *with* W. VA. CODE §§ 16-2M-6(a)-(b), 16-2F-5, 16-2I-5. Specifically, the Act includes a specific intent requirement, W. Va. Code § 61-2-8, while the Pain-Capable Unborn Child Protection Act forbids even

reckless abortions in some instances, W. VA. CODE § 16-2M-6(a)-(b). And the Parental Notification of Abortions Performed on Unemancipated Minors Law, the Women's Right to Know Act, and the Born-Alive Survivors Protection Act each provide supplementary rules covering medically necessary abortions the Act exempts. *See* W. VA. CODE §§ 16-2F-5, 16-2I-5, 16-2P-1.

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

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

Notwithstanding any conflict analysis, this Court does not "adjudge a statute to have been repealed by implication unless a legislative intent to repeal or supersede the statute *plainly and clearly appears*." *Rice*, 205 W. Va. at 285, 517 S.E.2d at 762 (emphasis added) (quoting *State ex rel. Thompson v. Morton*, 140 W. Va. 207, 212, 84 S.E.2d 791, 795 (1954)). To discern legislative intent, this Court begins with the laws' "history." *In re Sorsby*, 210 W. Va. 708, 713, 559 S.E.2d

45, 50 (2001). "[H]istorical details"—including a law's context and enactment history—help show the "primary difficulty" or mischief that the Legislature sought to address. *In re Sorsby*, 210 W. Va. at 714, 559 S.E.2d at 51; *see* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 990-99 (2021). The 1870 Act aimed to stop abortion. By passing *Roe*-era civil laws, the Legislature intended to limit abortion by addressing the new mischief of *Roe*—which required certain abortions and kept the State from enforcing its Act. *See Charleston Area Med. Ctr., Inc.*, 529 F.2d at 644. Nothing suggests that the Legislature intended its *Roe*-era laws to repeal the Act and provide *less* protection for the unborn.

Take first the enactment history. West Virginia adopted the earliest version of the Act in 1863. *See* VA. CODE tit. 54, ch. 191, § 8 (1849); W. VA. CONST. art. XI § 8 (1862). The State consistently enforced this Act to protect unborn human life until *Roe* prevented the State from doing so in 1973. AR 0010-0013 (Compl. ¶¶ 30-32); *see Charleston Area Med. Ctr., Inc.*, 529 F.2d at 644. After *Roe*, the Legislature had two options: (1) do nothing and allow all abortions, or (2) enact new laws that protect women and unborn children under the new constitutional rule. The State did the latter. AR 0015-0020 (Compl. ¶¶ 39-49). This history is critical. It shows that the newer civil laws aimed to mitigate *Roe*'s mischief, not to repeal the 1870 Act. *See Smith v. Townsend*, 148 U.S. 490, 494 (1893) (To "ascertain the reason" for a law, courts should consider "the history of the times when it was passed."); *Rice*, 205 W. Va. at 285, 517 S.E.2d at 762 (The Legislature is presumed to know the "constitutional" context in which it legislates.). In other words, *Roe*-era civil laws were meant to regulate *Roe*-required abortions. *See* Paul Benjamin Linton, *Overruling Roe v. Wade: The Implications for the Law*, 32 ISSUES L. & MED. 341, 349 (2017) (discussing this principle).

Bolstering this point, the Legislature had multiple invitations to repeal the Act but rejected those invitations. In 2010, the Legislature passed Senate Bill 457, which repealed many "outmoded criminal" laws. S.B. 457, 79th Leg., Reg. Session (W. Va. 2010), https://bit.ly/3ooPdBb. This repeal did not nix the Act, but it did wipe away nine sections *within the same article*. *Id.* (repealing W. VA. CODE §§ 61-2-17, 61-2-18, 61-2-19, 61-2-20, 61-2-21, 61-2-22, 61-2-23, 61-2-24 and 61-2-25). And Governor Manchin signed it into law. *Id.* This shows that the Legislature intended to keep W. Va. Code § 61-2-8 (but not other laws nearby) in case *Roe* was overturned. The Legislature again acted consistently with this intent a few years later. In 2018, House Bill 4264 was proposed. This bill sought to expressly repeal W. Va. Code § 61-2-8. H.B. 4264, 85th Leg., Reg. Session (W. Va. 2018), https://bit.ly/3BdqNSV. Some lawmakers urged this bill because a court had "declared [the Act] unconstitutional." *Id.* But the Legislature again rejected it, allowing the proposal to die in committee. It is absurd to suggest that by repeatedly acting to *keep* the 1870 Act in place, the Legislature "plainly and clearly" intended to *repeal* it.

Lawmakers' contemporaneous statements provide relevant history and context. For example, *Roe*'s limits consumed the Legislature while it debated the Pain-Capable Unborn Child Protection Act. "Lawmakers spent a significant amount of time questioning … legal counsel … on whether it was constitutional." Joel Ebert, *Abortion bill bound for Senate floor*, CHARLESTON GAZETTE-MAIL (Feb. 19, 2015), https://bit.ly/3OgmwB2. Some proposed amendments that would limit protections for unborn life and, in their view, "make the legislation more in-line with the constitution," while others opposed such amendments, seeking to "protect the unborn" as much as possible. Joel Ebert & Whitney Burdette, *Pain Capable bill up for vote on Wednesday*, CHARLESTON GAZETTE-MAIL (Feb. 10, 2015), https://bit.ly/3IBue7w. Reflecting these sentiments, one lawmaker said he favored "legislation … that could pass at the court level." Whitney Burdette, *House*

passes ban on abortion after 20 weeks, CHARLESTON GAZETTE-MAIL (Feb. 11, 2015), https://bit.ly/3ITi2zf. Another argued "the Legislature has a duty to protect life" instead. *Id.* The Legislature ultimately chose *more* protections for the unborn, rejected the amendments, and passed the legislation.

Meanwhile, Governor Tomblin had repeatedly affirmed his pro-life conviction but expressed concern that the proposed law "was unconstitutional" based on legal advice. Joel Ebert, *Abortion bills have support in Legislature*, CHARLESTON GAZETTE-MAIL (Jan. 21, 2015), https://bit.ly/3IB77Kh. So he vetoed the Act. *See* Whitney Burdette, *Gov. Tomblin again vetoes abortion ban bill*, CHARLESTON GAZETTE-MAIL (Mar. 3, 2015), https://bit.ly/3PAplOR (citing "constitutional concerns" for veto despite commitment to "life"). But the Legislature overrode the veto. *See* Associated Press, *W.VA. Lawmakers Nix Veto, Put 20-week Abortion Ban Into Law*, WEST VIRGINIA PUBLIC BROADCASTING (Mar. 6, 2015), https://bit.ly/3uKxcRi. This act, too, shows that lawmakers were trying to protect unborn life within *Roe*'s limits—not to repeal the 1870 Act. *Cf. Holy Trinity Church v. United States*, 143 U.S. 457, 463 (1892) (A statute's meaning may be "found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.").

Even if the *Roe*-era civil laws somehow conflict with the 1870 Act, this Court must "determine which statute is controlling." *In re Sorsby*, 210 W. Va. at 713, 559 S.E.2d at 50. It should not automatically pick the most recent one. Nor should it guess at "supposed legislative intent [not] expressed," *State ex. rel Marcum v. Wayne Cnty. Ct.*, 90 W. Va 105, 110 S.E.2d 482, 484 (1922) ("Unexpressed intention does not suffice."). Instead, the Court should consider the laws' words, the problem they seek to fix, and the intent behind those words. *Rice*, 205 W. Va. at 285, 517

S.E.2d at 762; *accord State ex rel. Bibb v. Chambers*, 138 W. Va. 701, 717, 77 S.E.2d 297, 306 (1953). The Court should also view the laws in their "statutory" and "*constitutional*" context. Syl. pt. 11, *Rice*, 205 W. Va. at 277, 517 S.E.2d at 754 (emphasis added); *see In re Sorsby*, 210 W. Va. at 713-14, 559 S.E.2d at 50-51. The court below disregarded this full context. It compared the Act to the civil laws, found what it erroneously described as a facial conflict, and declared the new laws the winner. AR 0345-0348, 0382-0389. But the Legislature is presumed to know about "constitutional" limits. Syl. pt. 11, *Rice*, 205 W. Va. at 277, 517 S.E.2d at 754. By refusing to expressly repeal the Act, enacting civil laws to fit *Roe*, and consistently seeking to protect unborn life within legal limits, the Legislature has shown no clear intent to repeal the Act. Quite the opposite, the Legislature acted to protect unborn life at every turn. Given that *Roe* is now overruled, the "primary difficulty" that the civil laws addressed "no longer exists." *In re Sorsby*, 210 W. Va. at 714, 559 S.E.2d at 51. And this Court should reject Respondents' invitation to "continu[e] … th[at] mischief" here. *Heydon's Case*, 76 Eng. Rep. 637, 638 (1584); *accord* syl. pt. 2, *Shipley v. Jefferson Cnty. Ct.*, 72 W. Va. 656, 78 S.E.2d 792, 792 (1913) ("A statute is always construed in the light of its purpose and the evil it was designed to remedy."); *State v. Patachas*, 96 W. Va. 203, 122 S.E.2d 545, 546 (1924) (same); *see also* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. at 1005-07. Recency should never prevail over a legislature's consistent and manifest resolve to protect life.

In contrast, the trial court made recency *dispositive*. It cited other cases that made the same mistake. AR 0382-0389. In *McCorvey v. Hill*, a court held that newer civil laws impliedly repealed an older criminal law protecting unborn life because the two laws could not "be harmonized" and there had to be a winner. 385 F.3d 846, 849 (5th. Cir. 2004). Recency won. But the analysis was deeply flawed. The court made a "remarkable error" by relying in part on a post-*Roe* administrative

regulation to support its implied-repeal holding. Linton, 32 ISSUES L. & MED. at 349. And it never considered the laws' enactment history—including the impact of *Roe*—as relevant to legislative intent. *Weeks v. Connick* suffers the same fate. 733 F. Supp. 1036 (E.D. La. 1990). It rejected any analysis of legislative intent to repeal Louisiana's criminal law protecting unborn life via its new civil laws, whereas West Virginia law *requires* such consideration. *Compare id.* at 1039 *with* syl. pt. 3, *Marcum*, 90 W. Va. at 105, 110 S.E.2d at 482; *In re Sorsby*, 210 W. Va. at 713-14, 559 S.E.3d at 50-51. Most inapposite is *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980), which concerned two conflicting statutes both enacted pre-*Roe*. In this situation, legislating around *Roe* was not even in play. The Arkansas Legislature knew it was legislating against the background of an enforceable statute that could be repealed in whole or in part—not legislating against the background of a U.S. Supreme Court decision that (erroneously) curbed its authority. Recency is a factor, but it is not dispositive.

Viewing the 1870 Act and civil laws in their *full* context, this Court should not apply the disfavored implied-repeal rule. That rule helps courts when laws conflict and the Legislature "plainly and clearly" intends that a new law repeal an old one, *Rice*, 205 W. Va. at 285, 517 S.E.2d at 762, such as where the Legislature enacts a 25-year limitations period for charging a certain crime and then later enacts a statute that reduces the limitations period to 10 years. That's nothing like the case here. The *Roe*-era civil laws were not "evidently intended" to repeal the Act. Syl. 1, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353, 354 (1959). Quite the opposite, the Legislature enacted the post-*Roe* civil laws because *Roe* had prevented the Act's enforcement. Other courts have refused to find implied repeal in similar challenges. *E.g. People v. Higuera*, 244 Mich. App. 429, 436-37 (Mich. Ct. App. 2001) (By enacting *Roe*-era regulations, "the Legislature intended to regulate … abortions permitted by *Roe* [ ]

and did not intend to repeal" an earlier ban.); *State v. Black*, 526 N.W.2d 132, 135 & n.2 (Wis. 1994) (viewing criminal and civil laws protecting unborn life "as having a distinct role"). This Court should emphatically reject Respondents' ahistorical implied-repeal theory here.

B. The Act is not void for desuetude.

The lower court also held that the 1870 Act was void for desuetude. AR 0345-0348, 0389-0393. That doctrine is inapplicable here, and this Court should discard it. West Virginia is the loneliest of outliers when it comes to desuetude—the idea that a statute is effectively repealed by implication due to nonuse. Indeed, West Virginia appears to be the only state that holds the view. Antonin SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 337 (Thompson/West 2012). The U.S. Supreme Court explains why it (and the other states) reject it: "The failure of the executive branch to enforce a law does not result in its modification or repeal" because "[t]he repeal of laws is as much a legislative function as their enactment." *John R. Thompson Co.*, 346 U.S. at 113-14 (citing *Louisville & N.R. Co. v. United States*, 282 U.S. 740, 759 (1931), and *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950)). This Court should use this opportunity to bring West Virginia in line with the rest of the country and hold "that only the [L]egislature has the power both to enact and to disenact statutes." SCALIA & GARNER, READING LAW, at 339.

But even under existing law, desuetude is inapplicable here. The doctrine only applies in West Virginia where (1) a law proscribes acts that are *malum prohibitum*, (2) there has been "open, notorious, and pervasive violation of the statute for a long period," and (3) there is has been a "conspicuous policy of nonenforcement." Syl. pt. 3, *Comm. On Legal Ethics of the W. Virginia State Bar v. Printz*, 187 W. Va. 182, 183, 416 S.E.2d 720, 721 (1992). No matter whether abortion qualifies as a crime that is inherently immoral, such as those prosecuted at common law, *see State*

ex rel. Canterbury v. Blake, 213 W. Va. 656, 660 n.1, 584 S.E.2d 512 n.1 (2003) (quoting Black's Law Dictionary 971 (7th ed. 1999))—something *Dobbs* establishes conclusively, *see Dobbs*, 142 S. Ct. at 2248-2256—it is impossible for Respondents to satisfy elements two or three of the test.

To begin, there were no "open, notorious, and pervasive violations" of the 1870 Act in the *Roe* era. Respondents do not claim that such violations happened before *Roe*; their contention is that such violations followed *Roe*. But after the United States Court of Appeals for the Fourth Circuit held the Act "unconstitutional beyond question" under *Roe* in *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644, performing an abortion in West Virginia was no longer a violation of the Act. *Roe* and *Charleston Area Med. Ctr., Inc.* protected such actions. The desuetude doctrine is "based on … fairness." *Printz*, 187 W. Va. at 186, 416 S.E.2d at 724. It keeps people from being surprised when long-unenforced laws are suddenly enforced for no reason other than the prosecutor's change of mind. But here, *Roe*—not policy—kept the Act from being enforced. And Respondents knew that. That is why Respondents immediately stopped performing abortions after *Dobbs*. In this situation, Respondents were not surprised that the 1870 Act would be enforced—they expected it. This Court should not blur the line between a law that was *unenforced* and a law that was *unenforceable*.

For the same reason, it is impossible to say there has been a "conspicuous policy of non-enforcement." No West Virginia executive official had the constitutional authority to enforce the 1870 Act after *Roe*. That is why Respondents and the trial court cite no cases about desuetude in which the period of non-enforcement was due to a court decision that was later overruled. Instead, Respondents' cases involved laws that were wittingly unenforced by officials tasked with their enforcement. *E.g., State ex rel. Golden v. Kaufman*, 236 W. Va. 635, 646, 760 S.E.2d 883, 894 (2014); *Blake*, 213 W. Va. at 661, 584 S.E.2d at 656; *Printz*, 187 W. Va. at 189, 416 S.E.2d at 727.

It is more appropriate to say that there was a court-enforced barrier to the Act's enforcement, and no West Virginia case has ever used such a situation to judicially repeal a validly enacted law by invoking desuetude. Put another way, the prevention of a state law's enforcement due to a federal court decision is not *policy* but an "application of [a] remedy" after the "determination of the law arising upon [ ]" "the truth of the fact." *Dostert*, 166 W. Va. at 749, 278 S.E.2d at 629 (comparing the judicial and executive power). If this Court is going to entertain desuetude arguments at all, it should not allow the doctrine to take overruled court decisions and make their holdings permanent by judicially repealing legislation that was temporarily enjoined by a court ruling. Respondents are unlikely to succeed on their desuetude claim.

C. The Act does not violate due process.

The lower court also held that the Act violated due process, AR 0345-0348—even though Respondents did not even raise this argument in seeking preliminary relief, AR 0047-0205. Respondents arguably "waived this argument" by not briefing it below. *State v. Lewis*, 235 W. Va. 694, 701, 776 S.E.2d 591, 598 (2015); *accord In re I.T.*, 233 W. Va. 500, 504, 759 S.E.2d 447, 451 (2014) (holding that unraised issued below was "waived"). Regardless of whether this was formally waived, it was clearly not briefed as a basis for a preliminary injunction, and this Court should disregard any due process claim.

In any event, the 1870 Act does not violate due process. To satisfy due process, a criminal statute must be sufficiently definite "to give a person fair notice" that his desired "conduct is prohibited," and provide "adequate safeguards for adjudication." Syl. pt. 1, *State v. Bull*, 204 W. Va. 255, 257, 512 S.E.2d 177, 179 (1998) (cleaned up) (citing syl. pt. 1, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974)). In other words, people must have "notice" about what they "should avoid," though the law may provide this notice through "general language." *Id.*at 262, 512 S.E.2d

at 184 (citing syl. pt. 1, *State ex rel. Myers v. Wood*, 154 W. Va. 431, 175 S.E.2d 637 (1970)). "Every reasonable construction must" be considered by the Court "to sustain" the law as constitutional. Syl. pt. 2, *State v. Mills*, 243 W. Va. 328, 331, 844 S.E.2d 99, 102 (2020) (citing syl. pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965)).

The Act itself is clear. It has proscribed abortion for over 150 years. Yet the lower court held that the Act is vague on the logic that, when it is read with the *Roe*-era civil laws, people cannot know *which law will be enforced against them*. AR 0347-0348, 0388-0399. That uncertainty does not violate due process. While performing an abortion "may violate both" the Act and civil laws, that "does not detract from the notice afforded by each." *United States v. Batchelder*, 442 U.S. 114, 123 (1979). Indeed, no matter whether the laws "create uncertainty as to which" law may be enforced or "what penalties may be imposed," [s]o long as [the] overlapping … provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of [due process] are satisfied." *Id.; accord State v. Davis*, 229 W. Va. 695, 699 n.2, 735 S.E.2d 570, 574 n.2 (2012); *United States v. Melvin*, 143 F. Supp. 3d 1354, 1372-73 (N.D. Ga. 2015).

But even setting this aside, any alleged or perceived vagueness when the Act is read with the *Roe*-era civil laws does not mean the Court should enjoin the Act. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." *State v. Connor*, 244 W. Va. 594, 601, 855 S.E.2d 902, 909 (2021) (citing syl. pt. 1, *Smith v. Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975)). Enjoining the Act's enforcement would undermine the Legislature's intent. *See* Section I.A.2 *above*. To remedy any due process violation, this Court should not enjoin the Act, but uphold the Legislature's intent to protect unborn life. Respondents are highly unlikely to succeed on their due process claim, which is presumably why they did not even present the claim as a ground for the preliminary injunction.

II. Respondents suffer no irreparable harm without an injunction.

Respondents must show "irreparable harm" to warrant a preliminary injunction. *Ne. Nat. Energy LLC v. Panchira Energy LLC*, 243 W. Va. 362, 367, 844 S.E.2d 133, 138 (2020). The lower court held that Respondents will suffer such harm without an injunction because (1) they could be prosecuted for performing abortions, (2) they are suffering business and mission losses, and (3) women cannot access their abortions. AR 0346-0348, 0393-0398. None constitutes irreparable injury.

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

Second, Respondents say they suffer economic harm because the Act jeopardizes their business. They also say that the Act thwarts their mission. These arguments fail because even purported liberty interests in earning a "livelihood in [a] lawful calling, and [pursuing a] lawful trade or a vocation [are] … routinely rejected [under the West Virginia Constitution.]" *Morrisey*, 239 W. Va. at 642, 804 S.E.2d at 892. Such an injury is not irreparable anyway. Like the labor unions in *Justice v. W. Virginia AFL-CIO*, Respondents can adjust to the law, prioritizing their other work, including gynecological and support services. 246 W. Va. 205, 866 S.E.2d 613, 628

(2021). Only 40% of the Center's revenue came from abortions. AR 0035. Respondents can recoup income via other means.

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

III. West Virginia and its citizens are suffering the most irreparable of harms—the loss of innocent, human life—every week the lower court's preliminary injunction remains in place.

In contrast, the State and its citizens have a compelling interest in ensuring that constitutional laws are properly enforced. "This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic, or scientific merits of statutes" lawfully considered by the Legislature. Syl. pt. 1, *Morrisey*, 239 W. Va. 633, 804 S.E.2d at 886. Validly adopted laws should be enforced. That is especially true for the Act, a criminal law designed to protect unborn human life. Indeed, criminal law enforcement is constitutionally required. Syl. pt. 6, *Dostert*, 278 S.E.3d at 627, 278 S.E.2d at 744; W. VA. CONST. art. III, §§ 2, 6, 8, 17. And the State has the highest interest in protecting society's most vulnerable members. E.g., Syl. pt. 4, *State ex. rel. K.M. v. W. Va. Dep't of Health & Hum. Res.*, 212 W. Va. 783, 786, 575 S.E.2d 393, 396 (2002) (The Legislature "has a moral and legal responsibility to provide for the poor."). There is no one more

vulnerable than an unborn child. The State has an overwhelming interest in ensuring its ability to protect them through the Act.

The lower court's injunction irreparably—and irrefutably—harms that interest. While the court ruled that Petitioners "will suffer no injury," AR 0346, 0397-0398, that statement is as offensive as it is wrong. The 1870 Act was designed to promote a critical public interest—protecting unborn human life. Respondent Women's Health Center operates 42 hours a week. WOMEN'S HEALTH CENTER OF WEST VIRGINIA HOMEPAGE, https://bit.ly/3cfOq2q (last visited July 19, 2022) (showing hours as "Monday-Thursday: 8am-5:15pm" and "Friday: 8am-1pm"). At its 2021 rate, the Center performs at least one abortion every two hours it is open. AR 0022 (Compl. ¶ 59 (Center performed over 1,300 abortions in 2021)). So, every week the lower court's injunction is in place, 25 unborn children will lose their lives. Each of those deaths irreparably harms the State's interest in protecting the unborn. Yet the trial court considers the loss of those innocent lives "no injury" at all.

For over 50 years, West Virginia has waited for the chance to make good on its promise to protect unborn children. The time is now. This Court should reverse the lower court and dissolve its injunction.

CONCLUSION

For over 150 years, West Virginia has sought to protect unborn life within legal limits. It has done what it could both before and after *Roe*. The Legislature plainly did not intend to repeal the 1870 Act by enacting new rules to cover *Roe*-required abortions. To the contrary, on multiple occasions, the Legislature rejected the opportunity to do just that. And the more modern civil rules do not create any vagueness or meaningful conflict with respect to the 1870 Act. Respondents

know exactly what conduct the Act prevents, which is why they immediately stopped performing abortions after the U.S. Supreme Court issued its decision in *Dobbs*.

The Act also never lapsed due to nonenforcement. The State's officials simply could not enforce the Act beginning with the *Roe* decision in 1973. This Court should not take the doctrine of desuetude—already an extreme outlier in American law—and amplify it by applying the doctrine even where state officials have no choice but not to enforce.

In considering the important issues and interests at stake, the Court should not overlook how irregularly the trial court proceeded below. The trial court supported its grant of preliminary injunction by invoking not only the two issues the Respondents raised in support but a third issue the Respondents did not even present in their motion. The trial court then refused to consider an oral motion for stay and required written briefing for that issue, which would likely do little other than delay this Court's opportunity to consider the Attorney General's request for an appellate stay. And the trial court then supplemented its sparse ruling from the bench by signing a lengthy opinion drafted by Respondents, making only the most minimal of changes. If this Court allows such irregularities to thwart the people's will and result in the loss of innocent human life, the citizens will rightly ask whether the West Virginia judiciary is truly a court of law or merely a political tool for those who are unable to achieve their policy aims in the Legislature. It is not just the lives of the unborn but democracy itself that is on trial in this proceeding.

In sum, this Court should uphold the Act, consistent with the Legislature's unwavering intent to protect life. The Attorney General asks this Court to reverse the lower court and dissolve the trial court's injunction, allowing W. Va. Code § 61- 2-8 to once again protect innocent, unborn life as the People's representatives intend.

Respectfully submitted this 22nd day July, 2022.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-576

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

Petitioner,

v.

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

Respondents.

From the Circuit Court of Kanawha County

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

CERTIFICATE OF SERVICE

I, Curtis R.A. Capehart, counsel for the Petitioner, Patrick Morrisey, Attorney General of the State of West Virginia, do hereby certify that I caused a true copy of the foregoing motion to be served on all parties and the Court by filing the same in the File&Serve Express system, which includes electronic mail for the counsel identified below.

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