ARIZONA COURT OF APPEALS
DIVISION TWO

PLANNED PARENTHOOD ARIZONA, INC., et al., Plaintiffs/Appellant, v. MARK BRNOVICH, Attorney General of the State of Arizona, et al., Defendants/Appellee, and ERIC HAZELRIGG M.D., as guardian ad litem of the unborn child of plaintiff Jane Roe and all other unborn infants similarly situated, Intervenor.	No. 2CA-CV-2022-0116 Pima County Superior Court No. C127867

RESPONSE TO EMERGENCY MOTION FOR STAY PENDING APPEAL

MARK BRNOVICH
Attorney General
(Firm State Bar No. 14000)

Brunn W. Roysden (No. 28698)
Michael S. Catlett (No. 25238)
Kate B. Sawyer (No. 34264)
Katlyn J. Divis (No. 35583)
Assistant Attorneys General
2005 N. Central Avenue
Phoenix, Arizona 85004
(602) 542–3333
Beau.Roysden@azag.gov
acl@azag.gov
Attorneys for Appellee Mark Brnovich, Attorney General for the State of Arizona

INTRODUCTION

In 1973, this Court, in a well-reasoned decision, upheld the constitutionality of A.R.S. § 13-3603. Three weeks later, the Court reversed course after the issuance of *Roe v. Wade* and ordered the trial court to enjoin § 13-3603 as to the Arizona Attorney General and Pima County Attorney. In June 2022, in *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court overruled *Roe* (and several other cases), holding that the issue of abortion regulation should be returned to the states. In light of that ruling, Attorney General Mark Brnovich requested that the Pima County Superior Court lift the injunction on § 13-3603 entered on the basis of *Roe*. Lacking any viable response to the argument that *Roe* is no longer good law, Planned Parenthood of Arizona, Inc. ("PPAZ") agreed that the injunction should be lifted as to non-physicians. But PPAZ requested that the Court reconcile all post-*Roe* statutes in Arizona and then modify the injunction such that licensed physicians would be exempt from § 13-3603.

The Superior Court exercised its discretion to lift the injunction in its entirety based on *Dobbs*. The Superior Court refused, however, to engage in the exercise of attempting to reconcile post-*Roe* statutes, finding "an attempt to reconcile fifty years of legislative activity procedurally improper in the context of the motion and record before it." The Superior Court made clear, however, that PPAZ could raise additional arguments through an amended pleading or a new action: "Planned

Parenthood may move to amend its complaint after relief is granted, or may file a new action to seek relief it believes appropriate."

PPAZ now seeks to stay the Superior Court's ruling, thereby putting the injunction of § 13-3603 back in place pending appeal. But PPAZ cannot show that its appeal presents serious questions as to the propriety of the Superior Court's ruling. The Superior Court's decision is subject to review for an abuse of discretion. PPAZ cannot dispute that Rule 60 allows for the relief the Attorney General requested or that the sole reason for the injunction—the holding in *Roe*—is no longer viable. Instead, PPAZ must satisfy this Court that the Superior Court abused its discretion in refusing to engage, based on the record before it, in the statutory reconciliation exercise that PPAZ requested in the context of Rule 60 proceedings. PPAZ does not cite a single case where a court has conducted the sort of analysis PPAZ requested the Superior Court to perform. In any event, PPAZ cannot establish that the Superior Court's decision to forego such an analysis in this particular case was an abuse of discretion, particularly when the Superior Court went out of its way to make clear that it was not foreclosing PPAZ from seeking further redress. Tellingly, a different set of plaintiffs has now initiated a new action in Maricopa County Superior Court seeking the very relief that PPAZ improperly sought here through Rule 60 proceedings.

PPAZ also cannot show that the balance of hardships tips sharply in its favor. The statutes PPAZ claims are in conflict with § 13-3603 can coexist, allowing prosecutorial discretion to determine whether, and to what extent, § 13-3603 is enforced. As the Superior Court explained in addressing the balance of hardships, "PPAZ has other appropriate legal avenues available to it to resolve the issues it seeks to resolve surrounding interpretation and harmonization of Arizona's abortion statutes." Nothing in the Superior Court's ruling prohibits a plaintiff from bringing an as-applied challenge to § 13-3603, or a prosecutor from exercising discretion not to prosecute a particular case. And PPAZ's arguments give no weight to the interests of the unborn or the sovereign harm that will result to Arizona from further enjoining a statute based on a decision (*Roe*) that the U.S. Supreme Court has described as "egregiously wrong from the start." The Court should deny PPAZ's Emergency Motion for Stay Pending Appeal.

BACKGROUND

Leading up to the U.S. Supreme Court's decision in *Roe v. Wade*, Arizona repeatedly enforced the prohibitions in former A.R.S. § 13-211, now numbered as § 13-3603, which prohibits "[a] person" from providing "any medicine, drugs or substance" or using "any instrument or other means whatever, with intent thereby to procure the miscarriage" of a "pregnant woman," unless "necessary to save her

life."[1] There are multiple published opinions involving enforcement of the statute. *See, e.g.*, *State v. Wahlrab*, 19 Ariz. App. 552 (1973) (noting Wahlrab was convicted under § 13-211 but vacating conviction because "although [the court] disagree[s] with the [*Roe v.*] *Wade* opinion we are bound by the U.S. Supreme Court decision"); *State v. Keever*, 10 Ariz. App. 354 (1969) (reversing conviction under § 13-211 based on reasonable doubt but not questioning the law's constitutionality); *State v. Boozer*, 80 Ariz. 8 (1955) (affirming conviction under § 13-211, as previously codified in 1939 Code § 43-301); *Hightower v. State*, 62 Ariz. 351 (1945) (same); *Kinsey v. State*, 49 Ariz. 201 (1937) (affirming conviction under § 13-211, as previously codified in 1928 Code § 4645).[2]

Against this backdrop, Planned Parenthood Center of Tucson, Inc., ten physicians, and "Jane Doe," an anonymous pregnant woman who wished to have an abortion, filed a Complaint in the Pima County Superior Court on July 22, 1971, challenging the constitutionality of A.R.S. §§ 13-211–13, and naming the Arizona Attorney General and the Pima County Attorney as Defendants. *See* Ex. A,

---

[1] For purposes of § 13-3603, "person" is defined broadly. *See* A.R.S. § 13-105(30); *see also State v. Leal*, 248 Ariz. 1, 4 (App. 2019) (A.R.S. § 13-105(30) includes a "broad definition of person[.]").

[2] Section 13-211 can be traced back to section 243 of the 1901 penal code, and when the people adopted the Arizona Constitution, they provided that "[a]ll laws of the Territory of Arizona now in force, not repugnant to this Constitution, shall remain in force as laws of the State of Arizona until they expire by their own limitations or are altered or repealed by law … ." Ariz. Const. art. 22, § 2. And as discussed below (at 7), the Legislature re-enacted this law in 1977.

Complaint for Declaratory Relief. After a trial, a dismissal for lack of justiciable controversy, an appeal, and a remand, the Pima County Superior Court filed a memorandum opinion on September 29, 1972, holding A.R.S. § 13-211 unconstitutional. *Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. App. 142, 143 (1973). The court entered a Declaratory Judgment and Injunction in favor of Plaintiffs Planned Parenthood and the named physicians on October 2, 1972. Defendants and Cliffton Bloom, an individual who the court named intervenor and guardian ad litem for the unborn child of Jane Roe and all other unborn infants similarly situated, appealed to this Court. In a published panel opinion, this Court *reversed* on all grounds, upholding the challenged laws as constitutional in a well-reasoned and thorough opinion. *Nelson*, 19 Ariz. App. at 142–50.

But less than three weeks later, the U.S. Supreme Court issued *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973). Finding itself bound by those decisions, this Court issued an Opinion on Rehearing, vacating its prior panel opinion on the *sole* and *express* ground of the binding nature of *Roe* and *Doe*. *Nelson*, 19 Ariz. App. at 152; *see also* U.S. Const. art. VI ("The Constitution … of the United States … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby… ."). The combined effect of this Court's panel opinion (*Nelson*, 19 Ariz. App. at 142–50) and Opinion on Rehearing (*id.* at 152), taken as a whole, was to affirm the prior judgment of the Pima County Superior

Court on the sole ground of the newly recognized federal constitutional right to abortion. *See id.* at 152 (using word "[a]ccordingly" to modify the vacatur of the prior panel opinion; expressly and solely basing its reasoning on the Court being "bound by" U.S. Supreme Court decisions interpreting the Constitution; and providing no other reasoning or suggestion that the Court had changed its position on the other issues presented on appeal and addressed in the prior panel opinion).[3]

The Pima County Superior Court then entered the Second Amended Final Judgment "[p]ursuant to the Mandate of the Court of Appeals, Division II." Ex. B *Second Am. Declaratory J. & Inj. Pursuant to Mandate of the Ct. of App.* (Mar. 27, 1973) ("Second Amended Final Judgment"). The Second Amended Final Judgment declared former A.R.S. §§ 13-211 through -213 unconstitutional. It also permanently enjoined the Arizona Attorney General and Pima County Attorney, and all successors, agents, servants, employees, attorneys, and all persons in active concert or participation with them, from taking any action or threatening to take any

[3] Other contemporaneous opinions from this Court confirm that the sole and express ground for declaring Arizona's abortion statutes unconstitutional was *Roe*. *See Wahlrab*, 19 Ariz. App. at 553 (citing *Nelson* and vacating conviction because "although [the court] disagree[s] with the [*Roe v.*] *Wade* opinion we are bound by the U.S. Supreme Court decision"); *see also State v. New Times, Inc.*, 20 Ariz. App. 183, 185 (1973) (citing *Nelson* and *Wahlrab*, noting that the issue of the constitutionality of the state laws "at this juncture, is essentially moot," and reasoning the court "need only say that we are bound by the conclusions previously reached by the courts, most notably the [U.S.] Supreme Court").

action to enforce the provisions of A.R.S. §§ 13-211 through -213 against anyone. Second Amended Final Judgment at 4.

The Legislature, however, did not acquiesce in the declaration that these laws were unconstitutional but rather took affirmative steps to ensure their continuing validity in the event that *Roe* was overruled. In 1977, the Legislature re-enacted former § 13-211 as § 13-3603, former § 13-212 as § 13-3604, and former § 13-213 as § 13-3605. *See* 1977 Ariz. Sess. Laws ch. 142, § 99 (1st Reg. Sess.).[4] The Arizona courts have at least twice expressly recognized this 1977 law as "re-enact[ing]" or "enact[ing]" the new statutes. *See Summerfield v. Super. Ct.*, 144 Ariz. 467, 476 (1985); *Vo v. Super. Ct.*, 172 Ariz. 195, 201 (App. 1992). In 2021, the Legislature repealed § 13-3604, indicating its intent not to continue criminalizing abortion as to the mother of an unborn child. *See* 2021 Ariz. Laws ch. 286, § 3 (1st Reg. Sess.). But the Legislature did not likewise repeal § 13-3603.[5] And in March of this year, even while it enacted a 15-week gestational age limitation on abortions prior to the issuance of the *Dobbs* opinion (when it was uncertain how the Supreme

---

[4] The first 38 sections of 1977 Ariz. Sess. Laws ch. 142 repeal many provisions in Title 13. But nowhere among the repeals are former §§ 13-211 through -213. Instead, the Legislature intentionally transferred these statutes for placement in Chapter 36 of Title 13, "Family Offenses."

[5] Thirteen other states have similar laws. *See* Sharon Bernstein, *Factbox: U.S. abortion restrictions mount after overturn of Roe v. Wade*, Reuters (Oct. 4, 2022, 10:26 AM), https://www.reuters.com/business/healthcare-pharmaceuticals/us-abortion-restrictions-mount-after-overturn-roe-v-wade-2022-10-04/#:~:text=ACTIVE%20BANS,an%20abortion%20rights%20research %20group.

Court would rule in the challenge to Mississippi's similar 15-week statute), the Legislature also expressly stated in the session law that the 15-week gestational age limitation does not "[r]epeal, by implication or otherwise, section 13-3603, Arizona Revised Statutes, or any other applicable state law regulating or restricting abortion." *See* 2022 Ariz. Sess. Laws ch. 105, § 2 (2d Reg Sess.); *see also, e.g.*, *State v. Stine*, 184 Ariz. 1, 3 (App. 1995) (collecting several cases that used statements in session laws to determine legislative intent regarding applicability of Arizona's criminal laws).

On June 24, 2022, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), overruling *Roe* and thereby returning the issue of abortion regulation entirely to state legislatures. In *Dobbs*, the Supreme Court "h[e]ld that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives." 142 S. Ct. at 2279. *Dobbs* further recognized that "States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'" *Id.* at 2283–84. "These legitimate interests include respect for and preservation of prenatal life at all stages of development[.]" *Id.* at 2284 (citing *Gonzales v. Carhart*,

550 U.S. 124, 157–58 (2007)). Ultimately, *Dobbs* held "[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion." *Id.*

In light of *Dobbs*, Arizona Attorney General Mark Brnovich ("Attorney General") filed a motion on July 13, 2022 in the Pima County Superior Court pursuant to Rule 60(b) asking the court to set aside the Second Amended Final Judgment's permanent injunction, as applied to A.R.S. § 13-3603, prospectively because such prospective application is no longer equitable and to similarly eliminate any prospective effect of the declaratory judgment as to that statute. PPAZ opposed the motion. While PPAZ agreed with the Attorney General that after *Dobbs*, it would *not* be equitable to enforce the Second Amended Final Judgment, PPAZ argued that the injunction should remain in place only as to licensed physicians.[6] Specifically, PPAZ argued that the court had "a duty to harmonize *all* of the Arizona Legislature's enactments [regulating abortion providers] as they exist today," and that such harmonization "would result in a modification of [the Second Amended Final 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." *Planned*

[6] The Pima County Attorney, who was a named defendant in the original matter, joined PPAZ's arguments against the Attorney General's Motion for relief from judgment.

Parenthood Arizona's Resp. to Defs.' Rule 60(b) Mot. for Relief from J. at 9 (July, 20, 2022) ("PPAZ Rule 60(b) Resp.").

On September 23, 2022, the Pima County Superior Court issued an order lifting the injunction of A.R.S. § 13-3603 in its entirety.[7] *Under Advisement Ruling* (Sept. 23, 2022) ("Order"). The court recognized the "narrow" inquiry before it and rejected PPAZ's harmonization arguments. Order at 7 ("The Court finds an attempt to reconcile fifty years of legislative activity procedurally improper in the context of the motion and record before it."). While the court recognized that "there may be legal questions the parties seek to resolve regarding Arizona statutes on abortion," it noted that "those questions [were] not for this Court to decide here." Order at 7. The Court agreed with the Attorney General that PPAZ "may move to amend its Complaint … or may file a new action to seek relief it believes appropriate." Order at 6.

On September 26, 2022, PPAZ filed its notice of appeal to this Court and also filed an emergency motion with the Superior Court requesting a stay pending appeal.[8] The Superior Court denied the motion. The court held that:

---

[7] In the same order, the court also granted the Attorney General's Motion for Substitution of Dr. Eric Hazelrigg as Intervenor and Guardian Ad Litem. Such an intervenor has been a party to this case, including in the prior appeal to this Court, and Dr. Hazelrigg is now a party to this appeal.

[8] The Pima County Attorney joined PPAZ's stay motion below. *See Pima County Attorney's Resp. & Joinder in Planned Parenthood Arizona, Inc.'s Emergency Mot. for Stay of Order Pending Appeal* (Sept. 27, 2022). And on October 4, 2022, the

> The Court's [Rule 60(b) Order] decided a narrow issue: that relief from judgment under Ariz. R. Civ. P. Rule 60 (b)(5) was appropriate, and that the injunction entered in 1973 has no prospective effect. The Court finds it is not probable that PPAZ will prevail on its claim that the Court, in considering the prospective effect of the injunction, should have undertaken an attempt to reconcile all of Arizona's now existing abortion statutes, including statutes not in effect at the time the injunction was entered.

Ruling at 2 (Sept. 30, 2022) ("Stay Order"). The court further found that PPAZ's appeal did not raise serious questions. Stay Order at 2. The court reiterated that "the interpretation and interplay of Arizona's abortion statutes should be addressed in a new lawsuit or on an amended complaint where a full record on the issues can be developed and considered by the Court." Stay Order at 2.

On October 3, 2022, Dr. Paul Isaacson and the Arizona Medical Association filed a complaint and order to show cause in the Maricopa County Superior Court, raising harmonization arguments nearly identical to those that PPAZ raised before the Pima County Superior Court. Ex. C. Plaintiffs in that action have asked for a declaratory judgment declaring that "Arizona's numerous laws that allow a licensed physician to provide an abortion in accordance with the regulatory scheme enacted by the Legislature continue to apply to licensed physicians, and … A.R.S. § 13-3603, applies to other 'person[s].'" Ex. C at 21. And on October 4, 2022, PPAZ filed this motion, now asking this Court to stay the Pima County Superior Court's judgment

---

Pima County Attorney also filed a notice of appeal of the Superior Court's order and joined PPAZ's current motion before this Court.

lifting the injunction of A.R.S. § 13-3603 pending the outcome of their appeal. ("Stay Mot."). For all the reasons the Superior Court denied PPAZ's request to stay the judgment, this Court should also deny PPAZ's request to stay the judgment, which in no way prevents immediate litigation of the "harmonization" issue through an amended complaint or new case.

ARGUMENT

I. PPAZ Has Not Shown That Its Appeal Presents Any Serious Legal Questions.

PPAZ has not established that its appeal presents a strong legal argument justifying a stay (the minimum showing PPAZ must make). *See Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12 ¶ 13 (App. 2009) ("[W]hether there are 'serious questions' depends more on the strength of the legal claim than on the gravity of the issue."). To the contrary, the legal issue to be decided on appeal is narrow—whether the trial court abused its discretion in setting aside a judgment based solely on *Roe v. Wade* after that decision was overturned in *Dobbs*. *See Rogone v. Correia*, 236 Ariz. 43, 48 ¶ 12 (App. 2014) ("We review the setting aside of a judgment under Rule 60[(b)] for abuse of discretion."); *see also Gonzalez v. Nguyen*, 243 Ariz. 531, 534 ¶ 11 (2018) ("The rule ... creat[es] a very broadly worded ground for relief, which we construe as investing extensive discretion in trial courts."). The answer to that narrow question is clearly no. The Superior Court's ruling falls squarely within the text of Rule 60(b)(5) and there is no argument that

Roe remains good law after *Dobbs*. Tellingly, PPAZ never disputed that the Attorney General was entitled to relief from the Second Amended Final Judgment after *Dobbs*. *See* PPAZ Rule 60(b) Resp. at 8.

Therefore, it was not an abuse of discretion for the Superior Court to set aside the Second Amended Final Judgment in full after *Dobbs* and channel future claims such as the harmonization claim to an amended complaint or new suit. The U.S. Supreme Court has held that "it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.'" *Agostini v. Felton*, 521 U.S. 203, 215 (1997). Conversely, "[a] court errs when it refuses to modify an injunction or consent decree in light of such changes." *Agostini*, 521 U.S. at 215. Twelve years after *Agostini*, the U.S. Supreme Court made crystal clear that once a party carries the burden of showing a change in law warranting relief, "a court abuses its discretion 'when it refuses to modify an injunction or consent decree in light of such changes.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009). The Ninth Circuit recently reiterated that "*Agostini* confirms the equitable principle that when the law changes to permit what was previously forbidden, it is an abuse of discretion not to modify an injunction based on the old law." *California v. EPA*, 978 F.3d 708, 714–15 (9th Cir. 2020). PPAZ ignores these statements entirely. The Superior Court's narrow

ruling lifting the Second Amended Final Judgment correctly applied these standards. *See* Order at 5 (applying *Agostini*).

Lacking any viable response to the Attorney General's argument that an injunction based on *Roe* cannot apply prospectively once *Roe* is overturned, PPAZ attempted to expand the narrow Rule 60 proceedings to include a post-*Roe* statutory reconciliation. The Superior Court exercised discretion and rejected that attempt. To prevail on appeal, then, PPAZ will have to convince this Court that the Superior Court abused its discretion in refusing to take up PPAZ's request to expand the Rule 60(b) proceedings beyond the narrow question of whether *Roe* remains good law. PPAZ cannot do so.

PPAZ does not cite a single case from Arizona or elsewhere where a trial court, in the context of a Rule 60 motion, undertook the type of implied repeal or statutory reconciliation analysis that PPAZ asked the trial court to undertake here. The only cases that PPAZ can muster are those where a movant pointed to changes to the statute that was enjoined as a basis for narrowing or setting aside a judgment. *See* Stay Mot. at 9–11. For example, in *Railway Employees v. Wright*, cited in *Agostini*, the parties entered into a consent decree prohibiting the labor union from discriminating against workers in violation of the Railway Labor Act. 364 U.S. 642, 644 (1961). The consent judgment expressly incorporated provisions of the Railway Labor Act. *See id.* The Court held that the trial court possessed the power to modify

the consent decree based on subsequent congressional alterations to the Railway Labor Act. *See id.* at 652–53.

Nor does PPAZ's reliance on *United States v. Tennessee* help its cause. That decision actually supports that the Superior Court did not abuse its discretion. In *Tennessee*, the Sixth Circuit made clear that the Rule 60 analysis "is limited to whether the State can meet its initial burden of pointing to new court decisions or statutes that make legal what once had been illegal." 615 F.3d 646, 655 (6th Cir. 2010) (internal quotations omitted). The court then rejected that case law from other circuits was relevant to the Rule 60 determination, while acknowledging that "these cases from other circuits could potentially be persuasive *if this case were before us in another context*." *Id.* (emphasis added).

The Fifth Circuit's decision in *Texas v. Alabama-Coushatta* similarly involved a purported change in the law actually underlying the judgment at issue to make legal what was once illegal. 918 F.3d 440 (5th Cir. 2019). Specifically, the judgment at issue in *Alabama-Coushatta* stated that the Restoration Act governed the legality of the Tribe's gaming activities and precluded the Tribe from conducting gaming activities. *Id.* at 445. Later, the National Indian Gaming Commission determined that the Tribe could conduct gaming activities under the Restoration Act. *Id.* The Tribe then attempted to use that determination to have the contrary judgment set aside, arguing that the determination "eliminates the sole legal basis for the

injunction." *Id.* at 446. But the Fifth Circuit *rejected* that the later administrative determination was a change in the law warranting relief under Rule 60. *See id.* at 449. This determination does not support at all that the Superior Court here abused its discretion (i.e., no one disputed that *Dobbs* changed the basis for the underlying injunction).

Finally, PPAZ cites and quotes *Associated Builders and Contractors v. Michigan Department of Labor and Economic Growth*, but that case primarily centered on whether Michigan had delayed too long in bringing its Rule 60 motion. *See* 543 F.3d 275, 278–79 (6th Cir. 2008) (discussing why "[t]he district court did not abuse its discretion in determining that the State filed its motion within a reasonable time"). Importantly, the Sixth Circuit emphasized—as it later did in *Tennessee*—that the Rule 60 analysis looks to the existence of "new court decisions or statutes that make legal what once had been illegal." *Id.* at 278. And the court emphasized that "[a] court should not lightly deny a State's request to regulate a matter of public safety, particularly when the obstacle to the regulation rests on a legal foundation that may no longer be sound." *Id.* at 278–79.

None of the cases PPAZ cites or quotes support that a Rule 60 analysis should include whether new court decisions or statutes continue to make illegal what had once been illegal *but on different grounds*. The Superior Court did not abuse its discretion in concluding that any analysis of whether § 13-3603 should be declared

illegal or enjoined on different grounds than *Roe* should be handled through different or further proceedings. In other words, the purpose of Rule 60(b)(5) is to determine whether something that was once illegal has become legal because of actual changes to the law *underlying the injunction*. *See California*, 978 F.3d at 714–16 (confirming that a court's conclusion on whether to modify a judgment should be based on changes to the law underlying the original judgment; expressly rejecting the argument that "other precedent requires a broad, fact-intensive inquiry into whether altering an injunction is equitable, even if the legal duty underlying the injunction has disappeared"). But that is not what PPAZ asked the trial court to do here. Instead, PPAZ claimed that the underlying statute that was enjoined should continue to be enjoined not because of any change to that law or to decisional law supporting the injunction (*i.e.*, either § 13-3603 itself or *Roe*), but because of implicit repeal through subsequent statutes that are not at issue in the Second Amended Final Judgment or even in the operative complaint in this action. The Superior Court did not abuse its discretion in refusing to engage in PPAZ's novel Rule 60 analysis.

Even if this Court believes that Rule 60 may allow, in certain circumstances, for the sort of analysis that PPAZ requested, the trial court did not abuse its discretion in deciding that *in this case* the analysis PPAZ proposed should be performed in a different procedural posture. After all, the Superior Court did not *foreclose* PPAZ from seeking to amend its complaint to assert its implied repeal theory or even to

bring a new action asserting that theory. The trial court merely concluded, *based on the record before it*, that PPAZ's theory should be presented in a different procedural posture. Order at 6 ("The Court finds modifying the injunction to harmonize laws not in existence when the Complaint was filed, on grounds for relief not set forth in the Complaint, is procedurally improper in the context of a Rule 60 (b)(5) motion."). The Superior Court's preference for PPAZ to present its implied repeal theory through an amended complaint clearly was not an abuse of discretion. *See Aloia v. Gore*, 252 Ariz. 548, 551 ¶ 11 (App. 2022) ("A trial court enjoys broad discretion whether to grant relief from a judgment or order under Rule 60(b)[.]"); *Findlay v. Lewis*, 172 Ariz. 343, 346 (1992) ("A trial court has broad discretion over the management of its docket. Appellate courts do not substitute their judgment for that of the trial court in the day-to-day management of cases.").

Since the Superior Court's ruling, other plaintiffs have taken the Superior Court's instructions to heart and have filed an action in Maricopa County seeking a declaration that § 13-3603 has been repealed as to licensed physicians. In all relevant respects, that lawsuit makes the same arguments and seeks the same relief that PPAZ improperly attempted to smuggle into the below Rule 60 proceedings. *See generally* Ex. C. That action demonstrates that the Superior Court here was correct to conclude that PPAZ's implied repeal arguments should be made in an amended pleading or

new action. And there remains nothing in the Superior Court's narrow ruling preventing PPAZ from doing so.

Because PPAZ has not made a showing that its appeal presents a difficult legal question about how the Superior Court narrowly exercised its discretion, PPAZ's other arguments about purported public confusion and statutory conflict are irrelevant. Relying primarily on press and social media clippings, PPAZ claims the public is confused about how § 13-3603 interacts with Senate Bill ("S.B.") 1164, which went into effect on September 24, 2022. PPAZ continues to mischaracterize that law as "allow[ing]" abortions to be performed within the 15-week limit set in that law. S.B. 1164 does not "allow" abortions prior to 15 weeks of gestation; the law instead *forbids* abortions after 15 weeks of gestation. In S.B. 1164, the Legislature expressly stated that "[t]he Legislature does not intend this act to make lawful an abortion that is currently unlawful." 2022 Ariz. Sess. Laws ch. 105, § 2(1) (2d Reg. Sess.); *see also id.* at § 2 (stating that S.B. 1164 does not "[r]epeal, by implication or otherwise, section 13-3603, Arizona Revised Statutes, or any other applicable state law regulating or restricting abortion"). Once the Superior Court set aside the Second Amended Final Judgment on Friday, September 23, 2022, all abortions made unlawful under A.R.S. § 13-3603 became unlawful again *that day*. By its express terms then, S.B. 1164 did not suddenly make those abortions lawful when it went into effect *the next day*. *See, e.g.*, *Stine*, 184 Ariz. at 3 (collecting cases

that used statements in session laws to determine legislative intent regarding applicability of Arizona's criminal laws).

S.B. 1164 is not the only statute to disclaim making abortion lawful. The Legislature has repeatedly disclaimed in statute after statute—including in the very laws that PPAZ relies upon—that it was creating a right to abortion. In 2009, the Arizona Legislature enacted legislation creating significant new regulations on the performance of abortions. *See* 2009 Ariz. Sess. Laws ch. 172 (1st Reg. Sess.). But, in so doing, the Legislature made clear that the law was not to be construed as creating a right to abortion or make abortion lawful: "This act does not create or recognize a right to an abortion and does not make lawful an abortion that is currently unlawful." *Id.* § 6. In 2017, the Legislature enacted significant changes to the laws governing abortion clinics and the duty to promote the life of a fetus delivered alive. *See* 2017 Ariz. Sess. Laws ch. 133 (1st Reg. Sess.). In that law, the Legislature again emphasized that "[t]his act does not create or recognize a right to abortion. It is not the intention of this act to make lawful an abortion that is currently unlawful." *See id.* § 7. The Legislature made the same statement in 2021 and 2022. *See* 2021 Ariz. Sess. Laws ch. 286, § 17 (1st Reg. Sess.) ("This act does not create or recognize a right to an abortion and does not make lawful an abortion that is currently unlawful."); 2022 Ariz. Sess. Laws ch. 105, § 2(1) (2d Reg. Sess.) ("This act does not: 1. Create or recognize a right to abortion or alter generally accepted medical

standards. The Legislature does not intend this act to make lawful an abortion that is currently unlawful.").

Both S.B. 1164 and A.R.S. § 13-3603 can (and now do) co-exist, allowing prosecutorial discretion as to which law will be charged when both are violated. *See State v. Lopez*, 174 Ariz. 131, 143 (1992) ("When conduct can be prosecuted under two or more statutes, the prosecutor has the discretion to determine which statute to apply.").[9] The Attorney General, therefore, accurately stated that S.B. 1164 would take effect approximately 90 days after the issuance of *Dobbs*. And the Attorney General did not "reverse course" from his accurate statement about S.B. 1164 by filing the motion for relief from judgment.

PPAZ continues to claim that § 13-3603 is inconsistent with a law requiring a 24-hour waiting period with exceptions for medical emergencies. The two laws are not inconsistent. There is no waiting period required under § 13-3603. Thus, if an abortion is allowed under § 13-3603 to save the life of the mother, the abortion can occur immediately if a "medical emergency" also exists. There is nothing "cruel" about this position, which is consistent with how the 24-hour waiting period has interacted with other statutes containing an exception for the life of the mother since enactment of the waiting period.

[9] The Superior Court also correctly recognized that the Order lifting the injunction does not require county attorneys "to pursue prosecutions under A.R.S. § 13-3603." Stay Order at 3.

Finally, for the first time in its Motion, PPAZ argues that § 13-3603 is also inconsistent with abortion reporting requirements contained in A.R.S. § 36-2161. That is also incorrect. While § 13-3603 may reduce the number of reasons that physicians will list for why an abortion was obtained, much of the data required to be reported (including the reason for the abortion) remains relevant. For example, data regarding the facility, the location, and specific medical information all remain relevant even under § 13-3603.

II. PPAZ Cannot Show That The Balance Of Hardships Tips In Its Favor.

Even if the Court concludes that there are serious questions going to the merits, PPAZ has not proven that the balance of hardships tips in its favor, let alone *sharply* in its favor.

PPAZ alleges that it is suffering hardship due to confusion caused by the interaction of Arizona's statutes regulating abortion and social media statements made by Arizona officials. As already discussed, the statutes PPAZ identifies can coexist, allowing prosecutorial discretion to determine whether, and to what extent, § 13-3603 is enforced.

But most notably, as the court below concluded in denying PPAZ's emergency stay request before that court, PPAZ did not show that the balance tips in its favor because "PPAZ has other appropriate legal avenues available to it to resolve the issues it seeks to resolve surrounding interpretation and harmonization

of Arizona's abortion statutes." Stay Order at 2–3. The court noted that "the interpretation and interplay of Arizona's abortion statutes should be addressed in a new lawsuit or on an amended complaint where a full record on the issues can be developed and considered by the Court." *Id.* at 2. Similarly, in the Superior Court's order lifting the injunction, it noted that PPAZ "may move to amend its Complaint after [Rule 60(b)] relief is granted, or may file a new action to seek relief it believes appropriate." Order at 6; *see also* Stay Order at 2 (recognizing that the Attorney General also suggested the alternate avenues throughout the Rule 60(b) briefing). The balance of hardships cannot tip sharply in PPAZ's favor when it has a readily available means of redress that it has failed to pursue.

Similarly, nothing in the Superior Court's ruling prevents a plaintiff from bringing an as-applied challenge to § 13-3603, or a prosecutor from exercising discretion not to prosecute a particular case. But the existence of hypothetical and speculative circumstances where § 13-3603 may be subject to challenge or where discretion will forego prosecution is not reason to maintain a total injunction based on a decision that has been overruled.

As already discussed, just this week, a physician and the Arizona Medical Association filed a complaint and order to show cause in Maricopa County Superior Court seeking relief identical to what PPAZ sought through its "harmonization" argument below. *See supra* 11. This new action demonstrates that the relevant time

period for the possibility of hardship to PPAZ is necessarily brief (several weeks at most). Because abortion is permanent and results in the termination of unborn life, PPAZ cannot show that the balance of hardships tips in its favor (let alone substantially so) during the short time needed for it to pursue the relief it improperly sought through a Rule 60 proceeding. PPAZ gives no weight to the interests of the unborn, even though Dr. Hazelrigg, as Guardian ad Litem, has laid out in detail the harms that occur from abortions at various weeks of gestation. *See, e.g.*, *Dr. Eric Hazelrigg & Choices Pregnancy Center's Proposed Reply in Supp. of Att'y General's Mot. for Relief from J.* (Aug. 4, 2022).

While the Attorney General need not establish injury to the State to avoid a stay, the harms to the State that would flow from a stay are irrefutable. It is well established that "a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). "[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Making the State's injury even greater in this case is that the statute was enjoined based on what the Supreme Court has now said was an "egregiously wrong" decision in *Roe*. *See Dobbs*, 142 S. Ct. at 2243 ("*Roe* was egregiously wrong from the start."). Staying the Court's order during the pendency of this appeal will

continue to cause the State sovereign injury no different from that caused by the injunction that has now been set aside in the wake of *Dobbs*.

Neither do PPAZ's "due process" arguments (at 26–27) tip the balance in its favor. Those arguments are merely a different way of stating PPAZ's "confusion" and "inconsistency" arguments. And those arguments, like PPAZ's other arguments, can be pressed in an amended pleading or a new action.

CONCLUSION

For these reasons, the Court should deny PPAZ's Emergency Motion for Stay Pending Appeal.

RESPECTFULLY SUBMITTED this 6th day of October, 2022.

MARK BRNOVICH
Attorney General

By /s/ *Brunn ("Beau") W. Roysden III*
Brunn W. Roysden III (No. 28698)
Michael S. Catlett (No. 25238)
Kate B. Sawyer (No. 34264)
Katlyn J. Divis (No. 35583)
Assistant Attorneys General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, Arizona 85004
Beau.Roysden@azag.gov
Michael.Catlett@azag.gov
Kate.Sawyer@azag.gov
Katlyn.Divis@azag.gov
acl@azag.gov

Attorneys for Defendant Mark Brnovich
Attorney General of the State of Arizona

CERTIFICATE OF SERVICE

I certify that on October 6, 2022, the original of the foregoing was electronically filed with the Clerk of the Court for Pima County Superior Court via TurboCourt, and electronically delivered to:

D. Andrew Gaona
Kristen Yost
Coppersmith Brockelman PLC
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004
(602) 381-5478
agaona@cblawyers.com
kyost@cblawyers.com

Diana O. Salgado
Planned Parenthood Federation of America
1110 Vermont Ave., NW, Suite 300
Washington, D.C. 20005
T: (212) 261-4399
diana.salgado@ppfa.org

Sarah Mac Dougall
Catherine Peyton Humphreville
Planned Parenthood Federation of America
123 William Street, 9th Floor
New York, NY 10038
T: (212) 261-4529
sarah.macdougall@ppfa.org
catherine.humpreville@ppfa.org

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

Stanley Feldman
MILLER PITT FELDMAN & MCANALLY PLC
One S. Church Ave., Ste. 1000
Tucson, AZ 85701-1620
Office/Firm: 520-792-3836
sfeldman@mpfmlaw.com
Former attorneys for Plaintiffs

Samuel E. Brown
Chief Civil Deputy
PIMA COUNTY ATTORNEY'S OFFICE
32 N. Stone Ave., Suite 2100
Tucson, AZ 85701
Office/Firm: 520-724-5600
sam.brown@pcao.pima.gov
Attorneys for Defendant Laura Conover, County Attorney of Pima County, Arizona

Kevin Theriot
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
480-444-0020
ktheriot@adflegal.org
Attorneys for Eric Hazelrigg, M.D., intervenor and guardian ad litem of all Arizona unborn infants

I certify that a copy of the foregoing was mailed via U.S. Mail to:

Damon Raphael
2151 W. Desert Serenity Place
Vail, AZ 85641
Plaintiff pro se

Nathaniel Bloomfield
6300 East Speedway Apt. #1124
Tucson, AZ 85710
Plaintiff pro se

By: /s/ *Brunn W. Roysden* III