

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. 22C-554
Honorable Salgado

v.

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.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Women's Health Center of West Virginia, Debra Beatty, Dr. John Doe, Danielle Maness, and Katie Quiñonez (collectively, "Plaintiffs") hereby move this Court pursuant to Rule 65 of the West Virginia Rules of Civil Procedure for a preliminary injunction enjoining Defendants, their employees, agents, and successors in office, and all those acting in concert with them, from enforcing West Virginia Code Section 61-2-8 ("the Criminal Abortion Ban" or "the Ban"), or from taking any enforcement action premised on a violation of the Criminal Abortion Ban that occurred while such relief was in effect.

Enacted over 150 years ago, the Criminal Abortion Ban makes it a felony for any person to "administer," "cause," or "use any means" to produce an abortion. W. Va. Code § 61-2-8. For a half century, however, the Criminal Abortion Ban has lain dormant and not been enforced. In

its place, the West Virginia Legislature has enacted a detailed, comprehensive statutory regime that recognizes and regulates the provision of legal abortion in West Virginia. Yet in the wake of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 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), Plaintiffs fear that they could be subject to prosecution under the Criminal Abortion Ban should they continue to provide abortion care in West Virginia. Because of the specter of criminal liability, they have stopped providing abortion care in West Virginia. They seek declaratory and injunctive relief from this Court to prevent enforcement of the Criminal Abortion Ban.

As detailed more fully in the accompanying Memorandum of Law, Plaintiffs satisfy the requirements for preliminary injunctive relief.

First, Plaintiffs are likely to succeed on the merits of their claims that the Criminal Abortion Ban is void under West Virginia law because (1) the outdated Ban was impliedly repealed by West Virginia's more recent enactment of a comprehensive statutory scheme regulating the provision of legal abortion care, and (2) in the alternative, the Ban is void for desuetude.

Second, Plaintiffs and their patients will suffer irreparable harm if the Criminal Abortion Ban is not enjoined. Plaintiffs face a credible threat of criminal prosecution and licensure penalties; the Women's Health Center is now unable to continue its normal operations and pursue its organizational mission, and is facing a budget shortfall that has already necessitated staff layoffs and may require more in the future; and pregnant people in West Virginia who wish to terminate their pregnancies are left without any option for in-state abortion care, causing them physical, emotional, psychological, and financial harm.

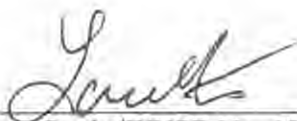
Finally, the balance of equities and public interest favor Plaintiffs. Whereas Plaintiffs and their patients are already suffering grave harm in the absence of an injunction, Defendants will suffer no injury from an injunction. The Criminal Abortion Ban has not been enforced for a half century, such that a preliminary injunction will merely preserve that status quo. In addition, there is a strong public interest in ensuring continued access to abortion care.

Accordingly, Plaintiffs have satisfied each factor for obtaining a preliminary injunction against enforcement of the Criminal Abortion Ban.

The Court should also determine, in its discretion, that the circumstances of this case do not compel the posting of an injunctive bond under West Virginia Rule of Civil Procedure 65(c) and should waive this bond requirement.

A proposed order is attached.

PLAINTIFFS
By Counsel
Dated: June 29, 2022



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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
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INTRODUCTION

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. *See* 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.

For the past half century, however, the Criminal Abortion Ban has lain dormant, having been replaced by a detailed, comprehensive statutory regime that recognizes and regulates the provision of *legal* abortion in West Virginia without imposing any criminal penalties. 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. Plaintiffs—the Women’s Health Center of West Virginia (“WHC”) and its Executive Director and employees—have relied on this modern regime to provide lawful abortion care to thousands of pregnant people in West Virginia.¹

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 immediate clarification by this Court that the Criminal Abortion Ban is no longer good law, that statute threatens felony charges against anyone in West Virginia who “administer[s],” “cause[s],” or “use[s] any means” to produce an abortion. Numerous statements

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.

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 prosecution if they continue to provide abortion care in West Virginia.

Plaintiffs therefore seek a preliminary injunction against any enforcement of the Criminal Abortion Ban as contrary to state law. Because Plaintiffs are likely to succeed on the merits of their claims; because they face irreparable harm absent entry of an injunction; and because the balance of the equities and public interest heavily favor enjoining enforcement of the Criminal Abortion Ban, this Court should issue a preliminary injunction.

First, with respect to likelihood of success on the merits, West Virginia’s comprehensive, contemporary statutory regulation of abortion impliedly repealed the Criminal Abortion Ban, which would otherwise criminalize virtually all abortion care in West Virginia. Enforcement of the Criminal Abortion Ban would render meaningless the State’s detailed, non-criminal regime allowing for *lawful* abortion—contrary to the Legislature’s intent.

Second, and in the alternative, the Criminal Abortion Ban is void on the grounds of 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 a half century, during which time West Virginians have relied on the ability to lawfully access abortion care in the State.

The ongoing and irreparable harm caused by the Criminal Abortion Ban is stark. The threat of prosecution it poses in the aftermath of *Dobbs* has already forced WHC and its personnel to stop providing abortions, cancel appointments, and turn away people seeking essential medical care. The consequences for WHC’s physicians, staff, and patients, as well as for families and communities across West Virginia, are devastating. Patients 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 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.

Accordingly, the Court should preliminarily enjoin the Criminal Abortion Ban.

STATEMENT OF FACTS

I. The Criminal Abortion Ban Has Been Replaced By A Modern Regulatory Regime.

A. The Anachronistic Criminal Abortion Ban Was Enacted 150 Years Ago.

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* Virginia Code tit. 54, ch. 191, § 8 (1849); W. Va. Const. art. XI § 8 (1862). In 1870, West Virginia affirmatively adopted a materially identical statute. *See Code of W. V. Comprising Legislation to the Year 1870*, at 678, *available at* <https://bit.ly/3a4capO>. West Virginia then amended the statute in 1882, which statute constitutes the Criminal Abortion Ban and remains part of the West Virginia Code today.

The Criminal Abortion Ban states:

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

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.”).

Prior to these legislative efforts 150 years ago, there was no universal criminalization of abortion at common law. Rather, abortion of an “unquickened” fetus—roughly, a pre-viability fetus—generally was not a punishable offense at common law.² After quickening, destruction of a fetus was considered a crime, but typically was punished less harshly than murder. Stark Aff. Ex. 1 at 3.

The Criminal Abortion Ban was enacted as part of a wave of anti-abortion legislation that swept across the United States in the mid-nineteenth century. Between the 1840s and 1870s, in response to the increased accessibility and use of abortion care, *id.* at 46–49, 52, an anti-abortion movement that advocated for greater abortion restrictions and harsher criminal penalties gained prominence. Certain physicians and medical writers blamed women’s purported “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. Indeed, these restrictions were part and parcel of a wide range of laws enacted during the same period reflecting the worldview that women were appropriately destined for the home and childrearing. See *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

² “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* at 3 (Oxford Univ. Press. 1978) (“*Abortion in America*”) (hereinafter, Affidavit of Loree Stark in Support of Plaintiffs’ Motion for Preliminary Injunction (“Stark Aff.”) Ex. 1).

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. The Criminal Abortion Ban Was Initially Enforced Against A Range Of Actors.

After its enactment, the Criminal Abortion Ban was used to prosecute a wide range of actors, ranging from physicians to spouses to pregnant people themselves, under both direct and accomplice liability theories. (See Compl. ¶¶ 30–32 (collecting accounts of enforcement actions documented in West Virginia newspapers); see also Stark Aff. Exs. 2–10.) These prosecutions continued through the mid-twentieth century. (See Compl. ¶¶ 32); see, e.g., *State v. Lilly*, 47 W. Va. 496, 498, 35 S.E. 837, 838 (1900) (affirming conviction of pregnant woman’s partner, who administered drugs for the “purpose of producing a miscarriage” and was present to dispose of the fetus); *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 a 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 a doctor for aiding and abetting an abortion by allegedly referring teenager to two women who performed the procedure because of insufficient evidence); cf. Syl. Pt. 1–2, *Willis v. O’Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967) (holding that a murder case involving a woman’s death from an illegal abortion could be tried in county where woman died, even though defendant was not physically present in that county when the death occurred).

C. The Criminal Abortion Ban Has Lain Dormant For A Half Century.

In 1973, the Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), which 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.

Soon after *Roe* was decided, numerous courts recognized that the Criminal Abortion Ban was irreconcilable with *Roe*. See *Smith v. Winter & Browning*, No. 74-571-CH (S.D. W. Va. Apr. 17, 1975) (three-judge panel dismissing action challenging the constitutionality of the Criminal Abortion Ban because there "exist[ed] no substantial constitutional question" following *Roe*); *id.* No. 75-1710 (4th Cir. Oct. 14, 1975) (agreeing to dismiss appeal); *Roe v. West Virginia Univ. Hosp.*, No. 75-0524-CH (S.D. W. Va. Aug. 15, 1975) (holding that the Criminal Abortion Ban was "invalid, void, and without force and effect, under decisions of the United States Supreme Court") (as quoted in *Smith v. Winter & Browning*, No. 75-1710 (4th Cir. Oct. 14, 1975)); *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644 (4th Cir. 1975) ("The West Virginia criminal abortion statute is unconstitutional beyond question."³)

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

³ 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)).

D. The West Virginia Legislature Has Replaced the Criminal Abortion Ban With A Comprehensive Statutory Regime Recognizing And Regulating Legal Abortion Care.

Over the last twenty years, the West Virginia Legislature 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. These laws exhaustively set forth the circumstances under which an abortion may be lawfully obtained and performed in West Virginia. And perhaps most notably, contrary to the Criminal Abortion Ban, none of the current statutory provisions imposes criminal liability on licensed medical professionals or patients. The statutory provisions comprising this scheme are as follows:

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.⁴ 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,

⁴ See Katherine Kortzmit 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 since 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.

but not criminal penalties. *Id.* § 16-2M-6(a). This provision does not impose any penalties on any patient upon whom an abortion is performed or induced. *Id.* § 16-2M-6(d).

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

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).

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.* § 16-20-1(c)(1)(2).⁵ Nor do they impose any penalties on any patient upon whom an abortion is performed or induced. *Id.* § 16-20-1(c)(1)(4).⁶

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 governing consent to abortion. Under West Virginia Code § 16-21-1 *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 certain information about abortion, either by telephone or in person. *Id.* § 16-21-2. Abortion patients also must be provided with the option to view their ultrasound images. *Id.* § 16-21-2(c). These requirements are waived in medical emergencies. *Id.* § 16-21-2; *see also id.* § 16-21-5 (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.* § 16-21-8.

⁵ 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 of 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 governing abortion; no other statute concerning abortion, other than the dormant Criminal Abortion Ban, imposes criminal penalties on licensed health care providers. In any event, WHC also has never utilized this method.

⁶ The “partial-birth abortion” ban likewise foreclosed any prosecution of the pregnant person. *See* W. Va. Code § 33-42-8(c).

Parental Notification. When the pregnant person seeking an abortion is an unemancipated minor, the Legislature has further 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 patient upon whom an abortion is performed or induced. *Id.* § 16-2F-8(d).

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.* § 16-21-7(e) (requiring the 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).

State Funding. The Legislature has also specified the circumstances in which state Medicaid funding can be used for abortion care. West Virginia law states 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 individual 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.

Licensure Penalties and Civil Liability. In enacting the legal framework described above, West Virginia replaced the Criminal Abortion Ban with a comprehensive scheme that provides only licensing penalties and civil liability for physicians and other licensed medical professionals (save for one long-enjoined outlier)⁷ and never subjects pregnant people, let alone their partners or family members who assist them in obtaining an abortion, to any penalty.⁸ The West Virginia

⁷ See *supra* note 4.

⁸ 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

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.

II. Until Recently, Plaintiffs Provided Abortion Care In West Virginia.

Plaintiffs are WHC, one of its physicians, and members of its staff, all of whom are dedicated to providing abortion care in West Virginia.

Until June 24, 2022, when the Supreme Court issued its decision in *Dobbs* and WHC ceased providing abortion care, WHC was the only outpatient clinic providing abortion care in West Virginia. (Affidavit of Katie Quiñonez (“Quiñonez Aff.”) ¶ 4.) Founded in Charleston in 1976, WHC was the first clinic to provide such care in West Virginia. (*Id.*) In the years before WHC opened, when the Criminal Abortion Ban was in force, West Virginians facing unplanned or unwanted pregnancies had limited options—they either had to travel out of state for care, an option limited to those with connections to information and resources; seek clandestine, illegal care or attempt to induce their own abortions; or remain pregnant and deliver a child against their will. (Affidavit of Debra Beatty (“Beatty Aff.”) ¶¶ 10–11; Affidavit of Maggie McCabe (“McCabe

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).

Aff.”) ¶¶ 5–6; Affidavit of Rev. Jim Lewis (“Lewis Aff.”) ¶¶ 13, 16–17; Affidavit of Nancy Tolliver (“Tolliver Aff.”) ¶ 28.) WHC’s founders recognized that ensuring access to safe and legal abortion is an essential part of fully responding to the needs of pregnant people and created WHC in the years immediately following *Roe v. Wade*, to do just that. (Tolliver Aff. ¶¶ 14, 31.)

Today, WHC offers a wide range of health care services, including gynecological and support services. (Quiñonez Aff. ¶ 13.) Prior to *Dobbs*, WHC also provided abortion care and offered both medication abortion and procedural abortion. (*Id.* ¶ 14.) Pregnant people came to WHC seeking abortion care for a variety of personal reasons, including that, for some, it was not the right time to have a child or add to their families, including because they lack the necessary financial resources and/or worry about being unable to adequately care for their existing children; for others, termination was necessary to preserve their physical, psychological, and/or emotional health, all of which can be jeopardized by pregnancy and delivery; and for others, they did not want to continue a pregnancy resulting from violence. (Affidavit of Dr. John Doe (“Doe Aff.”) ¶¶ 20–23; Quiñonez Aff. ¶ 17.)

Plaintiff Katie Quiñonez is the Executive Director of WHC. Inspired to join WHC based on her own experience receiving excellent care there as an abortion patient, Ms. Quiñonez provides executive leadership; creates and oversees all personnel policies and program activities; publicly represents WHC; manages personnel, property, and finances; and works with the Board of Directors. (Quiñonez Aff. ¶¶ 9–11.) Ms. Quiñonez fears that if WHC continues to provide abortion care, after *Dobbs*, she could face possible criminal prosecution under the Criminal Abortion Ban. (*Id.* ¶ 21.) She has the same concern for WHC and its officers, directors, and staff. (*Id.*)

Plaintiff Dr. John Doe is a board-certified family medicine physician who, until *Dobbs*, provided abortion care at WHC. (Doe Aff. ¶¶ 5, 7–8.) He grew up in West Virginia and chose to provide care here because of his strong desire to serve his community. (*Id.* ¶ 51.) Since WHC was forced to stop providing abortion services last week, WHC no longer needs Dr. Doe’s services as an abortion provider and has stopped employing him for that purpose. (*Id.* ¶ 47; Quiñonez Aff. ¶ 23.) Even if WHC had not stopped providing abortion services, Dr. Doe cannot continue to provide abortion care in West Virginia because he cannot risk possible criminal prosecution under the Criminal Abortion Ban, as well as suspension or revocation of his medical license. (Doe Aff. ¶ 42.) Having to deny his patients abortion care is deeply distressing for Dr. Doe—he feels forced by the Criminal Abortion Ban to break the Hippocratic Oath to avoid violating the criminal code, a choice no physician should have to make. (*Id.* ¶ 52.)

Plaintiff Danielle Maness is an Independent Women’s Health Care Nurse Practitioner, Certified Nurse-Midwife, and Advance Practice Registered Nurse, and the Chief Nurse Executive at WHC. (Affidavit of Danielle Maness (“Maness Aff.”) ¶¶ 3, 6.) Ms. Maness is responsible for overseeing all clinical procedures and processes associated with abortion care at WHC, including managing all clinical staff. (*Id.* ¶¶ 10–14.) Ms. Maness fears that if she were to continue her work with abortion care—as she strongly wishes to do—she could be criminally prosecuted as well as risk suspension or revocation of her nursing licenses. (*Id.* ¶ 17.)

Plaintiff Debra Beatty is a Licensed Independent Clinical Social Worker who, until *Dobbs*, worked as a counselor at WHC. (Beatty Aff. ¶¶ 5, 8; Quiñonez Aff. ¶ 23.) Ms. Beatty grew up hearing stories from her mother about the desperation of people facing unplanned and unwanted pregnancies in rural West Virginia, and herself provided counseling to pregnant people in the early 1970s when abortion was still criminalized in West Virginia. (Beatty Aff. ¶¶ 10–11.) As a

counselor at WHC, Ms. Beatty met with patients seeking 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. (*Id.* ¶¶ 13, 16.) In speaking with patients, Ms. Beatty endeavored to understand their histories, listen to their questions, concerns, or ideas, and provide them with the tools and resources they needed to make the best decision for themselves. (*Id.* ¶¶ 20–21.) Ms. Beatty fears that if WHC were to continue to provide abortion care and she were to perform any aspect of her counseling work, she could be at risk of criminal prosecution. (*Id.* ¶¶ 29–31.) Because WHC is currently unable to provide abortion care, Ms. Beatty’s counseling services there are no longer needed. (*Id.* ¶ 32; *Quiñonez Aff.* ¶ 23.)

III. The Criminal Abortion Ban Is Causing Significant And Irreparable Harm.

For the past half century, West Virginians relied on the availability of legal abortion as central to their equality, dignity, autonomy, bodily integrity, and health. 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. Because the Criminal Abortion Ban was never explicitly legislatively repealed, and out of fear that it will now be used to prosecute medical professionals who provide abortion care in West Virginia as well as anyone who helps a pregnant person in West Virginia obtain an abortion (or even patients themselves), Plaintiffs have been forced to stop providing abortion care to their patients. (*Quiñonez Aff.* ¶ 20.)

Plaintiffs’ fears have only been exacerbated by public statements made by West Virginia Attorney General Patrick Morrisey and other state officials in the weeks leading up to *Dobbs* and in the hours after the decision was issued. Those statements have caused real and significant concern that individuals involved in providing abortion care such as Plaintiffs—and even pregnant patients themselves—may face prosecution under the Ban.

Initially, after a draft of the *Dobbs* opinion was leaked in May 2022, Attorney General Morrisey indicated that the Criminal Abortion Ban may no longer be good law, stating that “[w]hen 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.”⁹ However, approximately two weeks later, Attorney General Morrisey appeared to hedge 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.”¹⁰ Then, on June 24, 2022, the day *Dobbs* was released, Attorney General Morrisey—the chief legal officer for the State of West Virginia—simply refused to directly answer the question whether abortion is still legal in West Virginia at all, stating, “I have been asked what the state of the law is in West Virginia regarding abortion. My response is very simple: you should not have one! Today, is a landmark day in our effort to protect babies.”¹¹ 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

⁹ June Leffler, *Abortion Access in Question After Leaked Supreme Court Draft Ruling*, West Virginia Public Broadcasting (May 3, 2022, 4:46 p.m.), <https://www.wvpublic.org/health-science/2022-05-03/abortion-access-in-question-after-leaked-supreme-court-draft-ruling>; 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.”) (Stark Ex. 11).

¹⁰ Newsmax, *Roe: Politics of Life*, Interview with Attorney General Patrick Morrisey (May 17, 2022), https://www.youtube.com/watch?v=D_xB7yXXSI0.

¹¹ Patrick Morrissey (@MorriseyWV), Twitter (June 24, 2022, 11:41 a.m.), <https://twitter.com/MorriseyWV/status/1540359576930983938> (Stark Ex. 12).

[the Criminal Abortion Ban] has not been on the books for a long time, a lot of people are going to challenge it.”¹²

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.”¹³

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 Supreme Court decision is overturned.”¹⁴ 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

¹² 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/>.

¹³ 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/>.

¹⁴ 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>.

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."¹⁵

Other state 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."¹⁶ 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."¹⁷

Given the threat of prosecution under West Virginia's Criminal Abortion Ban following *Dobbs*, WHC ceased all abortion care as soon as the Supreme Court issued its decision. As set forth more fully below, *see infra* Argument Section III, shutting down WHC's abortion services is already greatly harming WHC, its staff, and its patients.

WHC's mission is to provide reproductive health care that respects patients' choices. (Quiñonez Aff. ¶ 25.) But because of the threat of prosecution under the Criminal Abortion Ban, it cannot provide abortion care to pregnant people who desire it, and so cannot honor their choices.

¹⁵ 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/>.

¹⁶ *Id.*

¹⁷ 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>.

(*Id.*) Being unable to provide abortion care to people who need it is devastating for WHC's staff members. (*Id.*) WHC has already had to lay off counselors, physicians, and nurse anesthetists who were dedicated to supporting WHC's abortion patients. (*Id.* ¶ 23.) And WHC is now facing a significant budget deficit that may necessitate further staff layoffs. (*Id.*)

When, on June 24, WHC staff broke the news to dozens of patients with scheduled appointments that it was no longer able to provide abortion care, patients were stunned and despondent. (*Id.* ¶ 27.) Because WHC was the only outpatient abortion clinic in West Virginia and provided nearly all abortion care in the State (*id.* ¶¶ 4, 15–16), these patients and all other pregnant people in West Virginia who wish to terminate their pregnancies now must seek to travel out of state to obtain the care they need (a challenging prospect for many, especially the 40% of WHC's patients who struggle financially (*id.* ¶ 19)); seek to end their pregnancies outside of the medical system, risking criminal penalty themselves; or remain pregnant and give birth against their will.

Absent injunctive relief from this Court, the irreparable harm caused by the Criminal Abortion Ban will only continue to grow. This Court's intervention is urgently needed.

LEGAL STANDARD

West Virginia courts “apply th[e] same four-factor methodology [as federal courts] when weighing the granting or refusal of a preliminary injunction.” *Morrissey v. W. Virginia AFL-CIO*, 239 W. Va. 633, 638, 804 S.E.2d 883, 888 (2017). To obtain a preliminary injunction, the moving party “must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's

likelihood of success on the merits; and (4) the public interest.” *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 366, 844 S.E.2d 133, 137 (2020) (quoting *State ex rel. McGraw v. Imperial Mktg.*, 196 W. Va. 346, 352 n.8, 472 S.E.2d 792, 798 n.8 (1996)).

ARGUMENT

This Court should enter a preliminary injunction against enforcement of the Criminal Abortion Ban because Plaintiffs are likely to succeed on the merits of their claims and will suffer irreparable harm absent such injunctive relief, and because the balance of the equities and public interest weigh strongly in favor of an injunction.

I. Plaintiffs Are Likely To Succeed On the Merits Of Their Implied Repeal Claim.

Under the doctrine of implied repeal, a statute is considered repealed by later-enacted statutes in two circumstances: (1) if later-enacted statutes revise the whole subject matter of an earlier statute, or (2) if subsequent statutes are “repugnant” to an earlier statute. *See State v. Minex*, 38 W. Va. 125, 130, 18 S.E. 470, 471–72 (1893); *Syl. State v. Snyder*, 89 W. Va. 96, 108 S.E. 588 (1921); *id.* 89 W. Va. at 100–01, 108 S.E. at 589.

Applying virtually identical principles, nearly every court to consider the issue has concluded that pre-*Roe* criminal bans on abortion like the Criminal Abortion Ban are impliedly repealed by post-*Roe* laws comprehensively addressing the circumstances under which abortion care is legal. *See McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004); *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990); *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980).

West Virginia fits neatly within this line of precedent: its modern, comprehensive statutory framework regulating abortion cannot be squared with the Criminal Abortion Ban’s 150-year-old flat prohibition of nearly all abortions as a felony offense.

A. Through Laws Enacted After The Criminal Abortion Ban, The Legislature Has Revised The Whole Subject Matter Of Abortion In West Virginia.

If, as here, a later statute “makes full and complete provision touching the subject common to both” the later and an earlier statute, courts conclude that the earlier statute is impliedly repealed. See Syl. Pt. 1, *State v. Hinkle*, 129 W. Va. 393, 41 S.E.2d 107 (1946) (“A subsequent statute, which revises the whole subject matter of a former statute, and which is evidently intended by the Legislature as a substitute for such former statute, although it contains no express words to that effect, operates to repeal the former statute”). The “whole subject matter” standard applies regardless whether the later statute explicitly repeals the former statute. Syl. Pt. 3, *State ex rel. Wheeling v. Renick*, 145 W. Va. 640, 116 S.E.2d 763 (1960). Additionally, the party arguing for implied repeal need not prove that legislators intended such a repeal, because the legislature “must be presumed to know the language employed in former acts, and, if in a subsequent statute dealing with the same subject it uses different language concerning that subject, it must be presumed that a change in the law was intended.” *State v. General Daniel Morgan Post*, 144 W. Va. 137, 144, 107 S.E.2d 353, 358 (1959); see also *id.* Syl. 1, 144 W. Va. at 137, 107 S.E.2d at 354 (“A subsequent statute, which revises the entire subject matter of a former statute and which is evidently intended as a substitute for such former statute, operates to repeal the former statute even though such subsequent statute does not contain express words to that effect.”).

West Virginia courts have applied the “whole subject matter” standard to find implied repeal in a variety of contexts. For example, in *State v. Hinkle*, the original statute—spanning five short sections—provided that a person who had the intent to sell or dispense narcotic drugs was guilty of a felony and should be sentenced to one to ten years in jail, while the later statute contained 28 sections that “in comprehensive manner, and in elaborate detail” addressed narcotic drugs, and provided that a violation of the statute was punishable by fine or imprisonment for not

more than ten years. 129 W. Va. at 396–97, 41 S.E.2d at 108–09. As such, the court held that the subsequent, more comprehensive statute impliedly repealed the earlier one. *Id.* at 399, 41 S.E.2d at 110. Similarly, in *Gibson v. Bechtold*, 161 W. Va. 623, 629, 245 S.E.2d 258, 261 (1978), the Supreme Court of Appeals found that the “1977 changes in the juvenile law relating to jurisdictional matters . . . effected fundamental changes in juvenile proceedings and [were] intended as a substitute for all previous law pertaining to this subject matter.” *Id.*; *see also, e.g., State v. Jackson*, 120 W. Va. 521, 525, 199 S.E. 876, 877–78 (1938) (finding that the later statute “cover[ed] the whole range and subject of licensing and regulating the real estate business” and thus impliedly repealed the earlier, less detailed licensing act); *Cunningham v. Cokely*, 79 W. Va. 60, 65–66, 90 S.E. 546, 548 (1916) (“It is obvious that the Primary Act, dealing comprehensively and fully with the matter of official nominations, was not intended to be amendatory of older statutes on the same subject or supplementary thereto, but as an elaborate and ample scheme for the selection of political nominees. So construed, it repeals by necessary implication section 18, c. 3, Code 1913, relating to conventions.”); *id.* Syl., 90 S.E. at 547 (“When two statutes passed at different dates cover and fully provide for the same general subject, the subsequent one, not purporting to amend the earlier act, but manifestly intended to be a substitute therefor, is to be deemed and treated as the last legislative expression on that subject, and as operative to repeal the former statute by necessary implication.”).

The principles from these decisions readily apply here. The Criminal Abortion Ban has been impliedly repealed by the modern, comprehensive, *non-criminal* framework for lawful abortion enacted by the Legislature. This modern scheme revised the whole subject matter of abortion in West Virginia. Whereas the 150-year-old, two-sentence Ban criminalizes virtually all abortion care, the modern statutory scheme provides for lawful abortion in West Virginia “in [a]

comprehensive manner, and in elaborate detail.” *Hinkle*, 129 W. Va. at 396–97, 41 S.E.2d at 108–

09. In particular, West Virginia law now addresses:

- **Stage of Pregnancy.** West Virginia law permits abortions during the first “twenty-two weeks since the first day of the woman’s last menstrual period.” W. Va. Code §§ 16-2M-2(7), 16-2M-4.¹⁸ Approximately 99% of abortions are performed within this time frame.¹⁹
- **Patient Reason.** West Virginia law permits pregnant people to elect an abortion prior to 22 weeks LMP for any reason, unless, with certain exceptions, the patient is seeking the abortion “because of a disability.” W. Va. Code §§ 16-2Q-1(b), (c).
- **Abortion Methods.** West Virginia law provides detailed regulations concerning the use of specific abortion methods. *See, e.g.*, W. Va. Code § 30-3-13a(g)(5) (medications used in a medication abortion be prescribed in person); W. Va. Code § 16-2O-1 (certain procedures may not be used in second trimester abortions absent medical emergency or fetal demise).
- **Patient Consent.** As with other medical procedures, *see, e.g.*, W. Va. Code § 16-11-1 (sterilization), § 16-51-3 (use of investigational drugs and devices), § 16-4-10 (diagnosing and treating minors for sexually transmitted infections), West Virginia sets forth rules concerning informed consent to abortion. W. Va. Code § 16-2I-1 *et seq.*
- **Parental Notification.** West Virginia law provides detailed regulations for unemancipated minors to consent to abortion. *See* W. Va. Code § 16-2F-3.
- **State Funding.** The Legislature has also specified the circumstances in which state Medicaid funding can be used for abortion care. *See* W. Va. Code § 9-2-11.
- **State Reporting.** The Legislature has mandated that the West Virginia Department of Health and Human Resources collect and report a range of specified information about abortions and abortion patients in West Virginia. *See, e.g.*, W. Va. Code §§ 16-5-22, 16-2M-5, 16-2I-7, 16-2F-6.

¹⁸ Earlier this year, the Legislature considered but did not pass a bill that would have limited abortion to fifteen weeks since 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.

¹⁹ *See* Katherine Kortsmitt 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>.

- **Liability.** The Legislature has specified that physicians who violate any of these provisions are subject only to licensing penalties and civil liability—in direct contrast to the felony charges physicians would face under the Ban. Patients are never subject to any penalty. *See, e.g.,* W. Va. Code §§ 16-2M-6(a), 16-2P-1(c)(1), 16-2O-1(c)(1), 16-2F-8(a).

Through these laws, the Legislature has replaced the draconian Criminal Abortion Ban with a comprehensive, detailed framework permitting abortion in West Virginia. This modern framework is entirely incompatible with the near-total Criminal Abortion Ban, and, indeed, would serve no purpose whatsoever were the Ban to remain in effect.

Courts, when faced with similar circumstances in other states, have not hesitated to conclude that an outdated criminal prohibition on abortion was impliedly repealed through subsequent statutes regulating abortion. In *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), for example, the Fifth Circuit determined that the statutes criminalizing abortion were later repealed by implication because “Texas regulates abortion in a number of ways,” including through civil regulations on the availability of abortions for minors, health and safety regulations regulating clinics, and laws limiting the availability of Medicaid funding for abortion care. *Id.* at 849. The Fifth Circuit held the later provisions could not “be harmonized with provisions that purport to criminalize abortion” and thus struck down the earlier laws. *Id.* Similarly, in *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980), a three-judge panel of the Eastern District of Arkansas held that a 1969 abortion law impliedly repealed a criminal abortion law from 1875, including because the later law “treat[ed] the subject of abortion in a much more comprehensive manner than Act 4 of 1875” had. *Id.* at 924. In doing so, the court underscored that the 1969 law “sets forth in detail the conditions which make abortion ‘legal’ and the restrictions which are placed on the performance of legal abortions.” *Id.* (further noting that this “constitute[d]” the most significant difference between the two acts”); *cf. State v. Black*, 188 Wis. 2d 639, 646 (Wis. 1994)

(recognizing that statutes regulating abortion impliedly repeal an earlier criminal prohibition on abortion, noting that “any attempt to apply [Section 940.04(2)(a), a feticide law] to a physician performing a consensual abortion after viability would be inconsistent with the newer sec. 940.15 [an abortion law] which limits such action and establishes penalties for it”).

What the Fifth Circuit held in *McCorvey* is equally applicable to the Criminal Abortion Ban here: “There is no way to enforce both sets of laws; the current regulations are intended to form a comprehensive scheme—not an addendum to the criminal statutes struck down in *Roe*.” 385 F.3d at 849. Because West Virginia’s modern framework governing lawful abortion has revised the whole subject matter of abortion regulation in West Virginia, the Criminal Abortion Ban has been impliedly repealed.

B. West Virginia’s Later-Enacted Abortion Legislation Is Repugnant To The Criminal Abortion Ban.

Implied repeal also occurs where, as here, subsequent statutes are “repugnant” to an earlier statute. *Snyder*, 89 W. Va. at 100–01, 108 S.E. at 589 (noting that the later statutes will repeal the earlier one because they are “the last expression of the legislative will on the subject”); *id.* Syl. (explaining that repeal by implication “is allowable when the statutes deal with the same subject-matter and are so repugnant that both cannot coexist, and if so, the older must yield to the later, it being the last legislative declaration upon the subject”). Laws are “repugnant” to previously enacted laws when, among other things, they prescribe different penalties for the same act. *See id.* at 101, 108 S.E. at 589 (holding that a divorce statute imposing criminal penalties for remarrying within a certain period impliedly repealed an earlier divorce statute exonerating such a person from

criminal liability, as these differences were “too palpable to admit of their coexistence as the law”).²⁰

In the abortion context, this framework has led multiple other courts to strike down earlier laws whose terms conflict with—and thus are “repugnant” to—later-enacted legislation. For example, in *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990), a Louisiana district court held that the state’s criminal abortion ban was impliedly repealed by numerous subsequent laws, including ones that required informed consent, established reporting requirements, required parental or court consent for minors, and required physicians to keep certain abortion records. *See id.* at 1038. In so holding, the court observed that “it is *clearly inconsistent* to provide in one statute that abortions are permissible if set guidelines are followed and in another to provide that abortions are criminally prohibited.” *Id.* (emphasis added).²¹ Similarly, in *Planned Parenthood Association of Nashville, Inc. v. McWherter*, the Tennessee Supreme Court held that a Tennessee statute requiring “notice to parents or guardians” was in “direct conflict” with an older statute requiring “parental consent for abortions by minors,” because the “notice” law effectively permitted abortions for which “consent” had not been obtained. 817 S.W.2d 13, 15 (Tenn. 1991).

²⁰ West Virginia courts have also found statutes to be repugnant in other contexts. For example, in *In re Sorsby*, the Supreme Court of Appeals found that two statutes “provide[d] completely different time frames” for how to perfect a security interest on motor vehicle liens in other states. 210 W. Va. 708, 713, 559 S.E.2d 45, 50 (2001). The court could “conceive of no way to harmonize these two conflicting provisions” and held that the latter impliedly repealed the former. *Id.*; see also *Brown v. Preston Cty. Ct.*, 78 W. Va. 644, 645, 90 S.E. 166, 167 (1916) (holding that two statutes provided conflicting requirements regarding notice of elections in newspapers and “the last statute controls”).

²¹ Implied repeal decisions on repugnancy grounds often have an analysis that overlaps with analysis on “whole subject matter” grounds.

Given this “irreconcilable conflict” between the two laws, the court held that “the latter statute has effectively repealed the former by implication.” *Id.* at 16.

Here, West Virginia’s modern statutory framework for abortion is in direct conflict with, and is therefore repugnant to, the Criminal Abortion Ban, which is thus impliedly repealed. Whereas the Criminal Abortion Ban prohibits nearly all abortions and imposes severe criminal penalties, the later-enacted statutes describe the circumstances and conditions under which abortion in West Virginia is *legal*. In further conflict with the Criminal Abortion Ban, *none* of the later-enacted statutes impose any criminal penalties on physicians performing abortions. *See* W. Va. Code § 16-2O-1(c)(1); *id.* § 16-2M-6(a), (b); *id.* § 61-2I-2-8; *id.* § 16-2F-8(b); § 16-2Q-1(j); *id.* § 16-2P-1(c)(1). Nor do they impose any penalties on any patient upon whom an abortion is being performed—again unlike the Criminal Abortion Ban, which leaves open the possibility of prosecuting the pregnant person. *See, e.g., id.* § 16-2Q-1(l), (k); *id.* § 16-2P-1(c)(4), (c)(2); *id.* § 16-2M-6(d); *id.* § 16-2O-1(c)(4); *id.* § 16-2F-8(d). Because West Virginia’s “later acts regulating abortion are clearly inconsistent with a criminal prohibition of abortion,” *Weeks*, 733 F. Supp. at 1038, the Criminal Abortion Ban falls as impliedly repealed.

* * *

Accordingly, Plaintiffs are likely to succeed on the merits of their claim that the Criminal Abortion Ban has been impliedly repealed.

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

Courts in West Virginia have long recognized that penal statutes that have gone unenforced for many years can be declared “void due to desuetude.” *Comm. on Legal Ethics of the W. Virginia State Bar v. Printz*, 187 W. Va. 182, 188, 416 S.E.2d 720, 726 (1992). “Desuetude . . . is based on the concept of fairness embodied in the due process and equal protection clauses.” *Id.* at 186,

416 S.E.2d at 724. When “a law prohibiting some act . . . has not given rise to a real prosecution” in many years, renewed use of that law would be unfair and therefore impermissible. *Id.* In discussing the core of the doctrine, the Supreme Court of Appeals explained:

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

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

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

The doctrine of desuetude has particular force in the realm of sexual and reproductive autonomy, where anachronistic criminal laws fall into disuse but may nonetheless remain on the books as a formal matter. In *Poe v. Ullman*, 367 U.S. 497 (1961), for instance, the U.S. Supreme Court invoked desuetude in holding that it need not consider whether Connecticut’s statute

proscribing the use of contraceptives was unconstitutional because the law had not been enforced for more than 75 years other than a single test case, despite the open, common, and notorious sale of contraceptives in Connecticut drug stores. *Id.* at 501–02. Similarly, in *State ex rel. Golden v. Kaufman*, 236 W. Va. 635, 647, 760 S.E.2d 883, 895 (2014), the West Virginia Supreme Court of Appeals held that a law prohibiting “criminal conversation” (*i.e.*, adultery), for which there had been no reported claims asserted since 1969—when a more recent statute abolished all civil actions for alienation of affections—“had lapsed into desuetude.” *Id.*; *see also, e.g., Fort v. Fort*, 425 N.E.2d 754, 758 (Mass. App. Ct. 1981) (“It seems beyond dispute that the statutes defining or punishing the crimes of fornication, adultery, and lewd and lascivious cohabitation have fallen into a very comprehensive desuetude.”).

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

First, providing abortion care is *malum prohibitum*, not *malum in se*. “A crime that is *malum in se* is ‘a crime or an act that is inherently immoral, such as murder, arson, or rape,’ while a crime that is *malum prohibitum* is ‘an act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.’” *Blake*, 213 W. Va. at 660 n.1, 584 S.E.2d at 516 n.1 (quoting Black’s Law Dictionary 971 (7th ed. 1999)) (cleaned up). Yet it is inconceivable to imagine the Legislature setting up a comprehensive *non-criminal* regulatory scheme for

committing arson and rape in the same way it has comprehensively regulated legal abortion for multiple decades. Indeed, West Virginia's longstanding legislative decision to regulate abortion without criminal penalties in virtually all circumstances only underscores that abortion cannot be considered *malum in se*.²²

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

Third, the Criminal Abortion Ban has not been enforced in at least fifty years—comparable to or far longer than the periods of disuse in other cases holding West Virginia statutes void for desuetude. See *Kaufman*, 236 W. Va. at 646, 760 S.E.2d at 894 (no enforcement for 45 years); *Blake*, 213 W. Va. at 661, 584 S.E.2d at 517 (no enforcement for 22 years); *Printz*, 187 W. Va. at 189, 416 S.E.2d at 727 (no enforcement for 54 years). Moreover, as detailed above, during the Criminal Abortion Ban's long period of disuse, the State has enacted a statutory regime governing the *lawful* provision of abortion care, under which even State funds can be used for abortion care in certain circumstances. See *supra* Argument Section I.A. No one could fairly argue that conduct that the State *subsidizes* today is criminal under a law it has not enforced for half a century.

For years, abortion care providers like Plaintiffs have relied on the ability to operate without fear of criminal sanction. Pregnant people in West Virginia likewise have sought abortion

²² Even at common law, abortion was not wholly criminalized, *see, e.g.*, 1 W. Blackstone, *Commentaries on the Laws of England* 129–30 (7th ed. 1775) (Blackstone). But even if it were, that would not change the outcome here: “[A]s societal norms shift, crimes may move between these [*malum in se* and *malum prohibitum*] categories.” *Gov’t of Virgin Islands v. Richards*, No. F40/01, 2001 WL 1464765, at *4 n.5 (Terr. V.I. June 24, 2001). Here, the longstanding regulation and legal protection of abortion in recent decades defeats any suggestion that abortion could be considered *malum in se* today.

care with the understanding that the Criminal Abortion Ban would not be enforced against them or those who helped them access care. Against that background, initiating a criminal prosecution for providing abortion care would work tremendous unfairness. Plaintiffs are therefore likely to succeed on their claim that the Criminal Abortion Ban is void for desuetude.

III. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief.

“[I]n order to obtain a preliminary injunction, a party must demonstrate the presence of irreparable harm.” *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 367, 844 S.E.2d 133, 138 (2020) (citation omitted). Following *Dobbs*, the credible threat of prosecution under West Virginia’s Criminal Abortion Ban, given the inconsistent statements by state officials, has forced WHC to cease all abortion care, causing grave and irreparable harm to WHC, its staff, its patients, and all West Virginians. Preliminary injunctive relief is urgently needed to avoid further irreparable injury.

First, absent a preliminary injunction, Plaintiffs all face the credible threat that they will be prosecuted under the Criminal Abortion Ban, either directly or as accomplices, if WHC were to continue to provide abortion care and they were to continue to fulfill their responsibilities at the Center. Courts have long recognized that “irreparable harm may be present where engaging in the prohibited conduct would result in the realistic possibility of felony prosecution.” *Planned Parenthood Great Nw., Hawaii, Alaska, Indiana, & Kentucky, Inc. v. Cameron*, No. 3:22-cv-198-RGJ, 2022 WL 1597163, at *13 (W.D. Ky. May 19, 2022); *see also Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624, 631 (S.D. W. Va. 2013) (“The threat of prosecution . . . can constitute irreparable injury.”). For each Plaintiff, that threat is now self-evident and acute. As a physician at WHC, Dr. Doe performs abortions that the Criminal Abortion Ban prohibits, which plainly puts him at risk of criminal prosecution for direct liability if he continues to do so. (Doe Aff. ¶¶ 7, 9.)

Similarly, Katie Quiñonez, as Executive Director of WHC, faces the risk of prosecution for direct, accomplice, accessory, and/or conspiracy liability by continuing to manage the Center's operations should it continue to provide abortion care. (Quiñonez Aff. ¶¶ 11, 21.) The same holds true of Ms. Maness, WHC's Chief Nurse Executive, who directly oversees all clinical procedures and processes associated with abortion care at WHC. (Maness Aff. ¶¶ 10–14, 17.) Ms. Beatty, as a counselor at WHC, is also at risk of prosecution for her role in counseling WHC patients who come to the Center seeking abortion care. (Beatty Aff. ¶ 30.) The threat all Plaintiffs now face of criminal prosecution for simply doing their jobs and performing, assisting with, or enabling abortion care at WHC is a classic form of irreparable harm warranting preliminary injunctive relief.

Moreover, several Plaintiffs face the further threat of licensure penalties for providing abortion care in violation of the Criminal Abortion Ban. Under West Virginia law, licensure penalties flow from providing services beyond the scope permitted by law—thus jeopardizing Dr. Doe's medical license, *see* W. Va. Code § 30-3-14(c)(15), Ms. Maness's nursing license, *see* W. Va. Code § 30-7-11(a)(2), and Ms. Beatty's social worker license, W. Va. Code § 30-30-26(g)(2). For this reason, these Plaintiffs reasonably fear that they may not only be prosecuted, but also be stripped of licenses essential to performing their professional duties if the Criminal Abortion Ban is not enjoined. (*See, e.g.*, Doe Aff. ¶ 42; Maness Aff. ¶ 17.)

Second, shutting down WHC's abortion services is already causing WHC to suffer the irreparable harm of losing its ability to continue its operations. *See, e.g., Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981) (acknowledging “[t]he right to continue a business” and affirming finding of irreparable injury where plaintiff sought to “preserve its existence and its business” (citation omitted)); *Planned Parenthood Sw. Ohio Region v. Hodges*, 138 F. Supp. 3d 948, 960 (S.D. Ohio 2015) (recognizing “the inability to operate an ongoing

business for an unknown period of time constitutes irreparable harm that cannot be fully compensated by monetary damages”). Abortion care accounts for 40% of WHC’s annual revenue, and WHC will have no choice but to continue to reduce its staff if it is forced to stop providing this care. (Quiñonez Aff. ¶ 23.) Indeed, WHC has already stopped employing physicians and counselors who are wholly dedicated to abortion care. (*Id.*) And as seen in other states, restricting abortion care can lead to *permanent* clinic closures, even if restrictions ultimately are lifted. (*Id.* ¶ 24.) That is because restarting an abortion care practice can present significant logistical and financial challenges—it is very difficult, for example, to recruit out-of-state physicians to provide abortion care in West Virginia, and now that WHC has been forced to stop employing its current providers for such care, there is no guarantee that it will be able to recruit them or others to return to WHC. (*Id.*) Thus, by jeopardizing the viability of WHC’s business, the threat of prosecution under the Criminal Abortion Ban inflicts yet another form of irreparable harm. *See, e.g., Sogefi USA, Inc. v. Interplex Sunbelt, Inc.*, 538 F. Supp. 3d 620, 630 (S.D. W. Va. 2021) (finding business being forced to shut down results in harm that “is likely to be immediate and irreparable”); *W. Alabama Women’s Ctr. v. Miller*, 217 F. Supp. 3d 1313, 1334 (M.D. Ala. 2016) (finding irreparable harm where plaintiff clinics “would stop providing abortions and begin to wind down operations” and “would have to lay off staff and close their businesses”); *Hughes v. Cristofane*, 486 F. Supp. 541, 544 (D. Md. 1980) (inability to feasibly operate and “loss of revenue” under a new law irreparably harms the plaintiff); *North Carolina v. Dep’t of Health, Educ., & Welfare*, 480 F. Supp. 929, 939 (E.D.N.C. 1979) (finding irreparable harm where loss of critical funding would “inject an air of unpredictability” into future planning and budgeting).

Third, WHC will suffer further irreparable harm absent a preliminary injunction because being forced to stop providing abortion care “perceptibly impair[s]” its work and frustrates its

mission of providing reproductive health care that respects patients' choices. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016); see also *Action NC v. Strach*, 216 F. Supp. 3d 597, 642 (M.D.N.C. 2016) ("An organization has been harmed if the defendant's actions 'perceptibly impaired' the organization's programs, making it more difficult to carry out its mission."); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013) (recognizing that even a "temporary gap of 'unknown duration' in which abortions would be unavailable supports a finding of irreparable harm"); (Quiñonez Aff. ¶ 25). If WHC cannot provide abortion care to patients who want it, then the Center is simply not honoring their choice—betraying its core mission in the process. (Quiñonez Aff. ¶ 25.) WHC is seeing that harm today: its staff members have been devastated because they cannot—despite the aims and principles of the organization they chose to join—provide the care their patients have chosen to seek. (*Id.*).

Finally, enforcement of the Criminal Abortion Ban will cause irreparable harm to pregnant people in West Virginia who wish to terminate their pregnancies. Forcing patients to remain pregnant inflicts serious physical, emotional, and psychological consequences that alone constitute irreparable harm. WHC has already seen this harm to patients first-hand: the day *Dobbs* was decided, WHC called dozens of patients to cancel abortion care appointments in the coming weeks, and some were sobbing so heavily they could not speak. (See *id.* ¶ 27; Doe Aff. ¶ 48.) Because WHC performed virtually all abortions in West Virginia, these patients will now be forced to travel out of state to obtain the care they need, seek to end their pregnancies outside of the medical system and risk criminal prosecution, or remain pregnant and give birth against their will. (See, e.g., Doe Aff. ¶ 49; Beatty Aff. ¶ 33; McCabe Aff. ¶¶ 16–17.) Whichever path they take, pregnant people will suffer: traveling out of state imposes costs and logistical challenges that many pregnant people cannot bear, forcing someone to remain pregnant can cause lasting psychological damage, and

ending a pregnancy outside the medical system puts a person's health and even life at risk. (See, e.g., Doe Aff. ¶¶ 49–50; Beatty Aff. ¶¶ 33–34.)

The irreparable harm that pregnant people face through enforcement of the Criminal Abortion Ban is already palpable and more than sufficient to warrant injunctive relief. See, e.g., *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health*, 896 F.3d 809, 832 (7th Cir. 2018) (“Even an extended delay in obtaining an abortion can cause irreparable harm by resulting in the progression of a pregnancy to a stage at which an abortion would be less safe[.]” (quotation marks omitted)), *judgment vacated on other grounds*, 141 S. Ct. 184 (2020); *Van Hollen*, 738 F.3d at 795–96 (affirming finding of irreparable harm to pregnant people where they would be subjected to weeks of delay and the “nontrivial burden” of traveling hundreds of miles to abortion clinics); *Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) (noting that plaintiffs demonstrated irreparable harm by establishing likelihood of suffering pain and medical complications from delayed medical care); *Planned Parenthood of South Atlantic v. Wilson*, 527 F. Supp. 3d 801, 811 (D.S.C. 2021) (finding irreparable harm where abortion law disproportionately affected the health of low-income patients, patients of color, and patients who live in rural areas); Note, *Medford v. Levy*, 31 W. Va. 649, 8 S.E. 302, 308 (1888) (recognizing that “injury to health is special and irreparable” and “justif[ies] the interference of equity”); see also *Daniel v. Underwood*, 102 F. Supp. 2d 680, 681 (S.D. W.Va. 2000) (possibility that “the plaintiffs’ patients may be denied appropriate medical care either because physicians, fearing liability under the Act, will choose not to treat the patient” weighs in favor of finding irreparable harm).

Accordingly, enforcement of the Criminal Abortion Ban will cause irreparable harm.

IV. The Balance Of Equities And The Public Interest Strongly Favor An Injunction.

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

In addition, there is a strong public interest in ensuring continued access to abortion care. “[P]ublic policy supports an injunction when there would be a disruption to medical services or a patient’s continuity of care.” *Cameron*, 2022 WL 1597163, at *15; *see also Hampton Univ. v. Accreditation Council for Pharm. Educ.*, 611 F. Supp. 2d 557, 569 (E.D. Va. 2009) (public interest particularly affected when a case “implicates concerns about public health”).

V. The Bond Should Be Waived.

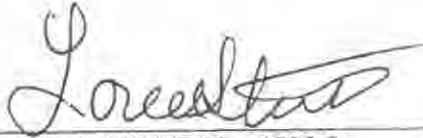
Defendants will not be harmed by the issuance of a preliminary injunction against enforcement of the Criminal Abortion Ban. Accordingly, this Court should waive the West Virginia Rule of Civil Procedure 65(c) bond. *See Collins v. Stewart*, No. 11-0056, 2012 WL 2924133, at *6 (W. Va. Feb. 14, 2012) (explaining that the decision to require a bond is ultimately “dependent on the prerogative of the enjoining court” and affirming waiver of bond requirement because defendant was not harmed by preliminary injunction permitting plaintiffs to use road on defendant’s property); *Kessel v. Leavitt*, 204 W. Va. 95, 160, 511 S.E.2d 720, 785 (1998) (noting that there will be cases “in which the facts and circumstances simply do not compel the posting of an injunctive bond,”

such as where the defendant would not be harmed by the issuance of a temporary injunction, even where the defendant's rights were otherwise restricted, and waiving bond requirement where defendant would not be harmed by temporary injunction prohibiting defendant from placing unborn child up for adoption).

CONCLUSION

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 issue a 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. This Court should further waive the Rule 65 bond.

PLAINTIFFS
By Counsel
Dated: June 29, 2022



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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,

2022 JUN 21 10:57 AM
JCS
CCM
CIRCUIT COURT OF KANAWHA COUNTY WEST VIRGINIA

Plaintiffs,

Civil Action No. 22-C-554
Honorable SALONDO

v.

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.

AFFIDAVIT OF LOREE STARK IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

1. Loree Stark, being duly sworn, state under penalty of perjury that the foregoing is true and correct.

1. I am over the age of 21.

2. I write this declaration in support of Plaintiffs' Motion for Preliminary Injunction against enforcement of West Virginia Code section 61-2-8 (the "Criminal Abortion Ban").

3. I am the Legal Director of the ACLU of West Virginia and counsel of record for Plaintiffs. My West Virginia State Bar Number is 12936.

4. The facts I state here are based on my personal knowledge, and, if called and sworn as a witness, I could and would testify competently thereto.

5. Attached to this declaration are true and correct copies of the documents listed in the table below. Entries in the table indicate where documents have been excerpted.

Exhibit	Description
Books	
1	Excerpt from James C. Mohr, <i>Abortion in America: The Origins and Evolution of National Policy, 1800-1900</i> (Oxford Univ. Press. 1978) ("Abortion in America").
Newspaper Articles	
2	<i>A Serious Charge</i> , The Wheeling Daily Reg., Mar. 5, 1892, at 6, https://chroniclingamerica.loc.gov/lccn/sn86092518/1892-03-05/ed-1/seq-6/
3	<i>True Bills</i> , Wheeling Intelligencer, Jan. 7, 1913, at 12, https://chroniclingamerica.loc.gov/lccn/sn86092536/1913-01-07/ed-1/seq-12/
4	<i>No Decision Yet</i> , Wheeling Intelligencer, Mar. 18, 1913, at 2, https://chroniclingamerica.loc.gov/lccn/sn86092536/1913-03-08/ed-1/seq-2/
5	<i>Coroner's Jury Holds Colored Doctor Responsible for Death</i> , Wheeling Intelligencer, May 6, 1916, at 5, https://chroniclingamerica.loc.gov/lccn/sn86092536/1916-05-06/ed-1/seq-5/

Exhibit	Description
6	<i>Feminine Follies</i> , Wheeling Daily Reg., Sept. 28, 1877, at 4, https://chroniclingamerica.loc.gov/lccn/sn84026847/1877-09-28/ed-1/seq-4/
7	<i>Brief Mention</i> , Wheeling Daily Intelligencer, Nov. 8, 1879, at 1, https://chroniclingamerica.loc.gov/lccn/sn84026844/1879-11-08/ed-1/seq-4/
8	<i>Admitted to Bail</i> , Wheeling Reg., Feb. 21, 1894, at 5, https://chroniclingamerica.loc.gov/lccn/sn86092518/1894-02-21/ed-1/seq-5/ ,
9	<i>Dr. G.W. Kelly</i> , Wheeling Daily Intelligencer, Apr. 18, 1888, at 4, https://chroniclingamerica.loc.gov/lccn/sn84026844/1888-04-18/ed-1/seq-4/
10	<i>Susan Mulvey Guilty</i> , Wheeling Daily Intelligencer, Mar. 29, 1894, at 4, https://chroniclingamerica.loc.gov/lccn/sn84026844/1894-03-29/ed-1/seq-5/
Webpages	
11	Patrick Morrissey (@MorrisseyWV), Twitter (May 2, 2022, 10:45 p.m.), https://twitter.com/MorrisseyWV/status/1521320044797571077
12	Patrick Morrissey (@MorrisseyWV), Twitter (June 24, 2022, 11:41 a.m.), https://twitter.com/MorrisseyWV/status/1540359576930983938

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AFFIANT FURTHER SAYETH NAUGHT.

Loree Stark
LOREE STARK

STATE OF WEST VIRGINIA

COUNTY OF Kanawha, to wit:

SWORN TO AND subscribed before me this 29th day of June, 2022.

Elizabeth Howard
Notary Public

271229380



EXHIBIT 1
STARK AFFIDAVIT

Abortion in America
The Origins and Evolution of
National Policy, 1800-1900

James C. Mohr

NEW YORK
OXFORD UNIVERSITY PRESS
1978

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To Jean and Ernest Mohr

Printed in the United States of America

x • *Abortion in Nineteenth-Century America*

well. Literally dozens of other librarians around the country surveyed their holdings at my request and turned up useful materials. I visited too many of them to list separately, but I was almost invariably treated politely and professionally by the nation's librarians, who deserve the unstinting support and appreciation of those of us who try to write history.

My greatest debt is neither financial nor scholarly. It is the one I owe my wife Elizabeth and my two children, Timothy and Stephanie.

Columbia, Maryland
August 1977

James C. Mohr

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Abortion in America

one ·

Abortion in America, 1800-1825

In the absence of any legislation whatsoever on the subject of abortion in the United States in 1800, the legal status of the practice was governed by the traditional British common law as interpreted by the local courts of the new American states. For centuries prior to 1800 the key to the common law's attitude toward abortion had been a phenomenon associated with normal gestation known as quickening. Quickening was the first perception of fetal movement by the pregnant woman herself. Quickening generally occurred 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. The common law did not formally recognize the existence of a fetus in criminal cases until it had quickened. After quickening, the expulsion and destruction of a fetus without due cause was considered a crime, because the fetus itself had manifested some semblance of a separate existence: the ability to move. The crime was qualitatively different from the destruction of a human

being, however, and punished less harshly. Before quickening, actions that had the effect of terminating what turned out to have been an early pregnancy were not considered criminal under the common law in effect in England and the United States in 1800.¹

Both practical and moral arguments lay behind the quickening distinction. Practically, because no reliable tests for pregnancy existed in the early nineteenth century, quickening alone could confirm with absolute certainty that a woman really was pregnant. Prior to quickening, each of the telltale signs of pregnancy could, at least in theory, be explained in alternative ways by physicians of the day. Hence, either a doctor or a woman herself could take actions designed to restore menstrual flow after one or more missed periods on the assumption that something might be unnaturally "blocking" or "obstructing" her normal cycles, and if left untreated the obstruction would wreak real harm upon the woman. Medically, the procedures for removing a blockage were the same as those for inducing an early abortion. Not until the obstruction moved could either a physician or a woman, regardless of their suspicions, be completely certain that it was a "natural" blockage—a pregnancy—rather than a potentially dangerous situation. Morally, the question of whether or not a fetus was "alive" had been the subject of philosophical and religious debate among honest people for at least 5000 years. The quickening doctrine itself appears to have entered the British common law tradition by way of the tangled disputes of medieval theologians over whether or not an impregnated ovum possessed a soul.² The upshot was that American women in 1800 were legally free to attempt to terminate a condition that might turn out to have been a pregnancy until the existence of that pregnancy was incontrovertibly confirmed by the perception of fetal movement.

An ability to suspend one's modern preconceptions and to accept the early nineteenth century on its own terms regarding the distinction between quick and unquick is absolutely crucial to an understanding of the evolution of abortion policy in the United States. However doubtful the notion appears to modern readers, the distinction was virtually universal in America during the early decades of the nineteenth century and accepted in good faith. Perhaps the strongest evidence of the tenacity and universality of the doctrine in the United States was the fact that American courts pointedly sustained the most lenient implications of the quickening doctrine even after the British themselves had abandoned them. In 1803 Parliament passed a law, the details of which will be discussed in the next chapter, that made abortion before quickening a criminal offense in England for the first time. But the common law in the United States, as legal scholars have pointed out, was becoming more flexible and more tolerant in the early decades of the nineteenth century, especially in sex-related areas, not more restrictive.³

In 1812 the Massachusetts Supreme Court made clear the legal distance between the new British statute on abortion and American attitudes toward the practice. In October of that year the justices dismissed charges against a man named Isaiah Bangs not on the grounds that Bangs had not prepared and administered an abortifacient potion; he probably had. They freed Bangs because the indictment against him did not aver "that the woman was quick with child at the time."⁴ In Massachusetts, the court was asserting, an abortion early in pregnancy would remain beyond the scope of the law and not a crime. *Commonwealth v. Bangs* remained the ruling precedent in cases of abortion in the United States through the first half of the nineteenth century and, in most states, for some years beyond midcentury.

harmful, the "person" taking her money was being reminded in advance that he or she would be charged with a crime if the woman had quickened.⁵²

All of this probably reflected the continued perception of abortion in the United States as a fundamentally marginal practice usually resorted to by women who deserved pity and protection rather than criminal liability. While the accuracy of that perception can never be checked, the available evidence on abortion during the 1830s continued to confirm it. John Beck still believed in 1835 that most abortees were young women in trouble.⁵³ Professor Hugh Hodge of the University of Pennsylvania asserted in 1839 that the intent of most abortions was "to destroy the fruit of illicit pleasure, under the vain hope of preserving [the aborter's or the paramour's] reputation by this unnatural and guilty sacrifice."⁵⁴ The court cases that were recorded by state officials or written up in medical journals prior to 1840 generally involved unmarried young women.⁵⁵

The best data for the 1830s were amassed by a Mendon, Massachusetts, physician, Dr. John G. Metcalf, a Harvard-trained regular with a deep devotion to the value of accurate aggregate statistics. In 1843 he published the detailed records he had kept on 300 obstetrical cases that he was involved in prior to 1839. Five of them eventually ended in abortion, and two of those had been illegitimate pregnancies. Metcalf knew also that one of the women who aborted "had drunk freely of tansy tea [another of the substances popularly thought to have emmenagogic powers] for some days before the occurrence of labour" and that "her paramour, as she averred, had also offered to procure some 'pothecary medicine' to expedite the process, if she would take it, but she declined." Summarizing his experiences during the 1830s, Metcalf also commented that "physicians [were] sometimes applied to for the procurement of abor-

tion," but hoped that "such solicitations" would be resisted unless "the condition of the mother should justify [medical] interference."⁵⁶

Even as Metcalf published his statistics, however, the American perception of who was having how many abortions for what purpose was shifting dramatically. That shift, along with a professional resurgence of the regular physicians following their eclipse and disillusionment during the 1820s, would have a profound impact upon the next stage in the evolution of abortion policy in the United States.

three .

The Great Upsurge of Abortion, 1840-1880

In the early 1840s three key changes began to take place in the patterns of abortion in the United States. These changes profoundly affected the evolution of abortion policy for the next forty years. First, abortion came out into public view; by the mid-1840s the fact that Americans practiced abortion was an obvious social reality, constantly visible to the population as a whole. Second, the overall incidence of abortion, according to contemporary observers, began to rise sharply in the 1840s and remained at high levels through the 1870s; abortion was no longer a marginal practice whose incidence probably approximated that of illegitimacy, but rather a widespread social phenomenon during the period. Third, the types of women having recourse to abortion seemed to change; the dramatic surge of abortion in the United States after 1840 was attributed not to an increase in illegitimacy or a decline in marital fidelity, but rather to the increasing use of abortion by white, married, Protestant, native-born women of the middle and upper classes who either wished

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to delay their childbearing or already had all the children they wanted. This chapter will examine the evidence for the first two of these crucial changes; the following chapter will explore the third.

The increased public visibility of abortion may be attributed largely to a process common enough in American history: commercialization. Beginning in the early 1840s abortion became, for all intents and purposes, a business, a service openly traded in the free market. Several factors were involved in the commercialization of abortion, but the continued competition for clients among members of the medical profession stood out.¹ Because that competition was so intense, many marginal practitioners began in the early 1840s to try to attract patients by advertising in the popular press their willingness to treat the private ailments of women in terms that everybody recognized as signifying their willingness to provide abortion services.² Abortion-related advertising by physicians, which was not prohibited during this period, quickly became a common practice in the United States and was encouraged by members of the also fiercely competitive press corps, hungry for advertising revenue. Abortion-related advertisements appeared in both urban dailies and rural weeklies, in specialty publications, in popular magazines, in broadsides, on private cards, and even in religious journals. To document fully the pervasiveness of those open and obvious advertisements would probably require the citation of a substantial portion of the mass audience publications circulated in the United States around midcentury.

During the 1840s Americans also learned for the first time not only that many practitioners would provide abortion services, but that some practitioners had made the abortion business their chief livelihood. Indeed, abortion became one of the first specialties in American medical history. Even its

opponents considered it "a regularly-established money-making trade" throughout the United States by 1860.³ Pre-eminent among the new abortion specialists was Madame Restell of New York City. Restell, an English immigrant whose real name was Ann Lohman, had begun performing abortions on a commercial scale late in the 1830s, but did not gain public attention until the early 1840s.⁴ In 1841 her first arrest placed both her name and her occupation before the public. Although at least one irate citizen made unveiled public suggestions about "a recourse to Lynch law," and although Restell's prosecutor warned that "lust, licentiousness, seduction and abortion would be the inevitable occurrences of every day" if her activities were not stopped quickly and completely, she was convicted only of two minor infractions of the law.⁵ The publicity she gained more than offset any temporary inconvenience, and by the middle of the 1840s Restell had branch agencies in Boston and Philadelphia. Salesmen were on the road peddling her abortifacient pills and, if the pills failed to work, her salesmen were authorized to refer patients to the main clinic in New York.⁶ Restell's enterprise would remain lucrative and successful into the late 1870s, when Madame Restell herself was destined to be one of the most celebrated victims of America's sharp shift on abortion policy.

It is important to note that Restell was no isolated aberration, but only the most flamboyant and the most publicized of the abortionists who began to appear during the 1840s. In the week beginning January 4, 1845, to cite but a single example, the *Boston Daily Times* contained the advertisements of a Dr. Carswell: "particular attention given to all Female complaints, such as Suppressions. . . . Dr. Carswell's method of treating these diseases, is such as to remove the difficulty in a few days. . . . Strict secrecy observed, and no pay taken unless a cure is performed"; a Dr. Louis Kurtz of

Leipsic, who would treat "private diseases" in the same manner and had the additional selling point of speaking English, German, and French; a Dr. Dow, whose advertisement was similar to Carswell's, but added: "N.B. Good accommodations for ladies"; and for Madame Restell's Boston branch.⁷ "Sleeping Lucy," a Vermont clairvoyant, had opened a small business in the abortion trade in 1842; her expanded enterprise would remain vigorous through the 1870s.⁸ In its first major statement on abortion in the United States, the prestigious *Boston Medical and Surgical Journal* noted with alarm in 1844 that abortionists had come out into the open and were thriving. "The law has not reached them," the *Journal* rightly observed, "and the trade of infanticide [i.e. abortion] is unquestionably considered, by these thrifty dealers in blood, a profitable undertaking."⁹

The popular press began to make abortion more visible to the American people during the 1840s not only in its advertisements but also in its coverage of a number of sensational trials alleged to involve botched abortions and professional abortionists. In Massachusetts, New York, New Jersey, and Iowa such cases evoked direct legislative responses, which will be examined in a subsequent chapter, but in the present context the very fact of public coverage indicated an increased awareness of abortion in the United States. Prior to 1840 virtually nothing had been mentioned about abortion in the popular press; during the period when the first laws concerning abortion were being passed in state legislatures, the practice had not been a public issue. By the early 1840s, however, the press had become interested in the phenomenon. When Madame Restell was arrested for a second time in 1845, the *New York City dailies* and the new *National Police Gazette* covered the story closely and expressed concern about the lack of restriction on abortion in the United States.¹⁰ Freed once again, Madame Restell herself took to

the columns of the *New York Tribune* in August of 1847 to counter what she regarded as unjustified slurs upon her and her line of work.¹¹

By 1850, then, commercialization had brought abortion out into public view in the United States, and the visibility it gained would affect the evolution of abortion policy in American state legislatures. At the same time a second key change was taking place: American women began to practice abortion more frequently after 1840 than they had earlier in the century. As a reasonable guess, abortion rates in the United States may have risen from an order of magnitude approximating one abortion for every twenty-five or thirty live births during the first three decades of the nineteenth century to an order of magnitude possibly as high as one abortion for every five or six live births by the 1850s and 1860s.¹² Clearly, a change like that was also likely to have some effect upon the evolution of abortion laws.

One indication that abortion rates probably jumped in the United States during the 1840s and remained high for some thirty years thereafter was the increased visibility of the practice. It is not unreasonable to assume that abortion became more visible at least in part because it was becoming more frequent. And as it became more visible, more and more women would be reminded that it existed as a possible course of action to be considered. The advertisement of abortion services remained vigorous from the early 1840s, when it first appeared, through the late 1870s, when anti-advertising and anti-obscenity laws drove it from the market

*Ann Lohman, calling herself Madame Restell, helped commercialize abortion in the United States during the 1840s by the use of modern business techniques, including the use of traveling salesmen and the opening of branch offices. Essential to her thirty-five years of lucrative success was her use of advertising, early examples of which are reproduced here. From *New York Sun*, Mar. 3, 1846, and *Boston Daily Times*, Jan. 7, 1845.*

FEMALE MONTHLY PILLS:
OWING TO THE CELEBRITY, EFFICACY,
 and invariable success of Madame Restell's Female Monthly Pills in removing female irregularity since their introduction into the United States, now about 7 years, counterfeits and imitations are constantly attempted to be palmed off for the genuine. Cheap, common pills are purchased, put up in different boxes, and called "Female Monthly Pills," with the object of deceiving the simple and unwary. Since the well known success of Madame Restell in the treatment of complaints arising from female irregularity, numerous imitators, without knowledge, skill or experience, now and then appear, all making pretensions to cure complaints, of the nature of which they are wholly ignorant. It behoves, therefore, to be careful to whom they entrust themselves with indisposition in the treatment which Madame Restell's experience and specifics has been pre-eminently successful.

CAUTION—No "Female Monthly Pills" are genuine except those sold at Madame Restell's Principal office, 148 Greenwich st., and by appointment, 129 Liberty st., New York. Price \$1. They can be used by married or single, by following directions. Madame Restell's signature is written on the cover of each box. Boston office, 7 Essex st., 26f 1m*

MADAME RESTELL, FEMALE PHYSICIAN,
 office and residence 148 Greenwich street, between Courtlandt and Liberty st., where she can be consulted with the strictest confidence on complaints incidental to the female frame.

Madame Restell's experience and knowledge in the treatment of cases of female irregularity, is such as to require but a few days to effect a perfect cure. Ladies desiring proper medical attendance will be accommodated during such time with private and respectable board.

Madame Restell would apprise ladies that her medicines will be sent by mail, or by the various expresses, to any part of the city or country. All letters must be post paid, except those containing an enclosure, addressed to Box No. 2569 New York, will be attended to. Boston office No. 7 Essex st. Madame Restell would also apprise ladies that she devotes her personal attention upon them in any part of the city or vicinity.
 26f 1m*

MADAME RESTELL.

FEMALE PHYSICIAN. is happy in complying with the solicitation of the numerous invalids of those who have tested the efficacy and success of her medicines, as being so especially adapted to female complaints.

Their known celebrity in the Female Hospitals of Vienna and Paris, where they have been altogether adopted as well as their adoption in this country, to the relief of the many and deleterious complaints hereto referred upon their notice, is ample evidence of the situation in which they are held to make any lengthened advertisements superfluous; it is sufficient to say that her celebrated 'FEMALE MONTHLY PILLS,' now acknowledged by the medical fraternity to be the only safe, mild and efficient remedy to be depended upon in long standing cases of Suppression, irregularity or stoppage of those functions of nature, the neglect of which is the source of such deplorable defects on the female frame, dizziness in the head, disturbed sleep, sallow complexion, and the innumerable fruitful effects which sooner or later terminate in incurable consumption.

The married, it is deemed necessary to state, must under some circumstances abstain from their use. All reasons contained in the full directions when and how to be used accompanying each box. Price \$1.

Females laboring under weakness, debility, neuralgia, or other ailments so destructive and undermining to the health, will obtain instant relief by the use of these Pills.

PREVENTIVE POWDERS, for married ladies in delicate health, the adoption of which has been the means of preserving many an affectionate wife and fond mother from an early and premature grave. Price \$5.00 a package. Their nature is most fully explained in a pamphlet entitled 'Suggestion to the Married,' which can be obtained free of expense, at the office, where ladies will find one of their own sex, conversant with their indisposition, in attendance.

FEMALE MEDICAL OFFICE, No. 7 Essex street, Boston. Office hours from 8 A. M. to 3 P. M.
Philadelphia Office, No. 7 South Seventh street.
Principal Office, No. 145 Greenwhich street New York.

place. Madame Restell's empire alone was reported in 1871 to be spending approximately \$60,000 per year on advertising.¹³ Economists argue that advertising both responds to a perceived market and helps to expand that market. Hence, abortifacient advertising was presumably aimed throughout the period from 1840 through 1880 at a clientele large

enough to justify its expense, it presumably helped to maintain the size of that clientele, and it may actually have been a factor in expanding the clientele in certain areas.

A second piece of evidence for high abortion rates for the period was the existence during that time of a flourishing business in abortifacient medicines. The *Boston Medical and Surgical Journal* asserted that there were at least six practitioners openly retailing abortifacient preparations in Boston by the summer of 1844, and before midcentury the abortifacient drug business would become a major and apparently very profitable enterprise.¹⁴ Moreover, and this point is important in the present context, the effectiveness of nineteenth-century abortifacient preparations is not really an issue. It is probable that these preparations helped to trigger a relatively small number of actual abortions.¹⁵ But the booming business in abortifacients indicated that a significant number of American women were trying to have abortions. After all, they did not know that the drugs were incapable of doing what their advertisers claimed they could do. And it is likely that many of the women who failed to get results with medicines would turn next to surgical methods of terminating their pregnancies.

During the week of January 4, 1845, the *Boston Daily Times* advertised Madame Restell's Female Pills; Madame Druette's Lunar Pills; Dr. Peter's French Renovating Pills, which were sold as "a blessing to mothers"; and although very mild and prompt in their operations, pregnant females should not use them, as they invariably produce a miscarriage"; Dr. Monroe's French Periodical Pills, also "sure to produce a miscarriage"; and Dr. Melveau's Portuguese Female Pills, likewise "certain to produce miscarriage." These ads, to repeat, were from a single paper for a single week in 1845.¹⁶ The "meaning and intent" of advertisements like that, it was widely acknowledged, were well

of the day, whom he considered to be dangerously leading American women toward their own physical destruction.⁶⁴ Many of Gardner's early ideas were reiterated and elaborated in *Conjugal Sins*, his 1870 best-selling treatise against family planning.⁶⁵ A. F. Barnes was at pains to point out that an 1869 abortion case he wrote up for the *Medical Archives of St. Louis* involved a 30-year-old married mother of three children who "strongly believed in 'woman's rights.'"⁶⁶ While many other men alluded to the possible link between feminism and abortion, a California doctor in 1877 gave the connection probably the most extended and least subtle treatment it received. This man, Henry Gibbons, Sr., blamed the spread of abortion on the unsettling effects of social theories like those of Frances Wright and Robert Dale Owen. Indeed, before he finished his lecture, which was printed in both of the major medical journals of the West Coast, he was denouncing reform generally as having a pernicious effect upon domestic relations in the United States.⁶⁷

In further support of commentators like these there was some evidence that women shared abortifacient information with one another and assisted their friends in attempted self-abortions. This was true even in isolated areas. To cite but a single example, it was axiomatic to a judge on the Colorado frontier in 1870 that a girl's "mother or any other old lady" would be both willing and able to offer her information on restoring menstrual flow after a missed period.⁶⁸ Dr. William H. Hardison of Richland, Arkansas, believed that self-abortions were quite common in his area and that they were made possible by women sharing abortifacient information with one another.⁶⁹ H.S. Humphrey of Janesville, Wisconsin, thought the same was true in his area.⁷⁰ As G. Dallas Lind put it in *The Mother's Guide and Daughter's Friend*: "Many women, being refused by honest

physicians to relieve them of what they consider a burden, learn from other women what to take or what to do to produce abortion upon themselves."⁷¹ Female undergrounds, if that phrase does not stretch the notion too far, even eliminated literacy as a necessary prerequisite for practicing abortion. Some of the principals in an 1855 abortion trial in a rural section of southern Indiana notarized their depositions with their marks, not their signatures.⁷²

Occasionally feminists confirmed the fears and accusations of the defensive anti-feminists who blamed the upsurge of abortion in America on the spread of feminist ideas. A woman from the mill county of Androscoggin, Maine, where a regular physician had reported at least four hundred abortions being performed each year, wrote to a feminist journal that it was not a lack of moral instruction but the movement for women's rights that produced the total.⁷³ A previous letter writer had asserted that American women continued to abort so frequently after the Civil War because virtually all of them still believed in the quickening doctrine their mothers had taught them. If they could be educated to see that abortion at any time during gestation was murder, this earlier correspondent believed, they would stop it.⁷⁴ But the Androscoggin writer, who signed herself "Conspirator," claimed that philosophical distinctions over the origins of life had little to do with abortion among her friends in Maine and would not deter "one out of ten, if it did one out of a hundred . . . from the commission of this deed." The aborters "cry la Liberty or Death," and the only thing that would solve the abortion problem in America would be "liberty to women, freedom entire."⁷⁵

The most common variant of the view that abortion was a manifestation of the women's rights movement hinged upon the word "fashion." Over and over men claimed that women who aborted did so because they cared more about

scratching for a better perch in society than they did about raising children. They dared not waste time on the latter lest they fall behind in the former. Women, in short, were accused of being aggressively self-indulgent. Some women, for example, had "the effrontery to say boldly, that they have neither the time nor inclination to nurse babies"; others exhibited "self-indulgence in most disgusting forms"; and many of the women practicing abortion were described as more interested in "selfish and personal ends" or "fast living" than in the maternity for which God had supposedly created them.⁷⁶ Occasionally a medical writer would temper the general indictment by alluding to the deep-seated fears of pregnancy and birth among American women or by suggesting that a woman tied to a drunken or ill-providing husband who used no discretion in the exercise of his "marital rights" had enormous temptations to have herself aborted.⁷⁷ But most medical writers continued to blame "social extravagance and dissipation" for a large proportion of the nation's abortions.⁷⁸ Over and over physicians warned that the growing self-indulgence among American women represented a blow "at the very foundations of society."⁷⁹ The practice of abortion was destroying American women physically and mentally, and, worst of all, undermining the basic relationships between them and men insofar as a willingness to abort signified a wife's rejection of her traditional role as housekeeper and child raiser. For this reason, some doctors urged that feticide be made a legal ground for divorce.⁸⁰ A substantial number of writers between 1840 and 1880, in other words, were willing to portray women who had abortions as domestic subversives.

Another connection between abortion and the drive for women's rights was alleged by an anonymous advocate of legalized abortion who addressed the Medico-Legal Society

of New York in 1888. The writer argued that the nation's anti-abortion laws were a farce, and claimed that this was "due, doubtless, to the fact (unpleasant and unpalatable as it may sound, to state it) that [anti-abortion] was against the common and almost universal sentiment of womankind; she who was the greatest sufferer and victim of the social conditions, under which its practice became necessary and inevitable, she who dreaded more the consequences as affecting her social condition than she feared legal penalties, never in her heart respected the law nor held it binding on her conscience." He went on to advocate, in a series of rhetorical questions, "the rights" of a woman to determine "whether she will take upon herself the pangs and responsibilities and duties of maternity," citing feminist views of marriage as he went. Near the end of his discussion he challenged the anti-feminist Medico-Legal Society to demonstrate "the manliness to speak one strong word for woman and womankind" on the issue of a wife's right to control her own reproductive capacities and to admit that a "hollow, shallow, mocking lie" underlay "the very base of the laws regarding abortion."⁸¹

Notwithstanding the possibility that recourse to abortion sometimes reflected the rising consciousness of the women who had them, and notwithstanding the fact that some males, especially regular physicians, were distinctly uneasy about the practice because of what its ultimate effects upon the social position of women might be, the relationship between abortion and feminism in the nineteenth century nevertheless remained indirect and ironical. This becomes evident when the arguments of the feminists themselves are analyzed. One of the most forceful early statements of what subsequently became the feminist position on abortion was made in the 1850s in a volume entitled *The Unwelcome*

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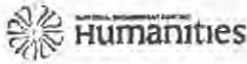
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Wheeling register. [volume], March 05, 1892, Page 6, Image 6

About [Wheeling register. \[volume\] / Wheeling, W. Va. / 1878-1935](#)

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Wheeling register. [volume] (Wheeling, W. Va.), 05 March 1892. Chroncling America: Historic American Newspapers. Lib. of Congress. <<https://chronclingamerica.loc.gov/ocn/sn86092518/1892-03-05/ed-1/seq-6/>>

A SERIOUS CHARGE

Samuel Porter, Jr., Arrested for Encouraging an Abortion.

On the ninth of September last, William Imer swore out a warrant before Justice Arkle for William Porter, Jr., who lives near Elm Grove, charging him with giving medicine to Mary Imer, to procure an abortion. Porter has succeeded in eluding the officer ever since, but yesterday he surrendered himself in Squire Arkle's office, waived examination, and furnished bond for his appearance at the next term of Court.

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About The Wheeling daily intelligencer. [volume] (Wheeling, W. Va.) 1865-1903

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WHEELING DAILY INTELLIGENCER, THURSDAY, MARCH 29, 1894

OUR SPRING EXHIBITION

Men's Clothing

VERY FINE SUITS

M. Gutman & Co.

The Intelligencer Bindery

NO WANTED-STATE

THE BALD BROWER

ALEXANDER

Carpets!

Mattings!

G. MENDEL & CO.

Spring Wrap.

Wool, Cotton, India and Export Silks.

LARDONERES AND TOBACCOES

Geo. E. Stifel & Co.

Don't be Afraid.

D. GUNDLING & CO.



The Wheeling daily intelligencer. [volume] (Wheeling, W. Va.), 29 March 1894, Chronicling America: Historic American Newspapers. U.S. of Congress. <<https://chroniclingamerica.loc.gov/lccn/sn84026844/1894-03-29/ed-1/seq-5/>>

MRS. MULVEY GUILTY

The Abortion Case Heard Before Judge Jordan Yesterday.

Yesterday in the criminal court, Judge Jordan on the bench, the case of Mrs. Susan Mulvey, accused of procuring an abortion on Libel Cooper, and indicted jointly with James Bachmann for that crime, was tried to a jury. Prosecutor Howard and Mr. Post represented the state, and Hon. G. W. Atkinson, Mr. Dick and Col. W. W. Arnold the defense.

Dr. Taylor, who treated the girl after the alleged crime, and Mr. and Mrs. Cooper, her parents, told what they knew about the case, then the girl herself was put on the stand. She told a very circumstantial story of the crime, describing the house in which Mrs. Mulvey lives, and saying Bachmann accompanied her there.

The details of the alleged crime were told very fully by the young woman. The state then put James Bachmann on the stand, and he denied everything she had told concerning him with the abortion. Lieut. Walter Terrill was called to the stand and asked as to statements the accused had made to him about the case, but most of his testimony was ruled out on objection.

Susan Mulvey herself was the only witness for the defense. She denied everything the girl had told, saying she had never seen the girl, and never saw Bachmann but once and then he was on a wagon.

The court room was packed full of people all day, and at the noon recess the crowd was so great in the hall that the large double door into the court room was forced open by the pressure against it, a bolt being broken.

Last night the attendance was even larger than during the day, the audience packing the corridors outside the doors. The argument was short on both sides, and the case was given to the jury about 9:45, and just as the clock struck 10 the jury came into court and rendered a verdict of guilty as charged in the indictment.

The usual motion for a new trial was entered and set for argument, Mrs. Mulvey was remanded in jail and court adjourned.

The case of James Bachmann, indicted for alleged complicity in the same crime, is set for to-day.

The penalty for the offense is three to ten years in the penitentiary.

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About The Wheeling Intelligencer. [volume] (Wheeling, W. Va.) 1903-1961

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Page 12 of 12

Features of the January White Sale

THE WHITE SALE IS A FAVORITE and, therefore, an important feature of the winter season at Wheeling. It is the time when the people get their winter wardrobe in shape and the stores get their winter trade.

Men's Suits	1/2 Off
Men's Ties	1/2 Off
Men's Hats	1/2 Off
Men's Shoes	1/2 Off
Men's Gloves	1/2 Off
Men's Socks	1/2 Off
Men's Underwear	1/2 Off
Men's Outerwear	1/2 Off
Men's Accessories	1/2 Off

Washable in the January Clearance Sale

Men's Suits	1/2 Off
Men's Ties	1/2 Off
Men's Hats	1/2 Off
Men's Shoes	1/2 Off
Men's Gloves	1/2 Off
Men's Socks	1/2 Off
Men's Underwear	1/2 Off
Men's Outerwear	1/2 Off
Men's Accessories	1/2 Off

Tailored Hats for Styling

The new hats for the winter season are now in. They are made of the finest materials and are styled to give you a smart and stylish appearance. They are available in a variety of colors and styles.

Men Save a Third on your Clothes

COME to the Stone & Thomas store on the hill for all the winter goods and clothes. They are now in and at a special price. You can save a third on your winter wardrobe. This is a great opportunity to get your winter clothes at a low price.

Men's Suits	1/3 Off
Men's Ties	1/3 Off
Men's Hats	1/3 Off
Men's Shoes	1/3 Off
Men's Gloves	1/3 Off
Men's Socks	1/3 Off
Men's Underwear	1/3 Off
Men's Outerwear	1/3 Off
Men's Accessories	1/3 Off

STONE & THOMAS

Geo. E. Johns Co. JANUARY CLEARANCE

Of Their Entire Stock PRIOR TO INVENTORY

Coats for Afternoon and Evening Wear
 Tailored Suits and Dresses, Broadcloth and Heavy Winter Coats, Fur Coats, Neck Pieces and Mitts at SWEEPING REDUCTIONS FROM FORMER PRICES

Exclusive Selections Throughout.

GRAND JURY FILES REPORT

The grand jury has filed its report on the case of the ...

Money

Money is tight in the market and the price of ...

Gen. E. Taylor

The general has returned from his trip to ...

CURTAIN SALE CONTINUED

FOR ANOTHER WEEK WE ARE OFFERING THE BEST OF ...

ALL SUITS	1/4 OFF
ALL TIES	1/4 OFF
ALL COATS	1/4 OFF
ALL DRESSES	1/4 OFF

CLOSE MARKING OF JEDDING

Blankets, Sweaters, and other winter goods at low prices.

REMANANT SALE

Thursday, Jan. 9th
 Semi-Annual Event

Blankets, Sweaters, and other winter goods at low prices.

True Bills.

The following true bills were returned by the jury:

State vs. Tony Smichel, misdemeanor, carrying concealed weapons.

State vs. John Kordic, misdemeanor, carrying concealed weapons.

State vs. Neal Robinson, misdemeanor, carrying concealed weapons.

State vs. John Dwyer, misdemeanor, carrying concealed weapons.

State vs. William Ayers, misdemeanor, attempting to defraud the Palace Furniture Company out of household goods.

State vs. Louie Horwood, felony, stealing bicycle.

State vs. Peter Hints and Bernard Hyle, felony, stealing fourteen barrels of apples.

State vs. Wilbur Simpson, felony, perjury.

State vs. Wilbur Simpson, misdemeanor, perjury.

State vs. Minnie Arnell alias Lurile Barker, misdemeanor, fornication and adultery.

State vs. John Blatner, felony, murder.

State vs. Martin Loftus, felony, murder.

State vs. Thomas Clatter, felony, murder.

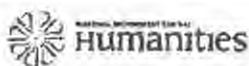
State vs. Dr. H. P. Campbell, felony, abortion.

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About The Wheeling Intelligencer. [volume] (Wheeling, W. Va.) 1903-1961

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Image viewer interface showing a newspaper page with various advertisements and news snippets.

Advertisements include:

- Easter Suits For Young Men** (McFadden's): \$10.00, \$12.50, \$15.00
- ITALIANS PLAN A BIG CELEBRATION**
- WAS ACQUITTED**
- YARDWORK**
- THE GUFFIN STUDIO**
- D.B. & T. Lucky Fifteen Sale** (Exciting Intense Interest and Selling Lots of Pianos)
- FATIMA CIGARETTES**
- THE BEST INVESTMENT ON EARTH JUST NOW**
- JUST A HINT**
- SUDDEN DEATH**
- Geo. W. Fox**
- Dr. J. B. Harkins & Tyler Co.**

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The Wheeling Intelligencer. [volume] (Wheeling, W. Va.), 08 March 1913. Chronicling America: Historic American Newspapers. Lib. of Congress. <<https://chroniclingamerica.loc.gov/lccn/sn86092536/1913-03-08/ed-1/seq-2/>>

No Decision Yet.

The jury in the case of the State of West Virginia against William Art and Dr. R. P. Bone, who were indicted on a charge of attempting to commit abortion, which has been deliberating since two o'clock on Thursday afternoon, were dismissed until next Monday morning at nine o'clock. The indications are at the present time that the jury will not agree and no verdict will be found.

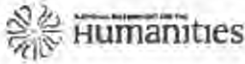
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THE WHEELING INTELLIGENCER, FRIDAY, MAY 6, 1916.

Godeffroy's

Saturday's Readywear Sales

**75
COATS
\$12.50**

A special lot consisting of an assortment of ready-made coats in the latest styles. Some of the best values ever offered. Includes the famous "Buckskin" coat, the "Woolen" coat, the "Cheviot" coat, and the "Tweed" coat. All in the latest styles and colors. A special price of \$12.50 for all.

BY TO 45 MEN'S

**65
COATS
\$13.95**

A special lot consisting of an assortment of ready-made coats in the latest styles. Some of the best values ever offered. Includes the famous "Buckskin" coat, the "Woolen" coat, the "Cheviot" coat, and the "Tweed" coat. All in the latest styles and colors. A special price of \$13.95 for all.

BY TO 45 MEN'S

Women's Readywear

Union Suits

1-75c Union Suits (all sizes) made of the best material and workmanship. A special price of 75c for all.

2-100c Union Suits (all sizes) made of the best material and workmanship. A special price of 100c for all.

3-125c Union Suits (all sizes) made of the best material and workmanship. A special price of 125c for all.

NECK AND EAR!

Neck and Ear Protection. Try one on for size. Best of quality.

HAIR AND HILLS OF Dress Gingham

AN ABSOLUTE BYES - POSITIVE QUALITY - AT AN EP TO 25 YARD

DEAR TOP FIVE HOUSE

At 177c. HONORARY

Women's Old Shoes

Monday Special

COBBLERS' DUTY HELD BY DOCTOR RESPONSIBLE

Advertisement for cobblers and shoe repair services.

Special Display of Bracelet Watches \$10 to \$100

For 97c windows

J. B. Broom Co.

Let Us Teach Your Children to Save

Advertisement for a savings program for children.

Plumbing and Heating

Steam-Electric Co.

Drisk

Advertisement for Drisk products.

WEIMER FALKING CO.

Advertisement for Weimer Falking Co.

The Wheeling Intelligencer. [volume] (Wheeling, W. Va.), 06 May 1916. Chronicling America: Historic American Newspapers. Lib. of Congress. <<https://chroniclingamerica.loc.gov/lccn/sn86092536/1916-05-06/ed-1/seq-5/>>

CORONER'S JURY HOLDS COLORED DOCTOR RESPONSIBLE FOR DEATH

BY VERDICT SAY USE OF DIRT INSTRUMENTS CAUSED BLOOD POISONING.

Three Witnesses Used to Establish Fact That Criminal Operation Caused Death.

State of West Virginia.
An inquisition held in the court room of the criminal court of Ohio county, Wheeling, West Virginia, on the 22d day of May, 1916, before Galia Mitchell, coroner of Ohio county, upon the view of the body of Gertrude Kestep, alias Kestep, The jury award to inquire upon how and by what means the said Gertrude Kestep came to her death, upon their oath do say that the said Gertrude Kestep came to her death from blood poisoning which resulted from a criminal operation performed upon her by Dr. H. H. Millard on the month of April, 1916, in Ohio county, W. Va., with intent to procure and produce an abortion and the destruction of her unborn child. And in testimony whereof the said coroner and jurymen have set their hands.

- H. J. Chapman.
- J. M. Houston.
- Charles Hill.
- Richard White.
- Tom Bishop.
- Robert Newman.
- H. I. Chapman.

GALIA MITCHELL, Coroner.

Three witnesses and the reading of a fourth a testimony by the official stenographer were all that were used to place the coroner's jury yesterday evening to establish the above verdict. The inquest was held in the criminal court room, and was attended by the prosecuting attorney.

In their verdict the jurors unequivocally held Dr. H. H. Millard, colored, responsible for the death of Gertrude Kestep, they finding that she died of blood poisoning sustained by a criminal operation. Miss

Keagle died last Sunday night at the Ohio Valley General Hospital. Coroner Mitchell, James A. White, who was the first placed on the stand, following the coroner's jury, read the testimony of Dr. H. H. Millard, a colored police headquarters on the stand, showing the dirt instrument which produced the blood poisoning was used. It showed Dr. Millard had been called to attend the girl on Friday, April 14, and Saturday, April 15.

Further, that he found her suffering from the effects of a criminal operation, and that after considerable treatment she died. Dr. H. H. Millard had performed it. She was taken to the North Wheeling hospital and there attended by Mrs. Miller, C. W. Dill, Gregory Ketchum, Frank J. Moore, Henry and H. H. Keagle. All were sworn to by the coroner, and their testimony then produced according to the testimony of Ford Lovell taken by him. Lovell had testified that he had gone with the girl to Millard's office, he having to the operation performed for the abortion to be performed, and then later in a week, it showed that while the operation was being performed Lovell had stayed in an adjoining room. According to his statement read, he said \$15 for the operation.

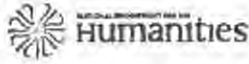
Dr. J. A. Campbell, county physician, was next interviewed; that of the testimony, it developing that the girl had criminal operation. Dr. H. H. Millard, county and coroner's physician, related the statement of the previous witness. Dr. White said that her death was caused by blood poisoning, caused by an infection of the organ caused by dirty instruments having been used in the performance of a criminal operation.

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THE WHEELING DAILY REGISTER - MONDAY MORNING, SEPTEMBER 28, 1877

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Feminine Follies.

Last evening, Samuel Motto went before Squire Phillips and swore on his oath that Ida Meredith had unlawfully and feloniously destroyed her unborn child by means of an instrument made of wire and a pencil. Mrs. Samuel Motto was arrested as an accomplice in producing the abortion. Both women were held in the sum of \$1,000 each for their appearance before Squire Phillips at 2 o'clock this evening. Not being able to give the required bond, both were jailed. The abortion is alleged to have been committed on April 13, 1877.

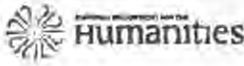
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Image provided by: West Virginia University



The Wheeling daily intelligencer. [volume] (Wheeling, W. Va.), 08 Nov. 1879. Chronicling America: Historic American Newspapers. Lib. of Congress. <https://chroniclingamerica.loc.gov/lccn/sn84026844/1879-11-08/ed-1/seq-4/>

BETHANY COLLEGE FIRE.—The burning of the Society Halls at Bethany College, and the obvious fact that they were intentionally fired is of such recent occurrence as still to be fresh. No one had been arrested for the crime, although suspicion pointed to more than one person as the guilty parties. Yesterday a gentleman who is acting the prosecuting attorney of Brooke county in the matter of investigation, came to this city and procured a requisition for one Thomas Cheek, a man said to be lurking in the neighborhood of Jacktown, Greene county, Pa., where he has friends. A telegram had previously been sent to arrest him, which we suppose is done ere this.

From the same gentleman we learned that Dr. David Parkinson, a dentist of Brooke county, and who has figured rather prominently in the criminal proceedings of their courts recently on a charge of procuring or aiding in procuring an abortion, had been arrested by Sheriff J. E. Curtis in connection with the same offense and confined in Wellsburg jail at three o'clock a. m. yesterday. On Thursday two women had been arrested for shoplifting and they, together with the husband of one of them, had given the information that led to the arrest of Parkinson and the issuing of the requisition for Cheek. There are also several other parties implicated whose names could not be divulged at the present time. There is considerable excitement both at Wellsburg and at Bethany over the matter as the citizens are anxious to bring the perpetrators of the act of vandalism to justice. Cheek, if arrested, will likely be jailed in Wellsburg to-day.

EXHIBIT 9
STARK AFFIDAVIT

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The National Endowment for the Humanities > Project: Chronicling America > Wheeling register > February 21, 1894 > Page 5, Image 5

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Wheeling register. [volume], February 21, 1894, Page 5, Image 5
 About [Wheeling register. \[volume\] \(Wheeling, W. Va.\) 1878-1935](#)

Image provided by: West Virginia University



Wheeling register. [volume] (Wheeling, W. Va.), 21 Feb. 1894. Chronicling America: Historic American Newspapers. Lib. of Congress. <<https://chroniclingamerica.loc.gov/ccn/sn86092518/1894-02-21/ed-1/sq-5/>>

Admitted to Bail.

Last evening Sue Mulby, charged with aiding in procuring an abortion upon Miss Cooper, of the Fifth ward, was admitted to bail, in the sum of \$1,000. The hearing will take place Monday evening.

EXHIBIT 10
STARK AFFIDAVIT

- LIBRARY**
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60

The Wheeling daily intelligencer. [volume] (Wheeling, W. Va.) 1865-1903, April 18, 1888, Image 4



Humanities

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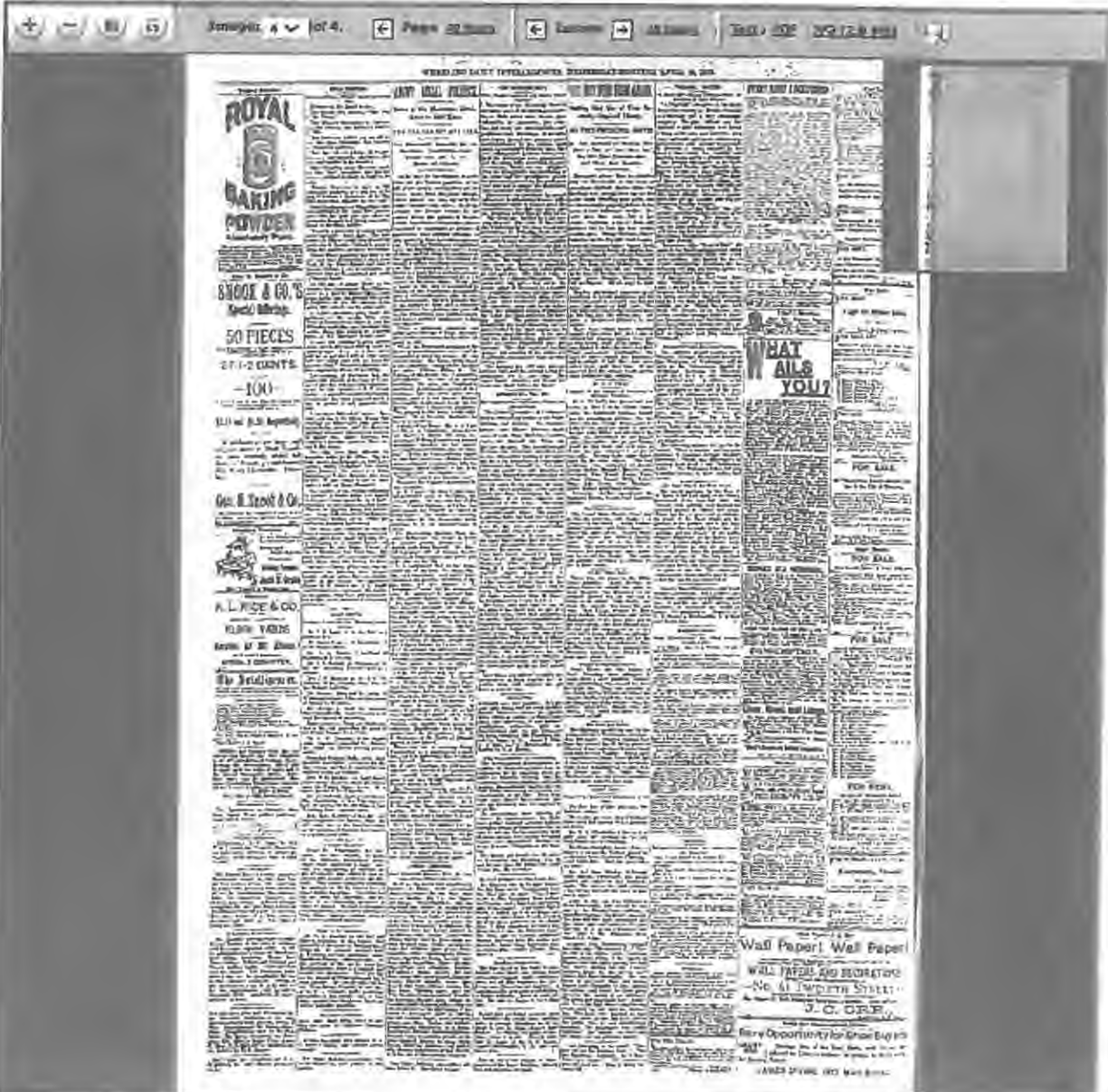
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The Wheeling daily intelligencer. [volume], April 18, 1888, Image 4

About The Wheeling daily intelligencer. [volume] (Wheeling, W. Va.) 1865-1903

Image provided by: West Virginia University



The Wheeling daily intelligencer. [volume] (Wheeling, W. Va.), 18 April 1888. Chronicling America: Historic American Newspapers. 116 of Congress. <<https://chroniclingamerica.loc.gov/doc/sn84026844/1888-04-18/ed-1/seq-4/>>

DR. G. W. KELLY

Cleared of the Charge of Procuring an Abortion Yesterday.

Dr. G. W. Kelly was put on trial yesterday in Part I of the Circuit Court, under the indictment pending against him for procuring an abortion. The evidence was that George Troung paid Dr. Kelly \$15 for medicine which he gave to the girl, Lulu Miller, and afterwards the crime was committed by mechanical means, but neither the girl nor Troung would say that Kelly did it, in view of which the jury returned a verdict of not guilty. Troung is also under indictment for the same offense. The jury yesterday was composed of Messrs. George Culver, Thomas F. Howley, Peter Bachman, Fred Forsch, Joseph Yahn, Alfred Clator, August Beltz, Robert Shaw, John Curtis, Frank Thallman, Harry Houser and Henry Schultze.


Prosecutor Jordan represented the State and Messrs. Dovener and Elson the defense.

EXHIBIT 11
STARK AFFIDAVIT

<https://twitter.com/MorrisseyWV/status/1521320044797571077> (accessed June 28, 2022)

← **Tweet**



Patrick Morrissey 
@MorrisseyWV



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.

10:45 PM · May 2, 2022 · Twitter for iPhone

10 Retweets **3** Quote Tweets **62** Likes




EXHIBIT 12
STARK AFFIDAVIT

<https://twitter.com/MorrisseyWV/status/1540359576930983938> (accessed June 28, 2022)

← **Tweet**



Patrick Morrissey 
@MorrisseyWV



I have been asked what the state of the law is in West Virginia regarding abortion. My response is very simple: you should not have one! Today, is a landmark day in our effort to protect babies.

11:41 AM · Jun 24, 2022 · Twitter for iPhone

13 Retweets **10** Quote Tweets **60** Likes



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, *et al.*,

Plaintiffs,

v.

CHARLES T. MILLER, *et al.*,

Defendants.

Civil Action No. 22-C-524

Hon. SA10290

FILED
GATEWAY
KANAWHA COUNTY CIRCUIT COURT

AFFIDAVIT OF KATIE QUIÑONEZ

I, Katie Quiñonez, being duly sworn, state under penalty of perjury that the foregoing is true and correct.

1. I am over the age of 21.

2. I write this affidavit in support of Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction against enforcement of West Virginia Code section 61-2-8 (the "Criminal Abortion Ban").

3. I am the Executive Director of Women's Health Center of West Virginia ("WHC" or the "Center"), a nonprofit corporation organized under the laws of the State of West Virginia. I am a Plaintiff in this action, as is WHC.

4. Until June 24, 2022, WHC was the only outpatient clinic providing abortion care in West Virginia. It was the first clinic to provide such care in West Virginia and had been providing safe, legal abortion care in Charleston, West Virginia, since 1976. WHC sues on behalf of itself, its staff, its physicians, and its patients.

5. The facts I state here are based on my experience, my review of WHC's business records, information obtained in the course of my duties at WHC, and personal knowledge that I have acquired through my service at WHC. If called and sworn as a witness, I could and would testify competently thereto.

Background

6. I currently reside in Huntington, West Virginia.

7. I hold a Master's in Public Administration and a Bachelor of Arts in Print Journalism, both from Marshall University.

8. Prior to joining WHC, I was a Paraprofessional at Children First LLC, a nonprofit organization that advocates for the interests of children and their families in coordination with the West Virginia Child Protective Services. I also worked as the Assistant Director of Development

and the Director of Development and Communications at Facing Hunger Foodbank in Huntington, West Virginia.

9. Working at WHC was my dream job. I am a former abortion patient of the Center, where I received excellent care. In 2017, I saw that WHC was seeking to hire a Development Director and immediately applied.

10. I served as WHC's Development Director from September 2017 to January 2020. In that capacity, I oversaw all the Center's fundraising activities, managed WHC's social media presence and website, and oversaw advocacy and community engagement.

11. After serving as Development Director for over two years, I was promoted to Executive Director of WHC in January 2020. As Executive Director, I am responsible for managing WHC's administrative, financial, and clinical operations, and for developing, implementing, and reviewing WHC's policies and procedures. I organize and maintain personnel records; maintain all necessary insurance policies; respond to staff questions regarding benefits and personnel policies and procedures; supervise contractors; work with WHC's Board of Directors and related committees; oversee staff recruitment, onboarding, development, and management; oversee the completion of performance reviews; coordinate with an external auditing firm; maintain WHC's tax-exempt status and business license; and handle all fiscal management.

Women's Health Center of West Virginia

12. WHC is a health center that has been providing quality reproductive health care to West Virginians since 1976.

13. WHC offers a wide range of health care services, including various gynecological and support services. For example, our "Right from the Start Program" provides pregnancy and parenting support services to high-risk, Medicaid-insured pregnant people and infants through aged one.

14. Until June 24, 2022, WHC also provided abortion care. WHC provided medication abortion from 28 days (4 weeks) through 77 days (11 weeks) of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"), and procedural abortion from 4 weeks and 0 days through 17 weeks and 6 days LMP. WHC provided abortion services two days per week.

15. 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; and 4% (47) occurred between 14 weeks and 16 weeks LMP. The vast majority of patients—87% (1129)—were from West Virginia, and the remainder were from other states, largely Ohio and Kentucky.

16. 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.

17. In my experience, WHC patients seek abortion for a multitude of personal reasons. For example, some patients decide that it is not the right time in their life to have a child or to expand their family. Others desire more financial, professional, or familial stability before having

a child or additional children. Still others may have preexisting medical conditions that put them at higher-than-average risks of complications from continuing a pregnancy.

18. While our patients generally seek abortion care as soon as they are able, many face obstacles that can delay access to care. Some patients may not discover they are pregnant until later in their pregnancies, and others may experience difficulties navigating the medical system, including finding a provider and scheduling an appointment.

19. Many WHC patients are also struggling financially. Indeed, approximately 40% of our patients have Medicaid as their health insurance, though they generally cannot use Medicaid to cover the cost of the abortion.

Impact of *Dobbs v. Jackson Women's Health Organization* and Enforcement of West Virginia's Criminal Abortion Ban

20. I understand that the Criminal Abortion Ban was never explicitly repealed by the West Virginia legislature and therefore the Attorney General or Kanawha Prosecuting Attorney may try to enforce the Criminal Abortion Ban against physicians who provide abortion care in West Virginia, and against anyone who helps or attempts to help a pregnant person obtain an abortion now that the Supreme Court has overruled *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*. This decision has forced us to stop providing necessary abortion care to our patients.

21. Now that the Supreme Court has overruled *Roe v. Wade*, I fear that people involved in providing abortion care under West Virginia Code § 61-2-8, the Criminal Abortion Ban, will be criminally prosecuted. If WHC continues to provide abortion care in light of *Dobbs*, I am worried that I will face possible criminal prosecution under the Criminal Abortion Ban, either directly or as an accomplice. I have the same concern for WHC and its officers, directors, and staff. Accordingly, WHC has ceased providing abortion care.

22. Shutting down WHC's abortion services will harm WHC's operations and the health of our patients in profound and disturbing ways.

23. To start, WHC has already suffered financially and operationally and will continue to if this Court does not act imminently. Since the Center stopped providing abortion care on June 24, 2022, we have already laid off counselors, physicians, and nurse anesthetists, all of whom are dedicated to supporting our abortion patients. We may need to lay off more staff members and counselors. We simply have no other choice—abortion care accounts for 40% of WHC's annual revenue, and suspending abortion services will leave us with a significant budget deficit. We have only budgeted enough to keep on full-time staff through the end of 2022.

24. Moreover, I am extremely concerned that the longer we are unable to provide abortion services, the more difficult it will be for us to resume. I am concerned that the out-of-state physicians who currently travel to West Virginia to provide abortions at WHC will begin providing services elsewhere, and it may be difficult to get them back on the schedule, or for them to come as often as they previously did. It is very difficult to recruit out-of-state physicians to come to West Virginia to provide abortion care, and now that we have had to stop employing our current providers for that purpose, there is no guarantee we will be able to recruit them or others to return to WHC in the future. Essentially, the longer the Criminal Abortion Ban remains enforceable, the more precarious the Center's ability to provide abortion care in the future becomes.

25. Having to stop providing abortion care also frustrates WHC's ability to fulfill its mission, which is to provide reproductive health care that respects patients' choices. If we cannot provide abortion care to pregnant people who want it, then we are not honoring their choice. Our staff members have broken down in tears because we are not able to provide abortion care to

patients who need it.

26. I am especially concerned for our most vulnerable patients who come to us seeking an abortion. For example, I recall a pre-teen patient from one of our poorest counties, who made the arduous journey to our clinic to seek an abortion after she was abused and raped by an older man she knew and trusted. Now that the prospect of prosecution under the Criminal Abortion Ban has forced us to stop providing abortion care, I do not know how vulnerable patients like this girl will be able to obtain the health care that they need. I worry they will be forced to endure pregnancy and childbirth against their will, without any regard for the consequences to them.

27. On the day *Dobbs* was issued, the Center staff called approximately 60 to 70 patients who had scheduled appointments to receive abortions at the Center in the coming weeks to cancel their appointments. Some patients broke down and could not speak through their sobbing. Some patients were stunned and didn't know what to say. Some patients did not understand. Some staff members at the Center cried so hard they were unable to continue working. Managers had to pull through to call the abortion patients we had scheduled. At the end of the day, we all had to turn our phones off to give staff time to just breathe and grieve.

28. Since a draft *Dobbs* opinion was leaked to the public in April 2022, WHC has been operating in a constant state of extreme stress. That stress has amplified exponentially since *Dobbs* was issued on June 24, 2022. Just the prospect of being unable to provide abortion services for our patients was physically and emotionally devastating for my staff and myself. Now that nightmare has become a reality.

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AFFIANT FURTHER SAYETH NAUGHT.


KATIE QUINONEZ

SWORN TO AND subscribed before me this 27th day of June, 2022.


Notary Public



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,

Plaintiffs,

v.

CHARLES T. MILLER, *et al.*,

Defendants.

Civil Action No. 22-C-520

Hon. SA1080

FILED
2022 JUN 29 PM 1:00
CLERK OF COURT
KANAWHA COUNTY CIRCUIT COURT

AFFIDAVIT OF DEBRA BEATTY

I, Debra Beatty, being duly sworn, state under penalty of perjury that the foregoing is true and correct.

1. I am over the age of 21.
2. I am a Plaintiff in this action. I am bringing my claims on behalf of myself and my patients. I write this affidavit in support of Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction against enforcement of West Virginia Code section 61-2-8 (the "Criminal Abortion Ban"). I have personal knowledge of the facts set forth in this affidavit and could and would testify competently to those facts if called as a witness.

General Background and Experience

3. I currently reside in Charleston, West Virginia.
4. I graduated from West Virginia University ("WVU") in 1976 with a Bachelor of Social Work degree and obtained a Master of Clinical Social Work from WVU in 1978.
5. I am currently licensed by the West Virginia Board of Social Work Examiners as a Licensed Independent Clinical Social Worker.
6. I was an adjunct faculty member at WVU Graduate School of Social Work from 1996 to 2007 and trained graduate students in clinical social work in that capacity.
7. Over the course of my career, I have provided counseling to adults and minors, and have done so in private practice and through public institutions, in inpatient and outpatient contexts, and via individual and group therapy. I have been actively involved in counseling veterans since 1985, when I began working with Vietnam veterans diagnosed with posttraumatic stress disorder at an outpatient Veterans Affairs ("VA") Veteran Center in Charleston. I have also provided monthly clinical consultations to counselors at both the Charleston and Huntington VA Veteran Centers.

8. I currently provide counseling services to patients at the Women's Health Center of West Virginia (the "WHC" or "Center").

Experience with Abortion Care Counseling

9. I have always been passionate about access to reproductive health care, particularly as someone who grew up in West Virginia before the Supreme Court issued its decision in *Roe v. Wade*, when abortion care in West Virginia was criminalized.

10. When I was a teenager, my mom used to tell me stories about her experience growing up in rural West Virginia in the 1930s, where access to abortion and contraceptive care was virtually nonexistent. Fortunately, today, it is possible for women to safely self-manage abortions with medication. But back then, and especially in rural locations, pregnant people's options were limited. When faced with unplanned and unwanted pregnancies, some pregnant people were so desperate to end their pregnancies that they would take matters into their own hands, frequently unsafely. My mother told me that she had heard stories about people who took various herbs or douched with bleach, inserted sharp objects into their cervix, or hit themselves in the stomach to attempt to terminate their pregnancies. She said that women desperate not to continue their pregnancies would go to extreme measures, and sometimes they would die as a result. I was horrified.

11. As an undergraduate student at WVU in the 1970s, I became involved with the Women's Information Center in Morgantown, which provided counseling services to pregnant people—mostly students—and sexual assault survivors. Because abortion at that time was illegal in West Virginia, the Women's Information Center helped pregnant people seeking abortions connect with places out-of-state where they could legally access abortion care. Although many of the pregnant people we counseled were students who were fortunate to have the resources needed to travel to states where abortions were available, some people we counseled did not have the

means to travel. Those individuals were left without any ability to access legal abortion care. There was not much we could do to help them; we provided them with the information about out-of-state clinics and referred them to professional counselors and personal physicians.

12. After I obtained my social work degrees, and after *Roe* was decided and accessing abortion care in West Virginia no longer carried the threat of criminal prosecution, I continued to counsel patients in connection with their reproductive health. As a therapist in private practice with a local psychiatrist from 1978 to 1980, I occasionally counseled pregnant people considering abortion care. And as a therapist at Shawnee Hills Behavior Health Center from 1980 to 1985, I counseled patients who had experienced unplanned and unwanted pregnancies, as well as patients who were fearful of becoming pregnant and wanted information about contraception.

Women's Health Center

13. I first became involved with the WHC approximately three years ago as a volunteer escort.

14. In 2020, I joined the WHC's staff as a counselor.

15. Currently, I work at the Center approximately one to six days each month (on days when the Center sees patients).

16. The Center offers non-directional, professional counseling to all of its patients who seek abortion care.

17. Patients elect to speak with me for a variety of reasons.

18. Sometimes, patients want to talk through relational issues, who they can safely discuss their decision with, and their perception of society's and their family's view of abortion. They ask questions like: "What will people think of me?" "What if my husband finds out?" "My mother is an evangelical Christian, what will she think?"

19. Other patients seek counseling because they have preexisting mental health issues like depression, anxiety, or posttraumatic stress that are exacerbated by the hormonal changes associated with pregnancy and the process of navigating their decision-making process, and they want to talk through their experience.

20. Whatever the patient's reason for seeking counseling, my role is to understand their history, listen to their questions, concerns, and ideas, and help them explore their decision-making process.

21. I never try to influence any patient's decision one way or the other. My goal is to provide patients with the tools and resources that they need to make the decision that is best for themselves.

22. Most pregnant patients who choose to have an abortion are sure about their decision. In some instances, however, I have counseled patients who were initially ambivalent about their choice and ultimately, after speaking with me, decided not to go through with the abortion. Sometimes, depending on the circumstances, I advise pregnant patients to take more time with their decision to make sure they are sure. Counseling those patients is just as much a part of my job as counseling the patients of mine who choose to obtain abortions.

23. I generally meet with patients before they receive abortion care. But if the patient requests, I am also available to stay with them during the abortion procedure, provide post-abortion care counseling or connect them with a therapist in their home county.

24. Pregnant people who come to WHC to receive abortion care receive very specific telephone counseling with WHC nursing staff prior to their visit, which includes Center staff reading state-mandated language to the patient regarding the abortion method. By the time patients visit the Center to obtain an abortion, most patients feel prepared to proceed.

25. I also counsel pregnant patients who are too far along in their pregnancies to receive abortion care at the Center. WHC provides abortion care up to 17 weeks and 6 days from the first day of a patient's last menstrual period. When we are unable to provide a pregnant patient with care due to how far along they are in their pregnancy, I counsel the patient on available alternatives and connect them with information and resources, including helping them with making an appointment and arranging transportation to out-of-state clinics that may be able to help them.

26. Those who discover they cannot receive care due to the stage of their pregnancies are distraught and express feeling "lost." There are almost always tears, and there is often fear, sometimes panic, about how to proceed. They wonder what options are available to them, and we discuss this thoroughly. Regardless of what they decide, I encourage them to seek support from family or their partners if it is a safe option to do so.

27. I also have state-mandated recordkeeping obligations. I provide the State with anonymized data on every patient I see, including their age, gestational stage, home county in West Virginia or whether they are from out of state, their race, and the type of abortion they had.

Impact of Criminal Abortion Ban

28. I understand that the Criminal Abortion Ban was never explicitly repealed by the West Virginia legislature and therefore the Attorney General or Kanawha Prosecuting Attorney may try to enforce the Criminal Abortion Ban against anyone who helps or attempts to help a pregnant person obtain an abortion, including counselors, now that the Supreme Court has overruled *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*.

29. I have read the Criminal Abortion Ban and am deeply concerned about the effect that it will have on my ability to freely counsel my patients and my patients' ability to access necessary health care.

30. I am worried that, because of the Criminal Ban, performing any of the aspects of my job as a counselor at WHC could put me at risk of criminal prosecution.

31. At the same time, the Criminal Abortion Ban compromises my ability to fulfill my professional obligations to my patients. My ability to have open and honest conversations with my patients is essential to providing my patients with appropriate and necessary care, but if I do so, I might face criminal penalties.

32. The Criminal Abortion Ban may also impact my employment. Since I provide counseling to patients receiving abortion care, my services may no longer be needed now that the Center no longer provides abortion care.

33. Most importantly, the impact of the Criminal Abortion Ban on the Center's patients and others in West Virginia will be irreversibly devastating. The Criminal Abortion Ban will effectively eliminate access to abortion care in West Virginia. Pregnant people will once again be forced to travel out of state to obtain abortion care, assuming they have the means to do so; self-manage their abortions; or remain pregnant and give birth against their will. And even for those patients who can afford to travel, many out-of-state clinics do not have any available appointments until well beyond certain patients' gestational limits.

34. I remember all too well what it was like when abortion care was criminalized in West Virginia. I am devastated—for myself, for my granddaughter, for my patients, and for all people in West Virginia—that a new generation may have to endure the fear and harm created by a criminal prohibition on abortion care.

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AFFIANT FURTHER SAYETH NAUGHT.

Debra Beatty
DEBRA BEATTY

SWORN TO AND subscribed before me this 27th day of June, 2022.

Kimberly J Richards
Notary Public



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, *et al.*,

Plaintiffs,

v.

CHARLES T. MILLER, *et al.*,

Defendants.

Civil Action No. 22-c-526

Hon. SA1070

2022 JUN 25 PM 4:06
JAN LERO
WEST VIRGINIA COUNTY CIRCUIT COURT

AFFIDAVIT OF MARGARET (MAGGIE) MCCABE

I, Maggie McCabe, being duly sworn, state under penalty of perjury that the foregoing is true and correct.

1. I am over the age of 21

2. I write this declaration in support of Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction against enforcement of West Virginia Code section 61-2-8 (the "Criminal Abortion Ban").

3. My mother co-founded the first abortion clinic in West Virginia, the Women's Health Center ("WHC") in Charleston, West Virginia, after I had to travel outside West Virginia to obtain an abortion in 1972. Based on my experiences, I am deeply concerned about the many ways the renewed enforcement of a law criminalizing abortion care will harm the WHC, its patients, and their families.

Background

4. I am a native West Virginian and grew up in Charleston.

5. I attended high school here in the early 1970s. At that time, abortion care was criminalized in West Virginia. Living under this extreme ban—with a lack of access to reproductive care or even reliable information—created an atmosphere of fear and uncertainty among women I knew.

6. Teenage girls who got pregnant in high school at that time (the late 1960s and early 1970s) had limited options. Some from wealthy families would "go to Europe" for a year to have the baby. I also knew of at least one family that lived near us in which a young woman got pregnant, and she was shamed into having the child. In poorer parts of Charleston, I also heard of "back alley" abortions.

7. In 1972, in the summer between my sophomore and junior year of high school, I got pregnant. I was extremely fortunate because when my boyfriend and I told our parents, they were disappointed, but ultimately supportive of my decision to have an abortion.

8. Because of West Virginia's law criminalizing abortion care, I could not legally obtain an abortion in West Virginia.

9. My mother, Jane McCabe, and I flew to Washington, D.C., where the area's first abortion clinic had recently opened. We flew there on a Sunday, had my abortion on Monday, and returned home on Tuesday. I was fortunate to have parents who could afford the expenses not only of the medical procedure but also of travel out of state.

10. My abortion gave me the opportunity to return to school, graduate high school, and attend college. It allowed me ultimately to marry my boyfriend, start a family at the time of our choosing, and have a career. I am now an assistant professor for medical coding. I am also a grandmother of four.

Women's Health Center of West Virginia

11. While I was having the abortion procedure at the Washington, D.C. clinic, my mother met with administrators at Planned Parenthood nearby to ask how to start a clinic.

12. She felt strongly that women should be able to access reproductive care within their own state, knowing well that West Virginia has many women living in poverty and far from the interstate highway who did not have the means to travel beyond state lines. She wanted those women, and all women in West Virginia, to be able to choose to access abortion care in their home state.

13. After the Supreme Court decided *Roe v. Wade* and people were no longer afraid of being prosecuted for helping to provide abortions in West Virginia, my mother worked to gain

support from local business leaders and St. John's Episcopal Church for her vision. She opened the WHC in Charleston in 1976. She was the first president of the board when she died in a car crash later that year.

14. I have carried on her legacy by speaking publicly about my own abortion experience and acting as a volunteer patient escort at the WHC.

Impact of *Dobbs v. Jackson Women's Health Organization* and the Enforcement of West Virginia's Criminal Abortion Ban

15. I am very concerned that the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* means that abortion care will again be the basis for criminal prosecution in West Virginia, and I am very worried about what this will mean for pregnant people in West Virginia. I remember a time when nearly all abortions in West Virginia were illegal, and I'm afraid of going back there.

16. I am especially concerned for vulnerable pregnant people. As someone who lives in a rural area outside of Charleston, I have neighbors who already have little access to health care. Even though they are just 20 minutes north of the city, because they lack access to transportation, information, and other resources, even nearby health care services are out of reach. As I have shared my story, many individuals have shared that they go to the WHC to receive annual pap smears and wellness check-ups.

17. I am also worried about the ability of young girls, particularly those who are pregnant because of incest or rape, to access care. During my time as a WHC escort, I have encountered patients as young as 12 or 13 who were the victims of rape or incest. I worry that these girls will now be forced to remain pregnant and give birth because they can no longer access abortion care at the WHC.

18. Unlike when I needed my abortion in 1972, today, it fortunately is possible for women to safely self-manage an abortion with medication. But those women in West Virginia who choose to do so will be placed in the extreme and unfair position of having to worry about being prosecuted under the Criminal Abortion Ban. And for those people who do not know about or cannot access a medication abortion, I am very concerned that the sudden inability to lawfully access an abortion in West Virginia will put them at risk of harm.

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AFFIANT FURTHER SAYETH NAUGHT.

Maggie McCabe

Signed by: Maggie McCabe
Date & Time: June 24, 2022 08:15:09 EDT

MAGGIE MCCABE

STATE OF WEST VIRGINIA,

COUNTY of KANAWHA, to-wit:

SWORN TO AND subscribed before me this 24th day of June, 2022



[Handwritten Signature]

 Notary Public

This remote online notarization involved the use of audio/visual communication technology

My commission expires: 1/3/2027

Video Meeting

Video ID: 0aGSLwxtu7, Recording URL: <https://ds4u.cc/0aGSLwxtu7>, Passcode: 6476

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, *et al.*,

Plaintiffs,

v.

CHARLES T. MILLER, *et al.*,

Defendants.

Civil Action No. 22-C-524

Hon. Salongo

FILED
2022 JUN 23 PM 6:02
CLERK OF COURT
KANAWHA COUNTY CIRCUIT COURT

AFFIDAVIT OF REVEREND EARL JAMES (JIM) LEWIS

I, Reverend Earl James ("Jim") Lewis, being duly sworn, state under penalty of perjury that the foregoing is true and correct.

1. I am over the age of 21.
2. I write this affidavit in support of Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction against enforcement of West Virginia Code section 61-2-8 (the "Criminal Abortion Ban").
3. I served in the United States Marine Corps in Southeast Asia from 1960 to 1961.
4. After my service, I returned to the United States and became an Episcopal clergyperson. I have served churches and dioceses in the United States, including in West Virginia, for over fifty years. I sponsored the founding of the Women's Health Center of West Virginia, the first clinic to provide abortion care in West Virginia, after the Supreme Court's decision in *Roe v. Wade*. I am currently retired and reside in Charleston, West Virginia.
5. Based on my experiences, I am deeply concerned about the impact that a law criminalizing abortion care will have on pregnant people in West Virginia.

The Clergy Consultation Service on Abortion

6. Religion has always been a core part of my life. My religious experience was deep in my spirit and took place early in my life. I grew up in the Episcopal church in Baltimore, Maryland, and attended an Episcopal school. I was inspired to become a clergyperson by the incredible priests, teachers, and coaches in my community. I graduated from Virginia Theological Seminary in Alexandria, Virginia, in 1964.
7. Before the Supreme Court's decision in *Roe v. Wade*, abortion was illegal in West Virginia. Given the threat of criminal prosecution, access to abortion in West Virginia unsurprisingly was virtually nonexistent.

8. In the late 1960s, Reverend Howard Moody, a minister at Judson Memorial Church in New York, founded the Clergy Consultation Service ("CCS") on Abortion, a nationwide network of religious leaders who helped women access abortions by providing counseling, information, and funds to travel, primarily to New York and/or Washington, D.C.

9. I first learned about the CCS when I was a clergyperson in Annapolis, Maryland, from pregnant people asking me about the CCS and whether I could help them obtain abortion care in some way. Listening to their stories was eye opening. Growing up in the church, I had been taught that abortion was morally wrong. But after listening to people's stories, I knew that it did not align with my faith to deny women access to necessary care. That was the listening project of my life. Growing up as a boy, I didn't have a sister, and I didn't have a mother that was incredibly open. It was a conversion for me. I saw the entire system of hierarchical male power and misogynistic power, and it didn't fit into my faith to treat women this way. I could not avoid the injustice of dictating what someone could or could not do with their body. I did not yet know which resources to point them to, but I knew that I needed to help.

10. In the early 1970s, when I was working as a clergyperson in Martinsburg, West Virginia, I received a letter in the mail inviting me to a meeting in Charleston, West Virginia, to join the CCS. I was elated and immediately booked a plane ticket. Approximately twelve clergymen from around the State, including myself, gathered at the meeting in a Presbyterian church. We were each assigned an area of the State to be the contact person for, and were given resources to help pregnant people, who would be referred to us through the Clergy Consultation Service. I was assigned to the Eastern Panhandle region of West Virginia.

11. Through the network, I counseled many pregnant people over the course of approximately five years. Most of the pregnant people were referred to me through word-of-mouth.

12. My goal as a counselor was to listen to pregnant people. I never tried to pressure them to make a particular choice regarding their pregnancies or talk them out of their decisions. My focus has always been on honoring each person's choice.

13. If a pregnant person decided they wanted to carry their pregnancies to term and raise their child, I helped connect them with financial support services. If they decided they wanted to carry their pregnancies to term and place their child for adoption, I helped them find adoption services. And if they decided they wanted an abortion, I provided information about abortion care services, helped them find a way to travel to New York City, provided them with information regarding what to do and where to go upon arrival in New York, and helped them with other logistics or resources they needed.

14. Most of the pregnant people I counseled were poor and/or survivors of domestic violence. Most did not feel that they could speak to their ministers at home about their situation. They seemed relieved that they could finally talk to a clergy person and, for those who so chose, find help to obtain an abortion.

The Impact of *Dobbs v. Jackson Women's Health Organization* and Enforcement of West Virginia's Criminal Abortion Ban

15. I understand that the Supreme Court overruled *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*, and it has once again become criminal to provide abortion care to pregnant people in West Virginia under the Criminal Abortion Ban.

16. As someone who lived in West Virginia when abortion was illegal, I am very afraid of what will happen to pregnant people in West Virginia now that abortion care is

criminalized again. As was the case back then, the impact will likely fall disproportionately on poor and marginalized women and/or survivors of domestic violence.

17. I remember what the landscape of abortion access was like when I arrived in West Virginia over fifty years ago. Even all these years later, I still remember how frightened the women I counseled were, and how grateful they were to have someone to listen to and provide resources for them to obtain an abortion.

18. I have read the Criminal Abortion Ban to other residents in my retirement community, who are also horrified that such an outdated and extreme law could be enforced against West Virginians. Like me, they remember the harms associated with criminalizing abortion all too well, and fear for what the implications may be for their children and grandchildren.

19. I am filled with grief at the prospect that the same services the CCS was providing more than fifty years ago may be necessary yet again. To provide information and resources to people seeking necessary health care is a way of fulfilling a core tenet of my faith—to love and support people in my community and provide help to those who need it.

20. When I was doing this work early on, I knew they might stop me, but that didn't make me afraid. I had gone to war, and I was afraid then that I wouldn't return. I knew my work with CCS could result in me getting in trouble with the authorities, but some things are just worth doing.

21. Others have also told me that they are terrified that, now that abortion has become criminalized again in West Virginia, they may go to jail if they help someone obtain an abortion. Now that I am 87, I am of the age where I only have a few more years left. If resuming the kind of work I did with CCS means carrying me off, then so be it. This is something I feel

passionately about. I look at how inspirational the advocates in the reproductive rights community are and how important the rights they aim to protect are. And I think about the sacrifice of life I saw in my time in the Marine Corps in service of this country. Who am I to stay on the sidelines when the lives of so many West Virginians are at stake?

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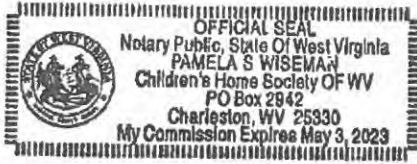
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AFFIANT FURTHER SAYETH NAUGHT.

Reverend Earl James (Jim) Lewis
REVEREND EARL JAMES (JIM) LEWIS

SWORN TO AND subscribed before me this 27th day of June, 2022.



Pamela S. Wiseman
Notary Public

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
2022 JUL 29 PM 1:13
JANIS L. GIBSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

WOMEN'S HEALTH CENTER OF WEST VIRGINIA, on behalf of itself, its staff, its physicians, and its patients, *et al.*,

Plaintiffs,

v.

CHARLES T. MILLER, *et al.*,

Defendants.

Civil Action No. 22-C-520

Hon. SAIGAS

AFFIDAVIT OF NANCY TOLLIVER

I, Nancy Tolliver, being duly sworn, state under penalty of perjury that the foregoing is true and correct.

1. I am over the age of 21.

2. I write this affidavit in support of Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction against enforcement of West Virginia Code section 61-2-8 (the "Criminal Abortion Ban").

3. In 1976, I was the founding Executive Director of the Women's Health Center of West Virginia ("WHC" or the "Center") in Charleston, West Virginia, where I worked until 1986. I then became the Director of Community Health Services at the West Virginia State Department of Health and Human Resources and, a few years later, became the Commissioner of Finance and Administration and, eventually, the Deputy Commissioner of Public Health at the West Virginia Department of Health and Human Resources, where I worked until 1996.

4. Around that time, I helped establish the Tri-State Public Health Leadership Institute, later renamed the Southeast Public Health Leadership Institute, through the University of North Carolina at Chapel Hill. I also taught at the Heartland Public Health Leadership Institute at St. Louis University in St. Louis, Missouri, until 2005.

5. In 2006, I established and led the West Virginia Perinatal Partnership, a statewide medical, hospital, and nursing professional group centered on the goal of improving health outcomes for pregnant people and infants in West Virginia. I am currently retired.

6. Based on my experiences, I am very concerned about the impact that a law criminalizing abortion care will have on the Center, its patients and their families, and all West Virginians.

Background

7. I have always been very passionate about women's health.

8. Prior to founding the Center, I was a maternal child health nurse. I graduated from St. Anthony's Hospital School of Nursing in Oklahoma City, Oklahoma, in 1966 and moved to West Virginia.

9. I started working at Charleston Area Medical Center, Memorial Division Hospital ("CAMC - Memorial Division Hospital") in West Virginia in 1967 and stayed until 1970.

10. Prior to founding the Center, I was very involved in providing childbirth and breastfeeding education to new parents. I was a member of the Board of Directors of the International Childbirth Education Association and a Certified La Leche League Group Leader. I taught various educational courses through the West Virginia Childbirth Educational Association in Charleston and as a group leader for La Leche League International, including preparing for childbirth, parenting, and breastfeeding.

11. As a nurse in West Virginia from the late 1960s to the 1980s, I often encountered young pregnant patients, including teenagers and sometimes children just twelve years old. Some were pregnant as a result of incest or rape. I had not encountered patients like these in my training and was astonished and concerned. Abortions were not

available in the State at the time. I was only able to provide maternal and childbirth care and birth control education and services to these patients.

12. In or around 1974, after the Supreme Court decided *Roe v. Wade*, I was approached by former childbirth and breastfeeding education patients of mine to see whether I had interest in opening a clinic that would provide abortion services for pregnant people in West Virginia. They knew that I had established a nonprofit relating to childbirth education and believed I had the experience and was compassionate and concerned enough about reproductive health to help build the clinic. At the time, I believed very deeply that there was a need for these services, but was initially hesitant due to how I would be received by others in the Catholic Church, where I was a member.

13. Around the same time, I was in discussions with a fellow Catholic nurse about opening a maternity home to support pregnant people with unplanned pregnancies.

14. After a few months of deliberation, I knew what I needed to do—I ultimately decided to open the Center. The maternity home was only one piece of the full set of services pregnant people in West Virginia needed. Pregnant people in West Virginia did not have any option to receive abortion care at the time. I knew that enabling access to abortion—having the *choice*—was an essential part of fully responding to the needs of pregnant people. Having worked closely with the rural community in West Virginia, I was very aware that what West Virginians needed was a clinical service that offered comprehensive health care education, medical services, including abortion care, and supportive counseling care. My vision was to open a women's center that would

eventually offer a full spectrum of options, including abortion care, contraception, and parenting education.

Opening the Women's Health Center of West Virginia

15. After WHC was founded, the Center's Board of Directors and I secured technical support, but still needed to obtain a matching loan from a local bank.

16. Before going to the bank, forty individuals from around West Virginia agreed to be financially responsible to secure the loan. We obtained a loan from a bank in Charleston with relative ease and were able to repay the loan extremely quickly—within 18 months. Our ability to secure agreements from members of the community and the speed with which we were able to pay back the loan was indicative of how important the Center was to West Virginians.

17. As soon as we opened the Center, there was a great demand for the services we provided. We were always fully booked for abortion services and quickly expanded the Center's abortion service hours from half a day, two days per week to eventually provide abortion care four days a week due to patient demand. The Center always prioritized the pregnant person's *choice* regarding their pregnancies.

18. Importantly, the Center did not only provide abortion care, but also focused on women's health care services more broadly.

19. It was important to the Center's Board, staff, and supporters that we provide holistic care and community health education. In fact, we established several committees within the Center that focused on other aspects of reproductive and maternal health care, such as the Education Committee, the Maternal Health Committee, and the Breast and

Cervical Committee. The committees were composed of physicians, nurses, and laypeople who were passionate about educating the community on such issues. The Center also provided pre-adolescent education classes, which covered comprehensive, accurate physical reproductive health development for children. The classes included discussions about decision-making and peer pressure.

20. Eventually, our health educational classes were well-recognized within the community and we were frequently called upon to deliver classes within the public and private school systems. After a few years, WHC housed the first on-call and on-site counseling service for abused women. The Center also established the Widowed Persons Service to assist people who had lost their partners.

21. In my time at the Center, we were able to provide abortion care to people who sought to end their pregnancies for a variety of personal reasons.

22. We also helped many pregnant people in abusive situations. I was astonished at the number of women who lived in abusive environments. I recall one patient with seven children who visited the Center seeking both abortion and contraceptive care due to unplanned pregnancies. Her husband would not allow her to use birth control, and even threw out her birth control when he found it.

23. I met and spoke with women who were victims of incest by their fathers, uncles, or brothers. I personally counseled pregnant teenagers and one or both of their parents. Many held strong religious beliefs. Many were Catholic. Many had never supported abortion previously but now acknowledged that there was a need for access to abortion. I felt great sympathy for my patients and their families.

24. We also helped people whose pregnancies put their own health at risk, and/or who learned of devastating fetal diagnoses. I will never forget some of those stories. In one instance, a woman I know learned during her pregnancy that her baby would be born with anencephaly, which is a neural tube defect resulting in an underdeveloped brain and incomplete skull. Some babies are stillborn, and others survive only a few hours or days. She ultimately decided to have an abortion. She was so grateful that she was able to make her own decision about her pregnancy. There are so many cases like that.

25. Based on my many years of involvement with the Center and work since, I know that the choice to have an abortion is always a thoughtful, considered decision. I also know that the right to choose and have access to abortion was absolutely crucial to the thousands of women and girls that I met during my years with the WHC.

Impact of *Dobbs v. Jackson Women's Health Organization* and Enforcement of West Virginia's Criminal Abortion Ban

26. I understand that the Supreme Court overruled *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization* and now the Center has had to stop providing abortion care out of fear of criminal prosecution.

27. I am very afraid of what will happen to the Center and pregnant people in West Virginia now that the Center must stop providing abortion care.

28. I remember what it was like to live in West Virginia and provide health care to pregnant people here when abortion care was criminalized. Pregnant people who wanted to obtain an abortion and had the means to afford it would travel out-of-state. But others were forced to try to find illicit care, induce their own abortions, or remain pregnant against their will.

29. I know from opening the Center over fifty years ago that criminalizing abortion is not what West Virginians want or need. Access to safe abortions is a necessary and critical component of health care. I am terrified to think that we will return to a time I thought we had left behind.

30. As I think about what it will be like to live in West Virginia when abortion care again carries a risk of criminal prosecution, I am reminded of the young pregnant patients I encountered as a nurse at the CAMC – Memorial Division Hospital.

31. Since its founding over forty years ago, the Center has always helped young women. I am devastated that the Center will have to shut down its abortion care services, and I am particularly concerned about all the ways that the Criminal Abortion Ban will harm vulnerable individuals who need access to safe and compassionate reproductive health care.

32. Indeed, the people who will be disproportionately harmed will be those pregnant people living in poverty or in abusive and difficult situations, who already lack adequate information and resources. Without a place like the Center, those people will have nowhere in West Virginia to turn and may be fearful of the stigma and legal consequences associated with asking for help obtaining an abortion. And the people who might otherwise help them obtain abortions may be too scared to provide any assistance due to the potential criminal penalties.

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AFFIANT FURTHER SAYETH NAUGHT.

Nancy J. Tolliver
NANCY TOLLIVER

SWORN TO AND subscribed before me this 27 day of JUNE, 2022.



[Signature]
Notary Public

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, *et al.*,

Plaintiffs,

v.

CHARLES T. MILLER, *et al.*,

Defendants.

Civil Action No. 22-C-554

Hon. Salango

FILED
10-21
10:23 PM
CARRIE S. GUNDEL, CLERK
KANAWHA COUNTY CIRCUIT COURT

AFFIDAVIT OF DR. JOHN DOE, M.D.

I, Dr. John Doe, M.D., being duly sworn, state under penalty of perjury that the foregoing is true and correct:

1. I am over the age of 21.
2. I am a Plaintiff in this action. I am bringing my claims on behalf of myself and my patients. I write this affidavit in support of Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction against enforcement of West Virginia Code section 61-2-8 (the "Criminal Abortion Ban"). I have personal knowledge of the facts set forth in this affidavit and could and would testify competently to those facts if called as a witness.

Background and Experience

3. I am a native West Virginian. I currently reside in Pittsburgh, Pennsylvania.
4. I graduated from West Virginia University School of Medicine in 2018 and completed my residency in Family Medicine at New York Presbyterian Hospital/Columbia University Medical Center in New York in 2021.
5. I was certified by the American Board of Family Medicine in 2021. I am currently licensed to practice medicine in West Virginia, Pennsylvania, and New York.
6. I have trained residents in providing both procedural and medication abortion care.
7. I have provided medication and procedural abortion services at the Women's Health Center (the "WHC" or "Center") in Charleston, since September 2021.
8. I also provide abortion care and non-abortion medical services, including full-spectrum primary care to patients of all ages, at multiple facilities in Pennsylvania.

Women's Health Center

9. As noted, at the Center, I provide both medication and procedural abortion care to patients.

10. Abortion is one of the safest medical procedures available, and far safer than continuing a pregnancy to term.

11. Medication abortion is available to patients who are at or before 11 weeks and 0 days, as measured from the last menstrual period (“LMP”), and is a common abortion method for many of the patients I see at this stage in pregnancy. Medication abortion involves ingestion of two pills: mifepristone and misoprostol.

12. For patients receiving medication abortion care, a licensed practical nurse first contacts the patient 24 hours before the patient’s appointment to read them state-mandated language regarding medication abortion. When the patient arrives at the Center for their visit, a medical assistant at the Center administers preliminary urine pregnancy and sexually transmitted infection (“STI”) tests. A nurse practitioner then performs the patient’s ultrasound and counsels the patient on the initial steps of the medication process. Once the patient has met with the nurse practitioner, the patient then has the option of meeting with a counselor at the clinic. I then meet with the patient and provide information regarding the medications.

13. In West Virginia, the law requires that medications used in a medication abortion be prescribed in person.¹ Accordingly, I prescribe both pills in person. After the patient has signed the consent forms, I administer the first pill—mifepristone—in person, and the patient self-administers the second pill—misoprostol—in the privacy of their own home or at another location of their choice, 24 to 48 hours later.

¹ See W. Va. Code § 30-3-13a(g)(5).

14. While medication abortion is effective at terminating the pregnancy in the vast majority of cases, in very rare instances, there will be an ongoing pregnancy. In that case, the standard of care is for the patient to receive a procedural abortion at the Center.

15. I also provide procedural abortions, which I perform at the Center with the assistance of a medical assistant or a licensed practical nurse. Although sometimes referred to as a "surgical abortion," a procedural abortion is not what is commonly understood to be "surgery," as it involves no incision and no need for general anesthesia.

16. For an in-clinic, procedural abortion, medical staff at the Center go through a similar process as for medication abortion of administering initial urine pregnancy and STI tests, performing ultrasounds, and providing educational information and state-mandated language to the patient regarding the procedure. Then, the patient takes a combination of Valium and ibuprofen, or, if they have chosen twilight sedation, is escorted to the procedure room and an IV is inserted by a certified nurse anesthetist. I then perform the abortion procedure. When the procedure is complete, the patient is then transported to the recovery room and, once the patient feels ready, is discharged and free to return home.

17. Occasionally, patients who are beyond 17 weeks and 6 days LMP will come to the Center seeking an abortion, and we are unable to help them. Those situations are uniformly difficult; the patient typically experiences a moment of grief, worry, and/or panic. When faced with these situations, I inform these patients that there are resources available to them and that how far they are into their pregnancies will not necessarily be a barrier to their obtaining abortion care. I refer them to other staff members at the Center, who provide these patients with specifics and connect them with other clinics and/or abortion funds outside of West Virginia that are able to help them.

Abortion Care

18. As I noted above, abortion is one of the safest medical procedures in the United States. In terms of mortality and morbidity, abortion is significantly 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.²

19. Abortion is also very common. Prior to *Dobbs*, approximately one in four women in the United States had an abortion.³

20. I know from my experience as a provider that people in West Virginia decide to terminate their pregnancies for a variety of personal reasons, including familial, medical, and financial.

21. 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.⁴

22. 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

² See Nat'l Academies of Scis., Eng'g, and Med., *The Safety & Quality of Abortion Care in the United States* 74–75 (2018).

³ 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>.

⁴ Katherine Kortsmit et al., *Abortion Surveillance – United States, 2019*, 70(9) *Surveillance Summ.* (Nov. 26, 2021), <https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm>.

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.

23. 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.

Pregnancy

24. 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.

25. The risk of death associated with childbirth is approximately fourteen times higher than that associated with abortion.⁵

26. Maternal mortality is a particularly acute problem in the United States. In 2019, 754 women died of maternal causes in the United States—a significant increase from the 658 who died in 2018.⁶ The U.S. has the highest maternal mortality rate of all high-income

⁵ Elizabeth Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *Obstetrics & Gynecology* 215, 216 (Feb. 2012).

⁶ 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>.

countries, and the difference is not marginal—the maternal mortality rate here is more than double that of most other high-income countries.⁷

27. 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.⁸

28. From the onset of pregnancy, every patient is at risk of complications. Pregnancy-related complications are much more common than abortion-related complications.⁹

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

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

31. 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.

⁷ 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>.

⁸ *Maternal Mortality Rates* at 1.

⁹ 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).

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

33. In addition, health conditions such as preeclampsia, deep-vein thrombosis, and gestational diabetes, may arise during pregnancy.

34. Many pregnant women 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.¹⁰ 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.¹¹

35. 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.

36. 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.

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

¹⁰ 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, 942 (2017).

¹¹ *See id.* at 941; *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.

38. 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.

39. 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.

Criminal Abortion Ban

40. I have read the Criminal Abortion Ban and am gravely concerned about the effect that it will have on my ability to provide abortion care and on my patients' ability to access necessary health care.

41. I understand that the Criminal Abortion Ban was never explicitly repealed by the West Virginia legislature and therefore the Attorney General or Kanawha Prosecuting Attorney may try to enforce the Criminal Abortion Ban against physicians who provide abortion care in West Virginia, and against anyone who helps or attempts to help a pregnant person obtain an abortion now that the Supreme Court has overruled *Roe v. Wade* in *Dobbs v. Jackson*

Women's Health Organization. Accordingly, as of June 24, 2022, the day *Dobbs* was decided, the Center has stopped providing abortion services.

42. Even if the Center had not stopped providing abortion services, I would not continue to provide abortion care in West Virginia because I cannot risk not only my livelihood, but also my liberty. I am deeply concerned that if I administer or prescribe medication abortion, or perform a procedural abortion, then I will have committed a felony under West Virginia law and would be subject to imprisonment for up to ten years. I also understand that I could lose not only my West Virginia state medical license but also my licenses to practice in New York and Pennsylvania if I were convicted of a felony under the Criminal Abortion Ban.

43. I understand that the Criminal Abortion Ban contains an exception for abortions performed to save the life of the pregnant person or for measures taken to save the life of the embryo or fetus.

44. The meaning of the exception for life-saving care, without any further definition or elaboration, is not clear to me. Given the harsh criminal penalties the Ban imposes, I would be afraid to interpret the language as encompassing anything beyond an immediate or imminent threat to the life of the patient.

45. Moreover, I am concerned that the elected law enforcement officials in West Virginia who would enforce the Criminal Abortion Ban 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. Many of these elected officials have made their anti-abortion views a core part of their political platform. In reality, health situations are incredibly complex. Physicians and health care professionals are far more capable of considering the nuances of patient care and determining what constitutes "life-saving care," and I

would feel more comfortable exercising my medical judgment regarding when care is necessary to save a life if that provision were enforced by licensing boards comprised of other medical professionals.

46. Furthermore, a law permitting abortion only to save the life of the patient is extremely narrow and woefully inadequate. Such an exception does not encompass the broad range of serious health conditions that lead some people to seek abortion care—*i.e.*, diabetes mellitus and chronic hypertension—that can result in significant, life-altering health consequences short of death.

47. The Criminal Abortion Ban also impacts my employment. Now that the Center has stopped providing abortion care, it no longer needs my services as an abortion provider.

48. In addition to the harms that enforcement of the Criminal Abortion Ban creates for me personally, it also gravely harms my patients and others in West Virginia. The Criminal Abortion Ban has effectively eliminated access to abortion care in West Virginia. The day that *Dobbs* was decided, staff at the Center had to cancel the appointments of dozens of patients who had been scheduled for abortions in the coming weeks.

49. Because the Criminal Abortion Ban has forced the Center to stop providing abortion care, my patients will be forced to travel out of state to obtain abortion care; to self-manage their abortions, which could also be illegal under West Virginia's sweeping criminal law; or to remain pregnant and deliver against their will.

50. Even for those who are able to travel, it may be difficult to secure care out of state. Following *Dobbs*, the other out-of-state clinic where I provide abortion care has already been overwhelmed by the increased call volume from out-of-state pregnant people seeking care,

including many patients from West Virginia. Indeed, appointments at my out-of-state clinic and at similar clinics are already booking up weeks beyond patients' gestational limits and may not have the capacity to handle all the increased demand, and some patients likely will be unable to access care as a result.

51. I was born and grew up in West Virginia, and will always consider myself a West Virginian regardless of where I live. The culture in West Virginia is so beautiful and the people here are my family. I am deeply committed to serving people in West Virginia. Before medical school, I was very involved in political advocacy and grassroots organizing, and seeing the practical change that advocates could make is what propelled me to become a doctor in the first place. I attended medical school here, and I decided to return to provide care in West Virginia after finishing my residency because I want to serve the community I'm from.

52. Ultimately, the Criminal Abortion Ban requires me to choose between breaking the Hippocratic Oath and violating the criminal code. Providing abortion care to my patients is essential health care. But if I continue to do so, I will face criminal penalties and adverse licensing actions. No physician should be put to that choice.

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AFFIANT FURTHER SAYETH NAUGHT.

John Doe
DR. JOHN DOE, M.D.

SWORN TO AND subscribed before me this 27 day of June, 2022.

Jason Martin

Notary Public

Commonwealth of Pennsylvania - Notary Seal
JASON MARTIN, Notary Public
Allegheny County
My Commission Expires June 6, 2025
Commission Number 1313284

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,

Plaintiffs,

v.

CHARLES T. MILLER, *et al.*,

Defendants.

Civil Action No. 22-C-520

Hon. Salando

2022 JUL 29 PM 4:02
WOMEN'S HEALTH CENTER
KANAWHA COUNTY CIRCUIT COURT

AFFIDAVIT OF DANIELLE MANESS

I, Danielle Maness, MSN, APRN, CNM, WHNP-BC, ADS, being duly sworn, state under penalty of perjury that the foregoing is true and correct:

1. I am over the age of 21.
2. I am a Plaintiff in this action. I am bringing my claims on behalf of myself and my patients. I write this affidavit in support of Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction against enforcement of West Virginia Code section 61-2-8 (the "Criminal Abortion Ban"). I have personal knowledge of the facts set forth in this affidavit and could and would testify competently to those facts if called as a witness.

3. I am the Chief Nurse Executive at the Women's Health Center (the "WHC" or "Center") in Charleston, West Virginia. Based on my experiences, I fear the many ways the renewed enforcement of the Criminal Abortion Ban will harm the WHC, its staff, its patients, and their families.

Background

4. I have worked in the nursing profession for over a decade.
5. I graduated from the University of Charleston with a Bachelor of Science in Nursing in 2011 and from Georgetown University with a Master of Science in Nursing in 2015.
6. I have obtained the following professional certifications:
 - a. Registered Nurse;
 - b. Advanced Practice Registered Nurse;
 - c. Certified Nurse-Midwife;
 - d. Board Certified Women's Health Care Nurse Practitioner;
 - e. Neonatal Resuscitation Program; and
 - f. Basic Life Support—CPR.
7. My husband and I moved to West Virginia in late 2008 to be closer to family.

My Role at the Women's Health Center of West Virginia

8. I started at the WHC in 2015 as a Certified Nurse Midwife and Nurse Practitioner. I worked there for a few months while waiting for insurance credentialing for my full-time position at a local federally qualified health center.

9. In September 2020, I returned to the WHC part-time as a Nurse Practitioner.

10. In March 2022, I took on the full-time role of Chief Nurse Executive at WHC. In this position, I am responsible for overseeing all clinical procedures and processes associated with abortion and gynecological services.

11. Every patient that receives abortion care at the Center first completes a urinary pregnancy test, ultrasound, and sexually transmitted infection tests, which I oversee. We provide the patient with consent forms and read them any mandatory legal disclosures. I put patient information into charts, make sure medications are administered, and occasionally rotate into patient recovery rooms to relieve other staff members.

12. I approve all medication abortions and any procedural abortions involving medical issues. For each patient considering medication abortion, I receive the patient registration intake information, which includes their medication abortion screening forms, from the registration front desk team after the patient is scheduled for their appointment. I review the patient's medical history, current medication list, and surgical history in order to determine whether they are a good candidate for medication abortion. For patients considering either medication or procedural abortion, if the patient has a medical condition that may require additional lab testing prior to receiving abortion care, such as a thyroid disorder or a bleeding or clotting disorder, I am responsible for contacting nearby laboratories and arranging lab orders prior to their appointment at the Center. I discuss patients with complicated health histories with the Center's medical director prior to approving the patient's care.

13. In the unlikely event there is a medical emergency in the course of providing reproductive care, such as if the patient's vital signs become unstable or the patient has abnormal bleeding, I act as the "team lead" in addressing the situation, including overseeing the patient's transfer of care from the Center to a hospital, if necessary. In my experience, emergency complications resulting from abortion care in a clinical setting are exceedingly rare.

14. I also have a management role with respect to the Center's three physicians, the other nurse practitioner, one nurse anesthetist, three counselors, two medical assistants, and one nurse. I am responsible for overseeing and evaluating the work of the medical assistants and the licensed practical nurse. I also manage and oversee the flow of the abortion team on days we are providing abortions, which includes a physician, nurse practitioner, counselor, and nurse anesthetist. When there are changes in clinical procedures or protocols, it is my responsibility to relay them to the clinical staff.

15. I love my job. Above all, I enjoy playing an active part in patients' care, advocating for them, and supporting them through what may be a difficult time in their lives.

Impact of *Dobbs v. Jackson Women's Health Organization* and the Enforcement of West Virginia's Criminal Abortion Ban

16. I understand that the Criminal Abortion Ban was never explicitly repealed by the West Virginia legislature and therefore the Attorney General or Kanawha Prosecuting Attorney may try to enforce the Criminal Abortion Ban against anyone who helps or attempts to help a pregnant person obtain an abortion, now that the Supreme Court has overruled *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*. I understand that, as a result of *Dobbs*, the Center must cease providing all abortion care.

17. I understand that if I were to continue my work with abortion care at the WHC—as I strongly wish to do—I could be criminally prosecuted and could lose my nursing licenses.

Because of that concern, I am being forced to stop providing care that I know from my many years of experience is critical for people in West Virginia.

18. Moreover, because the Center has stopped providing abortion care, some employees are at risk of losing their jobs. Our entire team at the Center feels strongly that abortion care is health care. We are all scared and anxious that abortion care is now subject to criminal penalty in West Virginia.

19. I am also terrified about the impact that *Dobbs* and the resulting suspension of abortion care at the WHC will have on its patients, their families, and all West Virginians.

20. Without access to legal abortion care in West Virginia, pregnant people will be forced to travel out of state, if they can afford to do so; self-manage their abortions; or remain pregnant and go through childbirth against their will.

21. Regarding self-management, although it is possible for women to safely self-manage an abortion through medication, many women don't have the means or know how to seek out the necessary medication, and due to the Criminal Abortion Ban, accessing that medication will be increasingly difficult and could put them at legal risk.

22. The medication abortion regimen typically involves two medications, mifepristone and misoprostol. However, due to the threat of prosecution under the Criminal Abortion Ban for health professionals who order, prescribe, and dispense these drugs for abortion care and for the pregnant people who take them, it may be difficult for pregnant people in West Virginia to obtain them.

23. And even assuming pregnant people could access the medications they need to safely self-manage their abortion, they may still face criminalization for doing so. Others may be

deterred from even trying to access safe medications out of fear of criminalization, which may lead them to pursue unsafe methods.

24. Moreover, in my experience, some employees at hospitals and emergency rooms in West Virginia are openly anti-abortion and therefore not sympathetic to people who have undergone *legal* abortions, which creates a stigma that I fear would particularly deter women from seeking help if they need it after a self-managed abortion. Accordingly, pregnant people who attempt to self-manage abortions and need follow-up care may be less likely to present to a health care provider or hospital for fear of prosecution, thereby increasing the risk to their safety and health.

25. In reality, abortion bans like the Criminal Abortion Ban do not stop abortions—they simply make *safe* abortions more difficult to obtain and may increase the risks of complications or delay the appropriate medical interventions if complications occur, which puts patients at risk for increased morbidity and mortality.

26. On the day the Supreme Court's decision in *Dobbs* came out, the staff at WHC spent hours calling approximately 60 to 70 patients who had scheduled appointments to receive abortion care at the Center to cancel their appointments. Although we feared a bad decision was coming, that still didn't help all of us fully prepare emotionally for that moment. Some staff members and some patients cried so hard that they couldn't speak.

27. As a nurse, I believe that abortion care is critical health care. Being forced to stop providing abortion services at the Center—the only abortion clinic in West Virginia—has already done irreversible damage to the Center, its staff, its patients, and all West Virginians. I have two teenage daughters and I am terrified for what criminalizing abortion care will mean for their health and lives.

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AFFIANT FURTHER SAYETH NAUGHT.

Danielle Mawess COM, WVA 2012
DANIELLE MAWESS

SWORN TO AND subscribed before me this 7th day of June, 2022.



Kimberly J Richards
Notary Public