Attachment to Notice of Appeal

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Nature of the Case, Relief Sought, and Outcome Below

Plaintiffs-Appellees Women's Health Center of West Virginia, Dr. John Doe, Debra Beatty, and Katie Quiñonez are abortion providers. On June 29, 2022, they filed a complaint against Defendant, Charles T. Miller, in his official capacity as Prosecuting Attorney of Kanawha County, and Patrick Morrisey, in his official capacity as Attorney General of the State of West Virginia, seeking to declare the State's 1870 law protecting unborn human life impliedly repealed, void for desuetude, and a violation of due process. Plaintiffs also sought to preliminarily enjoin the Act's enforcement, though only under the theories of implied repeal and desuetude.

West Virginia Code § 61-2-8 (the "Act") forbids "any person" from administering "any drug or other thing, or us[ing] any means, with intent to destroy [an] unborn child," which does "destroy [the] child"—unless the "act is done in good faith, with the intention of saving the life of [the] woman or child." W. Va. Code § 61-2-8. Violators face "not less than three nor more than ten years" in prison. *Id.* The State enforced this law from its passage in 1870 until 1973, when the U.S. Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), which prohibited states from protecting unborn life before viability. A federal court then declared the Act unconstitutional and directed a lower court to temporarily enjoin it though no permanent injunction was ever entered. *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644-45 (4th Cir. 1975).

To address this legal barrier, the Legislature passed a series of civil laws protecting women and unborn human life to the maximum extent possible under the new constitutional rule. *See* W. Va. Code §§ 16-2M-1 *et seq.* (Pain-Capable Unborn Child Protection Act), 16-2F-1 *et seq.* (Parental Notification of Abortions Performed on Unemancipated Minors Law), 16-2O-1 *et seq.* (Unborn Child Protection from Dismemberment Abortion Act), 16-2I-1 *et seq.* (Women's Right to Know Act), 16-2P-1 *et seq.* (Born-Alive Abortion Survivors Protection Act), 16-2Q-1 (Unborn Child with a Disability Protection Act). Then, last month, the U.S. Supreme Court overturned *Roe*, allowing states to again enact and enforce rational laws protecting unborn human life. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2283-84 (2022). While this ruling allowed the State to once again enforce its 1870 Act, Plaintiffs argued, in seeking the preliminary injunction, that the Legislature impliedly repealed it by enacting civil laws regulating *Roe*-required abortions, and that the Act is void for desuetude.

On July 18, 2022, the lower court made a bench ruling granting a preliminary injunction enjoining the Act's enforcement, holding that Plaintiffs were likely to succeed on their implied-

repeal and void-for-desuetude claims, and that the third claim in Plaintiffs' complaint, not briefed by the parties—that, as written, the Act deprives Plaintiffs of procedural due process as unconstitutionally vague under Article III, Section 10 of the West Virginia Constitution—also supported issuing the injunction. The Attorney General orally moved to stay the injunction at the hearing; the Circuit Court declined to rule upon this motion and directed the parties to brief the issue, which was completed on July 20, 2022, but for which no order has yet been entered. On July 20, 2022, the Circuit Court entered a formal written order and opinion regarding its decision to grant the preliminary injunction, which included discussion of the Circuit Court's procedural due process grounds under its discussion of the implied repeal claim. The Attorney General now asks the West Virginia Supreme Court to immediately stay the preliminary injunction (per motion already filed with the Court), reverse the lower court, dissolve the preliminary injunction, and allow the State to again enforce its 1870 Act.

Statement of the Assignments of Error

1. The lower court erred by holding that Plaintiffs were likely to succeed on their implied-repeal claim.

a. The issue is whether the West Virginia Legislature intended to repeal the 1870 Act by enacting civil laws post *Roe* to protect unborn life to the maximum extent possible under a new constitutional rule that has recently been reversed.

b. The lower court ruled that Plaintiffs were likely to succeed on their implied-repeal claim because, in its view, the State's *Roe*-era civil laws conflict with the 1870 Act. But that is wrong. To begin, because the *Roe*-era civil laws do *not* conflict with the Act, the lower court should have never applied the disfavored implied-repeal doctrine. The Act

and *Roe*-era civil laws complement each other. The former forbids only abortions performed with specific intent, while the latter forbid even certain reckless abortions. The laws simply allow West Virginia multiple enforcement options to fit a given situation.

Second, notwithstanding any conflict analysis, this Court does not "adjudge a statute to be repealed by implication unless a legislative intent to repeal or supersede the statute *plainly and clearly appears*." *Rice*, 205 W. Va. 274, 285, 517 S.E.2d 751, 762 (1998) (emphasis added) (quoting *State ex rel. Thompson v. Morton*, 140 W. Va. 207, 212, 84 S.E.2d 791, 795 (1954)). The enactment history and context of the *Roe*-era civil laws show that the Legislature intended the address the new mischief of *Roe*—which required certain abortions and kept the State from enforcing the 1870 Act. There is no evidence the Legislature intended to repeal the Act by enacting pro-life protections post *Roe*.

What's more, even in the event of conflicting statutory regimes, this Court must "determine which statute is controlling," *In re Sorsby*, 210 W. Va. 708, 713, 559 S.E.2d 45, 51 (2001). Because implied repeal "cannot arise out of supposed legislative intent [not] expressed," *State ex. rel Marcum v. Wayne Cnty. Ct.*, 90 W. Va 105, 110 S.E.2d 482, 484 (1922), this Court should discern the true and obvious "legislative intent" from history. *State ex rel. Bibb v. Chambers*, 138 W. Va. 701, 717, 77 S.E.2d 297, 306 (1953). The West Virginia Legislature has consistently sought to protect unborn human life. Given that *Roe* is now overruled, the "primary difficulty" or mischief that the civil laws addressed "no longer exists." *In re Sorsby*, 210 W. Va. at 714.

The 1870 Act aimed to stop abortion to the extent allowed by law. By passing *Roe*-era civil laws, the Legislature intended to address the new mischief of *Roe*—which required certain abortions and kept the State from enforcing its Act. *See Charleston Area Med. Ctr.*,

Inc., 529 F.2d at 644. There is no suggestion that the Legislature intended its *Roe*-era laws to repeal the Act and provide *less* protection for the unborn. The lower court disregarded the plain intent of the Legislature to protect life to the extent possible and instead applied a disfavored canon to allow newer laws to trump an older one. This Court should address and correct that glaring error on appeal.

2. The lower court also erred by holding that Plaintiffs were likely to succeed on their void-for-desuetude claim.

a. The issue is whether the 1870 Act is void for desuetude when the State had consistently enforced it for over 100 years until *Roe* kept it from doing so, deeming the Act unconstitutional up to last month, when the U.S. Supreme Court overturned *Roe*.

b. The lower court ruled that Plaintiffs were likely to succeed on their desuetude claim because the State did not enforce the 1870 Act after *Roe*. But the desuetude doctrine only applies where (1) a law proscribes acts that are *malum prohibitum*, (2) there has been "open, notorious, and pervasive violation of the statute for a long period," and (3) there is has been a "conspicuous policy of nonenforcement." Syl. Pt. 3, *Comm. On Legal Ethics of the W. Virginia State Bar v. Printz*, 187 W. Va. 182, 186, 416 S.E.2d 720, 724 (1992). The doctrine does not apply here.

There have been no "open, notorious, and pervasive violations" of the 1870 Act. Plaintiffs' contention is that such violations followed *Roe*. But after the United States Court of Appeals for the Fourth Circuit held the Act "unconstitutional beyond question" under *Roe, Charleston Area Med. Ctr., Inc.*, 529 F.2d at 644, performing an abortion in West Virginia was no longer a violation of the Act at all. The holdings of *Roe* and *Doe* protected such actions.

For the same reason, it is impossible to say there has been a "conspicuous policy of nonenforcement." No West Virginia executive official had the constitutional authority to enforce the 1870 Act after *Roe*. Instead, it is more appropriate to say that there was a court-enforced barrier to the Act's enforcement, and no West Virginia case has ever used such a situation to judicially repeal a validly enacted law by invoking desuetude. The enjoining of a state law due to a federal court decision is *not* policy but an "application of [a] remedy" after the "determination of the law arising upon [ ]" "the truth of the fact." *State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 749, 278 S.E.2d 624 (1981) (quotation omitted). Defendants are likely to succeed on Plaintiffs' desuetude claim. The Court should correct this issue.

3. The lower court erred by adopting Plaintiffs' unraised due process claim and holding that, if the 1870 Act were not impliedly repealed or void for desuetude, that it would be unconstitutionally vague and violate due process.

a. The issue is whether the lower court erred by addressing Plaintiffs' due process claim and holding that, if the 1870 Act were not impliedly repealed or void for desuetude, that it would be unconstitutionally vague and violate due process, when Plaintiffs did not present or brief that issue in its motion for preliminary injunction.

b. Courts should not address, and grant an award on, issues not raised in the parties' briefing. By not arguing due process in their preliminary injunction below, Plaintiffs waived any argument that they deserve a preliminary injunction based on that theory. *See In re I.T.*, 233 W. Va. 500, 504, 759 S.E.2d 447, 451 (2014) (holding that unraised issued below was "waived"). The lower court should not have addressed Plaintiffs' unbriefed due process claim. As for the merits, the 1870 Act is not vague. West Virginians

have understood the law for 150 years. Insofar as the Act is considered alongside the newer *Roe*-era civil laws, there is no conflict. The lower court erred by holding that the 1870 Act violates due process. This Court should fix that error.

4. The lower court erred by holding that the balance of equities and public interest favored entering a preliminary injunction and granting Plaintiffs' motion.

a. The issue is whether the lower court erred by entering an order preliminarily enjoining the 1870 Act when Plaintiffs are unlikely to succeed on the merits of their claims and the balance of equities and public interest favor not enjoining the Act.

b. The lower court entered an order preliminarily enjoining the Defendants below from enforcing the Act, holding that Plaintiffs are likely to succeed on the merits and that the balance of equities and public interest favor awarding the injunction. That ruling was error. As detailed in the points above, Plaintiffs are unlikely to succeed on the merits of their claims. And the balance of equities and public interest favor the State here.

Plaintiffs also show no irreparable injury. Because neither the State nor the federal constitution provides a right to abortion, Plaintiffs have no legally protected interest in performing abortions. Economic liberty interests do not suffice. And because Plaintiffs suffer no personal harm, they cannot assert harm on behalf of third parties, who can vindicate their own interests anyway. In contrast, the State is suffering irreparable harm every day the lower court's injunction remains in effect. West Virginia and the general public have a strong interest in ensuring that valid laws are properly enforced. That's especially true for the 1870 Act, a criminal law designed to protect unborn human life. Indeed, criminal law enforcement is constitutionally required. Syl. pt. 6, *State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 278 S.E.3d 624 (1981). And the State has a high interest in protecting

society's most vulnerable members. *See e.g.*, Syl. pt. 4, *State ex. rel. K.M. v. W. Va. Dep't of Health & Hum. Res.*, 212 W. Va. 783, 575 S.E.2d 393 (2002). The injunction harms this interest. At its 2021 rate, the Center performs at least one abortion every two hours it is open. So every week the injunction is in place, 25 unborn children will lose their lives. Each of those deaths irreparably harms the State's interest in protecting unborn life within its borders.

This appeal raises issues of immense public concern. The lower court declared that the State's oldest law protecting unborn human life has been impliedly repealed, is void for desuetude, and violates due process. It also preliminarily enjoined the Defendants below from enforcing the law. Every week, 25 unborn children will lose their lives until the lower court's injunction is stayed or dissolved. The Court should address the critical questions raised in this appeal, correct the lower court's glaring legal errors, and dissolve the preliminary injunction entered below.