IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Plaintiffs,

v.

CHARLES T. MILLER, PROSECUTING ATTORNY OF KANAWHA COUNT, *et al,*

Respondents/Defendants.

Judge Tera L. Salanga
22-C-556, 22-C-557, 22-C-558, 22-C-559, 22-C-560

RESPONDENT MILLER'S ANSWER TO THE VERIFIED COMPLAINT AND MOTION TO CONSOLIDATE CASES

Comes now the respondent Charles T. Miller, in his official capacity as Prosecuting Attorney for Kanawha County, West Virginia, by Donald P. Morris and Laura Young, Assistant Prosecuting Attorneys, and answers the complaint and motion to consolidate as follows.

1. Respondent Miller does not object to the motion to consolidate these civil actions.

2. Respondent Miller agrees that to his knowledge, there have been no criminal prosecutions under W. Va. Code § 61-2-8 since at least 1973, when *Roe v. Wade*, 410 U. S. 113 (1973) was decided.

3. Respondent Miller agrees that W. Va. Code § 61-2-8 has not been repealed.

4. Respondent Miller has made no public statements about prosecuting, or not prosecuting anyone, health provider or patient, for a violation of W. Va. Code § 61-2-8. Anecdotally, Respondent Miller observes that despite any current confusion about the enforceability of said statute, such confusion is likely to be clarified when a special session of the Legislature is called to address this issue. Again, anecdotally, Governor Justice has said such session will be called

soon. Respondent Miller is not predicting whether or not the West Virginia Legislature will ban abortion; instead, whatever statute is passed will clarify the status of the availability of abortion in West Virginia, and whether or not abortions are criminalized.

5. West Virginia did enact a regulatory, civil, scheme for the administration of abortions but that neither expressly nor impliedly repealed the abortion ban.

6. The ban has not fallen into desuetude. It is not void for vagueness.

7. Respondent Miller agrees that venue and jurisdiction are proper in Kanawha County.

8. Respondent Miller notes that he is joined in this action in his official capacity, in that as prosecuting attorney, he shall attend to the criminal business of the State, in Kanawha County, as noted in the complaint.

9. Respondent Miller agrees that the State of West Virginia enacted, and still has in its criminal statutes, a code section which by its terms, makes it a felony for any person, who by any means, with intent to destroy an unborn child, and produces a miscarriage shall be guilty of a felony.

10. Respondent Miller does not challenge the factual allegation regarding criminal prosecutions under the ban, which appear to have continued until 1967. Criminal prosecutions ceased once Courts noted that the West Virginia abortion ban statute seemed to irreconcilable with *Roe.*

11. Respondent Miller agrees that the legislature enacted a civil, regulatory scheme for the administration of abortions, but also notes that the criminal statute was never repealed.

12. There are reward, challenges, positive outcomes, and negative outcomes both in termination of a pregnancy, and in pregnancy itself, resulting in the birth of a child.

13. Respondent Miller agrees that a number of public officials have made statements regarding the enforceability or not of the abortion ban after the decision in Dobbs *v. Jackson Women's Health Organization,* No. 19-1392, 2022 WL 2276808, (2022), which overruled both *Roe* and *Casey.*

14. The only public statement made by Respondent Miller after the decision in *Dobbs,* is that he believes the law is in a state of flux. Addressing specifically this action, Respondent Miller states there are no referrals pending under the ban statute.

15. Again, while acknowledging that the plaintiffs have asserted harm because of the "confusion" regarding enforcement of the abortion ban statute, it is likely that in the reasonably foreseeable future, the legislature and governor, will participate in a special session which will squarely address and enact legislation regarding the status of abortion in West Virginia post-*Dobbs.*

16. W. Va. § 61-2-8 has not become unenforceable because of the principle of desuetude. Syllabus Point 3 of *Committee on Legal Ethics of W. Va. State Bar v. Printz,* 187 W. Va. 182, 416 S.E.2d 720, provides that penal statutes may become void under the doctrine of desuetude if (1) The statute proscribes only acts that are *malum prohibitum* and not *malum in se;* (2) There has been open, notorious and pervasive violation of the statute for a long period; and (3) There has been a conspicuous policy of nonenforcement of the statute.

17. That decision goes on to note that "desuetude is not, however, a judicial repeal provision that abrogates any criminal statute that has not been used in X years." *Printz* at 187 W. Va. 182 and 188, 416 S.E.2d 720 at 726. Further, there must be an open, notorious, and pervasive violation of the statute for a long period, accompanied by a conspicuous policy of non-enforcement. *Printz* at 187 W. Va. 182 and 188, 416 S.E.2d 720 at 726.

18. Prosecutions under the abortion ban statute were suspended because such prosecutions would fly in the face of *Roe*. That is, since 1973 until last month, there has not been an open, notorious, and pervasive violation of the statute. Nor has there been a conspicuous policy of nonenforcement. There could be no violations of the ban statute because it was unenforceable. It is not that the state did not enforce the ban; it could not. Therefore, the argument that the statute is void because of desuetude fails in two particulars. There have been no violations of the statute, open and notorious, since 1973 because enforcement was incompatible with *Roe*. And there has been no conspicuous policy of nonenforcement.

19. Because *Roe* has been repealed, the statute can be violated and can be enforced.

20. The statute has not been impliedly repealed. The enactment of a regulatory scheme which set forth procedures and standards for the administration and performance of abortions post-*Roe* neither addressed nor repealed W. Va. § 61-2-8. Implied repeal occurs when there is such a positive repugnancy between the statute claimed to be repealed and subsequent enactment that they cannot be reconciled. Syl. Pt. 8, in part, *Rice v. Underwood*, 205 W. Va. 274, 517 S.E.2d. 751 (1998.) Moreover, Syl Pt.6 of that same decision states that "Repeal of a statute by implication is not favored in law." (Internal citations omitted.)

21. The adoption of administrative regulations designed to render abortion safe in West Virginia is not repugnant to the abortion ban. It was an acknowledgment of the then existing legal climate that *Roe* rendered enforcement of the ban unconstitutional. Implied repeal is not favored in law. Therefore, absent some express action by the West Virginia legislature repealing W. Va. § 61-2-8, the statute has not been repealed, expressly or impliedly, and can be enforced.

22. Syllabus Points 4 and 5 of *State v. Mills*, 243 W. Va. 328, 844 S.E.2d 99 (2020) provide that "A criminal statute must be set out with sufficient definiteness to give a person of ordinary

intelligence fair notice that his contemplated conduct is prohibited by statute and to provide. And in Syl Pt. 5 "There is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions. The basic requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language." Syllabus Point 1, *State ex rel. Myers v. Wood*, 154 W. Va. 431, 175 S.E.2d 637 (1970). adequate standards for adjudication." Syllabus Point 1, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974).

23, W. Va. § 61-2-8, gives very specific guidance that notifies an individual of what actions he is forbidden to do, and is sufficient for adjudication. It is not void for vagueness.

24. The plaintiffs have not demonstrated they are entitled to injunctive relief. Generally, an injunction is issued only when the party seeking the injunction demonstrates the likelihood of irreparable harm; the absence of any other remedy at law, and balancing the hardships, including the likelihood of irreparable harm to the plaintiff, the likelihood of harm to the defendant with an injunction, the plaintiff's likelihood of success on the merits, and the public interest. *Northeast Nat. Energy LLC v. Pachira Energy LLC,* 243 W. Va..362 at 366, 844 S.E.2d 133 at 138 (2020.)

25. As plaintiffs are unlikely to succeed on the merits in that the statute in question is not void for vagueness, has not been impliedly repealed, and is not unenforceable under the principle of desuetude, they are not entitled to an injunction.

CONCLUSION AND RELIEF REQUESTED

Respondent Miller respectfully requests that this Court deny both a temporary and later, permanent injunction, and further requests that these civil actions be dismissed from the Court's docket.

Respectfully submitted by:

Charles T. Miller
Prosecuting Attorney
Kanawha County, West Virginia

By:

Donald P. Morris
Assistant Prosecuting Attorney

And

Laura Young
Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

I, Laura Young, Assistant Prosecuting Attorney for Kanawha County, do hereby certify that a true copy of the foregoing answer was served upon counsel for the plaintiff by enclosing the same in an envelope addressed to said counsel at her last known address, Loree Stark, American Civil Liberties Union of West Virginia Foundation, P. O. Box 3952, Charleston, West Virginia, 25339-3952, with postage fully paid, and depositing said envelope in the regular United States mail on the 11th day of July, 2022.

Laura Young
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