Case No. C127867
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**Application for Pro Hac Vice Forthcoming*

Attorneys for Plaintiff Planned Parenthood Arizona, Inc., successor-in-interest to Plaintiff Planned Parenthood Center of Tucson, Inc.

ARIZONA SUPERIOR COURT

PIMA COUNTY

PLANNED PARENTHOOD CENTER OF TUCSON, INC., et al., Plaintiffs, v. MARK BRNOVICH, Attorney General of the State of Arizona, et al., Defendants,	No. C127867 **PLANNED PARENTHOOD ARIZONA'S RESPONSE TO DEFENDANTS' RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT** (Assigned to the Hon. Kellie Johnson)

and

CLIFTON E. BLOOM, as guardian ad litem of unborn child of plaintiff Jane Roe and all other unborn infants similarly situation,

Intervenor.

INTRODUCTION

For nearly 50 years, abortion has been legal in Arizona and relied on by pregnant Arizonans and their families to decide whether, when, and how they want to welcome children. It is also the subject of ongoing debate and legislation by Arizonans' elected representatives who have invested significant time and political capital to pass and modify abortion laws over the last 50 years. The result is a complex statutory scheme that regulates the provision of abortion by licensed physicians.

Most recently, the Legislature passed, and Governor Ducey signed, a law permitting physicians to provide abortions up until 15 weeks of pregnancy[1] ("15-week Law"), which will take effect September 24, 2022. Unlike other state legislatures around the country that passed "trigger" abortion bans in anticipation of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, the Arizona Legislature passed the 15-week Law.

Since *Dobbs* overturned *Roe v. Wade*, providers in Arizona have been left to navigate inconsistent statements by elected officials about the status of the laws. Specifically, it has been entirely unclear whether state officials—notwithstanding the mosaic of more recent abortion statutes that permit abortion performed by physicians—believe they have the authority to enforce a criminal ban on abortion, which can be traced back to 1864 and is currently codified as A.R.S. § 13-3603 (the "Territorial Law"), to criminalize otherwise legal, physician-provided abortions. For weeks, state officials, including Defendant Attorney General Brnovich (the

[1] Pregnancy is commonly measured from the first day of a pregnant person's last menstrual period or LMP. A full-term pregnancy is around 40 weeks LMP.

"AG"), either refused to state which abortion laws are in effect or gave inconsistent positions on the matter, even though A.R.S. § 13-3603 has been enjoined since 1973. This confusion brought abortion services to a halt across the state.

The AG has moved this Court for full relief from the judgment and injunction against A.R.S. § 13-3603 and has asked this Court to "return[] [the law] to what it was prior to *Roe*"—blatantly ignoring that Arizona's statutory code today includes dozens of laws that plainly permit physicians to provide abortions. Att'y Gen's Mot. for Relief from J. ("Mot.") at 10.[2]

Contrary to the AG's arguments, this Court has a duty to harmonize *all* of the Arizona Legislature's enactments as they exist today. Doing so here would result in a modification of this Court's judgment to make clear that A.R.S. § 13-3603 can be enforceable in some respects but does *not* apply to abortions provided by licensed physicians under the regulatory scheme the Legislature enacted over the last 50 years. Indeed, the State will not be harmed if all laws the Legislature enacted are harmonized, rather than granting the AG an undemocratic windfall in the full reanimation of a long-dead law. On the other hand, irreparable harm will befall Arizonans if this Court's 1973 injunction is modified to allow the State to enforce A.R.S. § 13-3603 in a manner that criminalizes nearly all abortions in the state.

BACKGROUND

I. The Territorial Law

As the State acknowledges, A.R.S. § 13-3603 was first enacted when Arizona was still a U.S. Territory, long before women were allowed to vote. Mot. at 3 n.2. A.R.S. § 13-3603 was formerly codified as § 13-211 and codified in a different part of the code prior to that. In fact, this near total criminal ban on abortion is so antiquated that it can be traced back to 1864 when the 1st Arizona Territorial Legislature enacted the "Howell Code" as a basis for Arizona's law.

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[2] Among other procedurally improper arguments, the AG has also moved to substitute Dr. Eric Hazelrigg as intervenor and guardian ad litem in this case. PPAZ will oppose this motion.

The Howell Code, attached as Exhibit A, included a ban on providing abortions that is substantially similar to A.R.S. § 13-3603. A.R.S. § 13-3603 today provides:

> A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life, shall be punished by imprisonment in the state prison for not less than two years nor more than five years.

A.R.S. § 13-3603, in effect, bans the provision of abortion, except when necessary to save a pregnant person's life. It does not contain any exceptions to allow abortions in the case of threats to the patient's health, rape, or incest. A.R.S. § 13-3603 was operative from its passage until enjoined by an Order of this Court in 1973. Ex. A to Mot.

II. *Planned Parenthood Center of Tucson, Inc. v. Nelson*

In 1971, the Planned Parenthood Center of Tucson, Inc.—a predecessor organization to Planned Parenthood Arizona, Inc. ("PPAZ")—and several medical providers filed suit in Pima County Superior Court, arguing that the Territorial Law[3] violated the Arizona and U.S. Constitutions. Ex. B to Mot. After a bench trial, the trial court agreed with the plaintiffs, entered a declaratory judgment that the Territorial Law violated federal and state law, and permanently enjoined enforcement of the Territorial Law. Ex. C to Mot.

The court of appeals disagreed with that conclusion and reversed. *Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. App. 142, 150 (1973). However, ten days later, the U.S. Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973). On January 30, 1973, the court of appeals granted plaintiffs-appellees' motion for rehearing and held that its "former opinion is vacated." *Nelson*, 19 Ariz. App. at 152. It further stated that, based on *Roe*, "the decision of the

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[3] At issue in the case were two other statutes: A.R.S. § 13-3604 (formerly § 13-212), which criminalized soliciting an abortion, and A.R.S. § 13-3605 (formerly § 13-213), which criminalized advertising abortion and contraception. Neither are at issue here; A.R.S. § 13-3604 has been repealed and the AG is not seeking to vacate or modify the injunction as to A.R.S. § 13-3605. Mot. at 1 n.1.

[*Nelson*] trial court is affirmed except that part of the decision limiting the effect of the decision to the parties only is modified in that the statutes in question are unconstitutional as to all." *Id.* This Court then entered a modified order and permanently enjoined the taking of action or threatening to take action to enforce the Territorial Law as to all persons. Ex. A to Mot.

III. Abortion Laws Enacted Since 1973

In the nearly five decades since 1973 (and since *Roe*), the Legislature has enacted a complex regulatory scheme that recognizes and regulates abortion as a lawful medical procedure in our state. This includes, for example:

- A.R.S. § 36-2301.01(A) (1984) (amended 2017) (allowing the performance of an abortion up to viability, meaning approximately 24-weeks, with limited exceptions to "preserve the life or health of the woman" after viability) (the "Post-viability Law");
- A.R.S. § 36-449.01, *et seq.* (1999) (amended 2021) (requirements for the licensure and operation of abortion facilities, including but not limited to, pre-abortion screening procedures, equipment that must be present in the facility, and procedures to be followed after an abortion is provided)[4];
- A.R.S. § 36-2155 (2009) (prohibiting anyone other than a "physician" from performing a "surgical abortion"), A.R.S. § 36-2160 (2021) (stating "[a]n abortion-inducing drug may be provided only by a qualified physician") (the "Physician-only Laws"[5]);

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[4] *See also* A.A.C. R9-10-101(1); A.A.C. R9-10-902(C)(6); A.A.C. R9-10-1501 *et seq.* (implementing A.R.S. § 36-449.01 *et seq.*).

[5] There are a collection of statutes and administrative rules that prohibit anyone other than a licensed physician from providing abortions and related services (the "Physician-only Laws"). *See* A.R.S. §§ 32-1606(B)(12) (prohibiting the State Nursing Board from "decid[ing] scope of practice relating to abortion"); 32-2531(B) (prohibiting physician assistants from performing "surgical abortions"); 32-2532(A)(4) (prohibiting physician assistants from performing medication abortions); 36-449.03(C)(3) (requiring a physician to be "available" at a clinic at

- A.R.S. § 36-2153 *et seq.* (2009) (amended 2021) (requiring patients to give informed consent, provided certain information is given 24 hours prior to abortion) (the "24-hour Law");
- A.R.S. § 36-2161 (2010) (amended 2021) (requiring a hospital or health care facility where abortions are performed to submit reports to the Department of Health Services ("Department") that must include, among other things, demographic information about the patient, informed consent, whether any complications occurred, and fetal tissue disposition).

Further, the Legislature has repeatedly amended Title 13 (*i.e.* criminal code) laws on abortion since 1973. In 1997, the Legislature enacted A.R.S. § 13-3603.01, prohibiting "partial-birth abortion." Then, in 2011, it passed A.R.S. § 13-3603.02, prohibiting abortions "based on . . . sex or race." *Id.* In 2021, it amended A.R.S. § 13-3603.02 to also prohibit abortions "sought solely because of a genetic abnormality of the child," (the "Reason Law"); *Isaacson v. Brnovich*, 563 F. Supp. 3d 1024 (D. Ariz. 2021), *vacated*, No. 21-1609, 2022 WL 2347565 (U.S. June 30, 2022). The Legislature provided an exception for medical emergencies (which is broader than the exception in the Territorial Law) in the race and sex-selective abortion

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which medication or aspiration abortions are performed); 36-449.03(D)(5), (G)(4), (5), (8) (requiring a physician to estimate the gestational age of the fetus, to be physically present at, or in the vicinity of, a clinic where medication or aspiration abortions are performed, to provide counseling, and to provide specific follow-up); 36-2152(A), (B), (H)(1), (M) (permitting only physicians to provide minors with abortion services); 36-2153(A) (requiring physicians to provide counseling), (E) (prohibiting non-physicians from performing "surgical abortion"); 36-2155 (same); 36-2156(A) (requires "the physician who is to perform the abortion" or "the referring physician" to facilitate provision of an ultrasound); 36-2158(A) (requiring physicians to provide information "orally and in person"); 36-2160 ("[a]n abortion-inducing drug may be provided only by a qualified physician"); 36-2161(A)(16), (20)–(21), (D) (requiring "the physician performing the abortion" to create certain records); 36-2162.01(A), (C) (requiring physicians to complete certain records as either the "referring physician" or the "physician who is to perform the abortion"). The Physician-only Laws also include the following regulations: A.A.C. R9-10-1507(B)(2), (3); A.A.C. R9-10-1509(A)(2), (B)(1), (5), (C), (D)(3)(a); A.A.C. R9-10-1510(B)(1); and A.A.C. R9-10-1512(A)(6) and (D)(3)(d).

prohibition and the Reason Law. A.R.S. §§ 13-3603.02(A); 36-2151(9). In the same bill that passed the Reason Law, the Legislature repealed A.R.S. § 13-3604, removing the ability to prosecute people who seek an abortion.

A. 2022 Legislative Session

During the 2022 legislative session, the Legislature considered but did not pass several bills regarding abortion. Namely, it considered adding a new section, A.R.S. § 13-3604, that would have prohibited medication abortion. H.B. 2811, 55th Leg., 2nd Reg. Sess. (Ariz. 2022). It also considered a privately-enforced ban on abortion after approximately six weeks LMP. S.B. 1339, 55th Leg., 2nd Reg. Sess. (Ariz. 2022); H.B. 2483, 55th Leg., 2nd Reg. Sess. (Ariz. 2022).

Ultimately, the Legislature instead passed the 15-week-Law, S.B. 1164, which provides that "[e]xcept in a medical emergency, a physician may not perform, induce or attempt to perform or induce an abortion" after 15 weeks LMP. S.B. 1164, 55th Leg., 2nd Reg. Sess. (Ariz. 2022). After signing S.B. 1164 into law, Governor Ducey announced that "the law of the land today in Arizona is the 15-weeks' law . . . and that will remain the law," even if the Supreme Court decides to overrule *Roe v. Wade*.[6]

B. *Dobbs v. Jackson Women's Health Organization* and Aftermath

On June 24, 2022, the U.S. Supreme Court upheld Mississippi's ban on abortions after 15 weeks LMP. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022). Immediately following the *Dobbs* decision, the AG released a statement that "[t]he Arizona Legislature passed an identical law to the one upheld in *Dobbs*, which will take effect in approximately 90 days."[7] The AG also highlighted his defense of the Reason Law on his Twitter

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[6] Howard Fischer, *Arizona Gov. Ducey: abortion illegal after 15 weeks*, KAWC (Apr. 24, 2022), https://www.kawc.org/news/2022-04-24/arizona-gov-ducey-abortion-illegal-after-15-weeks.

[7] Ariz. Att'y Gen., *Arizona Attorney General Mark Brnovich Applauds Supreme Court Decision to Protect Life* (June 24, 2022), https://www.azag.gov/press-release/arizona-attorney-general-mark-brnovich-applauds-supreme-court-decision-protect-life.

account.[8]

The Republican Caucus of the Senate, however, issued a press release claiming that "effective immediately is ARS 13-3603," but that S.B. 1164, once it becomes effective, will operate "in addition to ARS 13-3603."[9] On June 26, 2022, Maricopa County Attorney Rachel Mitchell appeared on a television news program and stated that after *Dobbs* "[s]ome abortion is going to be illegal in terms of the providers providing it," that "it is complicated," that some abortion statutes have been "found to be unconstitutional," that the *Nelson* injunction is still in effect, and that this was going to be a "complex question for the courts."[10] A spokesman for Governor Ducey maintained that "the governor's intention was clear" when he signed the law that abortions should only be banned after 15 weeks.[11]

Although the AG did not initially take the position that A.R.S. § 13-3603 would take effect post-*Dobbs*—and despite being subject to the *Nelson* injunction—on June 30, 2022, he posted on Twitter that his office had determined that "ARS 13-3603 is back in effect and will not be repealed in 90 Days by SB1164." The tweet added, "[w]e will soon be asking the court to vacate the injunction which was put in place following Roe v. Wade in light of the Dobbs decision earlier this month."[12] Two weeks later he filed the present motion.

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[8] Mark Brnovich (@GeneralBrnovich), Twitter (June 24, 2022, 7:47 AM), https://twitter.com/GeneralBrnovich/status/1540345852715098113.

[9] *See* AZSenateRepublicans (@AZSenateGOP), Twitter (June 24, 2022, 11:39 AM), https://twitter.com/AZSenateGOP/status/1540404293315964930?s=20&t=dhnDUIqZVdw0rSUy6dIVJA.

[10] *Rachel Mitchell weighs in on the past and future of abortion in Arizona*, 12News (June 26, 2022), https://www.12news.com/video/news/politics/sunday-square-off/sunday-square-off-rachel-mitchell-on-the-past-and-future-of-abortion-in-arizona/75-f43ab60f-2b64-4a38-8ec1-86bb651111c9.

[11] *Arizona has 2 abortion laws on the books. The governor and legislators can't agree which one is in force*, 12News (updated June 29, 2022), https://www.12news.com/article/news/politics/governor-ducey-gop-lawmaker-disagree-abortion-law/75-4154b84e-9211-43c3-8dd7-5a5973b7dc04.

[12] Mark Brnovich (@GeneralBrnovich), Twitter (June 29, 2022, 3:34 PM), https://twitter.com/GeneralBrnovich/status/1542275229925249024?s=20&t=SnCquVRA2z9oe

LEGAL STANDARD

"A party seeking modification or dissolution of a final permanent injunction [under Rule 60(b)(5)] bears the burden of establishing a significant change in facts or law warranting revision or dissolution of the injunction because applying it prospectively is no longer equitable." *Tegowski v. Bareiss*, No. 2 CA-CV 2018-0155, 2019 WL 2157785, at *2 ¶ 6 (Ariz. App. May 17, 2019) (quotation omitted).[13] Under Rule 60(b)(5), "[a] court may recognize subsequent changes in either statutory or decisional law." *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

The AG makes an alternate argument under Rule 60(b)(6). Mot. at 13. PPAZ does not dispute that Rule 60(b)(5) is the appropriate vehicle for the AG's request. Therefore, the Court should not reach the Rule 60(b)(6) question. *See, e.g., Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988) (motions for relief under Rule 60(b)(6) require a showing of "extraordinary circumstances" that is mutually exclusive of grounds covered under the other subdivisions of the Rule); *Edsall v. Superior Ct. In & For Pima Cnty.*, 143 Ariz. 240, 243 (1984) (cleaned up) (same).

ARGUMENT

I. *Dobbs* Warrants a Modified Judgment Regarding A.R.S. § 13-3603, Not Vacatur.

There is no question that the *Dobbs* decision overturned *Roe v. Wade*. This affects the Court's 1973 order enjoining § 13-3603 since that injunction was based on *Roe*, and PPAZ agrees that a modification of the order is warranted. *See* Ex. A to Mot. But the effect of *Dobbs* is only one part of the wholly changed legal landscape in Arizona since 1973.[14] Therefore, this

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OmpQB0S1g; *Arizona's Attorney General Says a Pre-1901 Abortion Ban is Enforceable*, NPR (June 30, 2022), https://www.npr.org/2022/06/30/1108871251/arizonas-attorney-general-says-pre-1901-abortion-ban-is-enforceable.

[13] PPAZ cites this memorandum decision under Ariz. Sup. Ct. R. 111(c)(1)(C).

[14] The AG asserts without explanation that, post-*Dobbs*, "[t]he law has therefore returned to what it was prior to *Roe*, and for Arizona this means the well-reasoned panel opinion in *Nelson*." Mot. at 10. To the extent the AG means that the court of appeals panel opinion in *Nelson* is somehow revived, this is simply not the case. "A vacated judgment lacks force or effect and places parties

Court should not unqualifiedly grant the AG's motion, because simply granting the relief the AG requests, Mot. at 14, is too blunt a remedy as it ignores—and implicitly repeals—other applicable laws.

As discussed above and as the AG acknowledges, Mot. at 2, the Legislature has "authorize[d] what had previously been forbidden," *California v. EPA*, 978 F.3d 708, 715 (9th Cir. 2020) (quotation omitted) (cited in Mot. at 9), under A.R.S. § 13-3603 by passing the less-restrictive statutes that have governed since 1973 and continue to govern abortion in Arizona. A proper Rule 60(b)(5) analysis, therefore, requires this Court to consider not only the change in decisional law but also statutory law when determining the new bounds of the injunction. *See Agostini*, 521 U.S. at 215 ("A court may recognize subsequent changes in either statutory or decisional law."). To do so, this Court must consider the mosaic of laws regulating abortion that have been passed since 1973—including, for example, the Physician-only Laws and most recently the 15-week Law—and reconcile those laws with A.R.S. § 13-3603. This is because when "statutes relate to the same subject matter, [courts] construe them together as though they constitute one law," *Fleming v. State Dep't of Pub. Safety*, 237 Ariz. 414, 417 ¶ 12 (2015), and "whenever possible, [courts must] adopt a construction that reconciles one with the other, giving force and meaning to all statutes involved," *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 333 ¶ 28 (2001).

Such an analysis is well-within Rule 60(b)(5)'s scope. *See, e.g.*, *Agostini*, 521 U.S. at 223, 238–39 (analyzing under Rule 60(b)(5) whether and to what extent the law had changed since injunction entered); *Texas v. Alabama-Coushatta Tribe*, 918 F.3d 440, 447 (5th Cir. 2019) (noting that review of district court's denial of Rule 60(b)(5) relief from permanent injunction "turns on whether a judicial precedent—holding that the Restoration Act and IGRA conflict and that the former, not the latter, applies to the Tribe's gaming activity—or a later contrary agency

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in the position they occupied before entry of the judgment." *Nielson v. Patterson*, 204 Ariz. 530, 533 ¶ 12 (2003). Because the court of appeals vacated the panel opinion in *Nelson* on rehearing, "nothing remain[s]" of it. *Id.*

interpretation should control"); *Williams v. Butz*, 843 F.2d 1335, 1339 (11th Cir. 1988) (noting that it was "a question for the district court on remand" whether the prospective injunctive relief at issue should be "either vacated or modified" to comport with the intent for more recently-promulgated federal regulation), *abrogated on other grounds by Blackmun v. Wille*, 980 F.2d 691 (11th Cir. 1993); *see also Sys. Fed'n No. 91, Ry. Emps. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961) ("There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.").[15]

II. A.R.S. § 13-3603 Must be Harmonized with the Legislature's Subsequently Enacted Scheme of Regulation for Abortion Providers.

A.R.S. § 13-3603 and Arizona's current regulatory scheme for abortion "relate to the same subject matter," *Fleming*, 237 Ariz. at 417 ¶ 12, because A.R.S. § 13-3603 prohibits "procur[ing] the miscarriage" unless "necessary to save [the woman's] life," and Arizona's other abortion laws, such as the Physician-only Laws, Post-viability Law, and the Reason Law, would instead allow abortion in a broader range of circumstances. Courts thus must construe all these provisions "together as though they constitute one law." *Fleming*, 237 Ariz. at 417 ¶ 12. In doing so and when possible, they should "avoid interpretations that result in contradictory provisions." *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, 195 ¶ 9 (2016).

When interpreting and harmonizing statutes, courts "first look to the plain language of the statute as the most reliable indicator of its meaning." *Advanced Prop. Tax Liens, Inc. v. Sherman*, 227 Ariz. 528, 531 ¶ 14 (App. 2011); *see also Ridgell v. Ariz. Dep't of Child Safety*, 253 Ariz. 61, ¶ 15 (App. 2022). "When an ambiguity or contradiction exists, however, [courts] attempt to determine legislative intent by interpreting the statutory scheme as a whole and consider the statute's context, subject matter, historical background, effects and consequences,

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[15] As the AG stated, Arizona Rule 60(b)(5) and Fed. R. Civ. P. 60(b)(5), as well as their analyses, are identical. *See* Mot. at 8 n.7.

and spirit and purpose." *UNUM Life Ins. Co. of Am.*, 200 Ariz. at 330 ¶ 12 (quotation omitted). And, importantly, "when there is conflict between two statutes, the more recent, specific statute governs over the older, more general statute." *In re Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 157 (1997) (quotation omitted).

A. The Plain Language of Many Arizona Laws Makes Clear that Physicians May Provide Abortion.

The plain language of Arizona's more recent, more specific statutes regulating abortion supports a harmonized reading of those laws together with A.R.S. § 13-3603. The text of the Physician-only Laws and Post-viability Law, for example, is clear: licensed physicians are allowed to provide abortions up until those gestational ages, while A.R.S. § 13-3603's prohibition applies to non-physicians. This interpretation properly gives effect to *all* the Legislature's enactments. And it stands far apart from the untenable interpretation the AG posits: that A.R.S. § 13-3603—which is over one hundred years old—somehow preempts a host of other subsequently enacted laws and criminalizes nearly all abortions in Arizona, even abortions performed by physicians within the longstanding framework established by the Legislature.

Such a reading would not only nullify decades of laws passed by the people's elected representatives, but it also would conflict with the presumption that the "more recent, specific statute governs over an older, more general statute," since each of the more recently enacted statutes provide more specific regulations for abortion than A.R.S. § 13-3603. *UNUM Life Ins. Co.*, 200 Ariz. at 333 ¶ 29 (cleaned up). Through this same lens, the Court can also harmonize A.R.S. § 13-3603 and the recently-enacted 15-week Law[16]: The Legislature chose, more recently

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[16] The 15-week Law is not effective until September 24, 2022, which is 90 days after the legislative session ended. But because the same analysis applies to the harmonization of that law with A.R.S. § 13-3603, this Court should provide clarity for PPAZ and the public at large as to how the 15-week Law should be harmonized once it is in effect. There is nothing to suggest that it will not become law; no application for serial number to refer the bill has been filed with the Secretary of State. *See Initiative, Referendum and Recall Applications,* State of Ariz. Sec'y of State, https://apps.arizona.vote/info/irr/2022-general-election/33/0 (last updated July 11, 2022).

and specifically, to allow licensed physicians to provide abortions up until 15 weeks LMP, while A.R.S. § 13-3603's prohibition applies to non-physicians.

The AG points to language in S.B. 1164 (the 15-week Law), stating that that law does not "[r]epeal, by implication or otherwise, section 13-3603, Arizona Revised Statutes, or any other applicable state law regulating or restricting abortion," to support his argument. Mot. at 7. But PPAZ does not argue that A.R.S. § 13-3603 has been repealed; rather, according to Arizona law, S.B. 1164 must be harmonized with more recent legislative enactments. Indeed, the AG ignores the second half of the sentence he cites: it in fact continues by saying that it also does not repeal, "*any other* applicable state law regulating or restricting abortion" (emphasis added). This clause logically must be read to include, for example, Arizona's Physician-only Laws. The Legislature's intent therefore was to preserve the ability to have all its abortion laws coexist. The AG's argument further ignores the section on "legislative intent" in S.B. 1164, which states that "[t]his legislature intends through this act and any rules and policies adopted hereunder, to restrict the practice of nontherapeutic or elective abortion to the period up to fifteen weeks of gestation." S.B. 1164, 55th Leg., 2nd Reg. Sess. (Ariz. 2022). Nothing in this unequivocal statement supports the AG's position that the Legislature intended to impose a near total criminal ban on abortion.

B. Other Indications Similarly Support This Harmonization.

Other relevant indicators of statutory intent also support a harmonized reading. For example, the "context of the statute," *Glazer v. State*, 237 Ariz. 160, 163 ¶ 12 (2015) (quotation omitted), refers to an interpretation that "give[s] effect to an entire statutory scheme," *Backus v. State*, 220 Ariz. 101, 104 ¶ 10 (2009). *See also Oaks v. McQuiller*, 191 Ariz. 333, 334 ¶ 5 (App. 1998) (interpreting a claim brought under a single workers' compensation statute within "the context of the entire statutory scheme" of workers' compensation statutes "of which it is a part," which was designed to protect workers, not tortfeasors). The context of A.R.S. § 13-3603 is that it exists as only one part of a robust regulatory scheme that Arizona has developed for abortion

providers over the last 50 years. In fact, the Legislature enacted some of these more specific laws in the same title and chapter as § 13-3603, which is further evidence that the provisions must be read harmoniously. *See supra* Section III.

Further, the historical background, purpose, and effect of Arizona's abortion laws, including the imminent 15-week Law, also support this harmonization. Other proposed legislation that was *not* passed by the Legislature in the most recent session proves that the currently elected lawmakers considered and rejected other more stringent regulations on abortion. As noted above, *supra* Section III.A, the Legislature considered—but failed to pass—a law criminalizing all medication abortion. H.B. 2811, 55th Leg., 2nd Reg. Sess. (Ariz. 2022). It also considered and failed to pass a privately enforced prohibition on abortions after approximately 6 weeks LMP. S.B. 1339, 55th Leg., 2nd Reg. Sess. (Ariz. 2022); H.B. 2483, 55th Leg., 2nd Reg. Sess. (Ariz. 2022). And 2022 was no outlier; indeed, during the prior session in 2021, the Legislature considered (but failed to pass) two bills that would have replaced A.R.S. § 13-3603 altogether and made abortion eligible for prosecution under the homicide chapter—proving that the Legislature knew how to pass more restrictive criminal abortion laws. *See* H.B. 2650, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 2878, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

Beyond that, unlike many other state legislatures that passed "trigger laws" under which restrictive abortion laws would immediately spring into place upon the U.S. Supreme Court overruling *Roe v. Wade*, Arizona's Legislature did not do so.[17] *See, e.g.*, La. Rev. Stat. § 40:1061

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[17] The AG argues that, by recodifying § 13-3603, the 1977 Legislature "took affirmative steps to ensure [its] continuing validity in the event that *Roe* was overruled." Mot. at 6–7. But this ignores the actual history of abortion legislation in Arizona. In 1977–78, the Legislature re-codified *all* of Arizona's criminal statutes in an effort to modernize the criminal code. *See, e.g.*, *State v. Gunnison*, 127 Ariz. 110, 111 n.1 (1980) ("[C]itations to criminal statutes in this opinion are to the Arizona Revised Statutes in force prior to 1 October 1978, when the most recent criminal code and laws revised pursuant to it became effective."); *State v. Heylmun*, 147 Ariz. 97, 99 n.1 (App. 1985) ("We also note the definition of 'offense' in § 13–105(18) was adopted

("The provisions of this Act shall become effective immediately upon, and to the extent permitted, by the occurrence of any of the following circumstances: (1) Any decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade* . . . , thereby, restoring to the state of Louisiana the authority to prohibit abortion.").[18] This background of the Legislature's decision to not pass a trigger law or other more restrictive abortion bans, and instead pass the 15 Week Law, demonstrates that the extreme position the AG is taking in his Motion—that nearly all abortions should be banned in the state—is squarely at odds with the intent of the Legislature. Indeed, Governor Ducey and Senate Republicans have stated that the 15-week Law will be the operative law upon its effective date in September—a statement that the AG also agreed with until reversing course on Twitter several days later.[19]

Because a harmonized interpretation of Arizona's abortion statutes exists (under which meaning can be given to all the Legislature's enactments), this Court should give them that effect and reject the AG's request to dissolve the prior judgment of this Court in full without modification (which would instead nullify decades of legislative work and dozens of enactments). *Cf. State ex rel. Montgomery v. Brain*, 244 Ariz. 525, 531 ¶ 21 (App. 2018) (courts should interpret statutes "sensibly to avoid reaching an absurd conclusion" (quotation omitted)).

III. The Equities Weigh Strongly Against Granting Unqualified Relief from Judgment.

Under the "flexible standard" of Rule 60(b)(5), *Bredfeldt v. Greene*, No. 2 CA–CV 2016–0198, 2017 WL 6422341, at *3 ¶ 10 (Ariz. App. Dec. 18, 2017) (quotation omitted), consideration is given to whether applying the injunction prospectively "is no longer equitable,"

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as part of the revised criminal code in 1978."). This was therefore not an effort specific to A.R.S. § 13-3606, but instead a wide-ranging code maintenance effort.

[18] *See also* Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here's What Happens When Roe is Overturned*, Guttmacher Inst. (June 6, 2022), https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned.

[19] Ariz. Att'y Gen., *supra* note 7 ("The Arizona Legislature passed an identical law to the one upheld in Dobbs, which will take effect in approximately 90 days."); Brnovich, *supra* note 12.

Tegowski, 2019 WL 2157785, at *2 ¶ 6 (quoting Ariz. R. Civ. P. 60(b)(5)).[20] Here, PPAZ acknowledges that some modification of the judgment is appropriate, but the AG's requested relief is not equitable and does not account for the harms at stake.

First, the State will not be harmed by modifying the injunction in a manner that harmonizes *all* of Arizona's laws, as PPAZ urges. But modifying the injunction to allow the State to "bring[] prosecutions against doctors who perform . . . abortions," Mot. at 9,[21] would nullify in one fell swoop dozens of duly enacted laws, which have been passed more recently and which deal more specifically with the subject matter—thereby actually *preventing* the State from carrying out all its duly enacted laws. *Cf. Abbott v. Perez*, __ U.S. __, 138 S. Ct. 2305, 2324 n.17 (2018) ("[I]nability to enforce its duly enacted plans clearly inflicts irreparable harm on the State.").

Second, the real-world result of nullifying dozens of more recently enacted statutes and "return[ing] [the law] to what it was prior to *Roe*," Mot. at 10, would impose grievous irreparable harm to thousands of Arizonans of all racial and ethnic backgrounds,[22] reproductive age,[23]

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[20] PPAZ cites the two memorandum decisions in this paragraph under Ariz. Sup. Ct. R. 111(c)(1)(C).

[21] The AG states that the first court of appeals opinion in *Nelson* "framed the purpose" of the Territorial Law on abortion provision as, in part, "to protect the health and life of pregnant women by keeping them from incompetent abortionists." Mot. at 4–5 (quoting *Nelson*, 19 Ariz. App. at 144). This concern is clearly no longer valid given that in the past 50 years, Arizona has enacted a complex statutory scheme that regulates abortion and allows only licensed physicians to perform abortions. Arizona public data confirms that complications are highly rare and non-fatal. *See* Marguerite L.S. Kemp et al., Ariz. Dep't of Health Servs., *Abortions in Arizona: 2020 Abortion Report* (Sept. 21, 2021), https://azdhs.gov/documents/preparedness/public-health-statistics/abortions/2020-arizona-abortion-report.pdf. The Department's report is a public record of which the Court can take judicial notice. *See, e.g., Hernandez v. Frohmiller*, 68 Ariz. 242, 258 (1949).

[22] Approximately 40.5% of the abortions among Arizona residents in 2020 were to people who self-identified as "Hispanic or Latinos;" 35.5% Non-Hispanic White; 12.1% Black/African American; 2.8% American Indian or Alaska Native; 4.2% Asian or Pacific Islander; and 2.5% of multiple races. Kemp et al., *supra* note 19, at 8 tbl.4.

[23] The age range for Arizonans receiving abortions in 2020 was 10 to 50 years, with the average age being 27.1 years. Kemp et al., *supra* note 19, at 6.

relational, marital, and familial status[24], and education levels[25] who decide to have abortions. According to the most recent publicly available vital statistics data compiled from reports submitted by PPAZ and other abortion providers in the state to the Department, 13,273 abortions were provided in Arizona in 2020.[26] Publicly available data also confirm that Arizonans decide to have abortions for many different reasons, including because of their medical or personal emotional/mental health; because they were victims of domestic violence, sexual assault, or physical abuse; because they are unprepared to have a child at that time, or do not desire another child; or because of financial, work, career, unemployment, or education reasons that prevent them from being able to have a child.[27] Denying thousands of Arizonans control over their reproductive lives by denying them the ability to have a safe, legal abortion provided by a licensed physician under Arizona's existing laws—particularly when such a result lacks popular electoral support, as evidenced by the Legislature's recent enactment of the 15-week law—would gravely harm the public interest.

CONCLUSION

For all these reasons, PPAZ requests that the State's Rule 60(b) Motion for Relief from Judgment should be granted in part and denied in part. The Court should issue a modified injunction making clear that Defendants Mark Brnovich, Attorney General of the State of Arizona, and Laura Conover, County Attorney of Pima County, Arizona, their successors, agents, servants, employees, attorneys, and all persons in active concert or participation with

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[24] Close to 15% of abortion patients in 2020 reported they were married, and approximately 55% reported having given birth to one or more children. Kemp et al., *supra* note 19, at 9 fig.2, 11 tbl.5.

[25] While the education status of almost half of Arizonans who received an abortion in 2020 was unknown, approximately 20% had completed 12 years of education, and approximately 20% some postsecondary education. Kemp et al., *supra* note 19, at 10 fig.3.

[26] Kemp et al., *supra* note 19, at 4. 92.5% of abortions were performed prior to 13 weeks gestational age, *id.* at 14 tbl.7, and 99.6% in an abortion clinic, *id.* at 19 tbl.12.

[27] Kemp et al., *supra* note 19, at 16 tbl.9.

them,[28] are permanently enjoined from taking any action or threatening to enforce the provisions of A.R.S. § 13-3603 with respect to abortions provided by licensed physicians who are authorized to do so consistent with Arizona's duly enacted laws and regulations, including A.R.S. § 36-2155 and A.R.S. § 36-2160. A proposed order is submitted simultaneously for the Court's consideration.

RESPECTFULLY SUBMITTED this 20th day of July, 2022.

COPPERSMITH BROCKELMAN PLC.

By: /s/ D. Andrew Gaona
D. Andrew Gaona
Kristen Yost

PLANNED PARENTHOOD FEDERATION OF AMERICA
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**Application for Pro Hac Vice Forthcoming*

Attorneys for Plaintiff Planned Parenthood Arizona, Inc., successor-in-interest to Plaintiff Planned Parenthood Center of Tucson, Inc.

ORIGINAL of the foregoing efiled and
COPY sent by email on July 20, 2022, to:

The Honorable Kellie Johnson
Civil Presiding Judge
Pima County Superior Court
Roxanne Lee, Judicial Assistant
rlee@sc.pima.gov

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[28] This prohibition therefore applies to the county attorney of each county in Arizona. *See* A.R.S. § 11-532(A)(1) (county attorneys carry out prosecutions "on behalf of the state."); *see also Crosby-Garbotz v. Fell in & for Cnty. of Pima*, 246 Ariz. 54, 60 ¶ 24 (2019) (rejecting the State's argument that there was no mutuality of parties between a state agency and the county attorney because, even though "different legal offices handle different cases," the State is still "a party in both actions" and because the Attorney General's Office represented the state agency in the earlier proceedings and "has supervisory authority over county attorneys" (citing A.R.S. § 41-193(A)(4))).