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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

PLANNED PARENTHOOD CENTER OF TUCSON, INC., et al.,

Plaintiffs,

v.

MARK BRNOVICH, Attorney General of the State of Arizona, et al.,

Defendants,

and

CLIFFTON E. BLOOM, as guardian ad litem of the unborn child of plaintiff Jane Roe and all other unborn infants similarly situated,

Intervenor.

Case No.: C127867

ATTORNEY GENERAL'S MOTION FOR RELIEF FROM JUDGMENT

EXPEDITED CONSIDERATION REQUESTED

ORAL ARGUMENT REQUESTED

INTRODUCTION

Pursuant to Arizona Rule of Civil Procedure 60(b)(5) and (6), Defendant the Arizona Attorney General moves this Court for relief from the "Second Amended Declaratory Judgment and Injunction Pursuant to the Mandate of the Court of Appeals, Division II," which was entered in this case on or about March 27, 1973 (the "Second Amended Final Judgment," attached as Exhibit A).

Just weeks after the U.S. Supreme Court issued its opinions in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), this Court issued the Second Amended Final Judgment declaring unconstitutional former A.R.S. § 13-211, now numbered as § 13-3603, which makes it a crime for a person to provide "any medicine, drugs or substance" or use "any instrument or other means whatever, with intent thereby to procure the miscarriage" of a "pregnant woman," unless "necessary to save her life." The Second Amended Final Judgment declared this statute unconstitutional and enjoined the Attorney General and the Pima County Attorney from "taking any action or threatening to take any action to enforce the provisions … against all persons." Second Amended Final Judgment at 3–4.[1]

Relief is warranted because the Second Amended Final Judgment was based solely and expressly on decisions the U.S. Supreme Court has now overruled. *See Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. App. 142, 152 (1973) (Opinion on Rehearing) (relying solely on the U.S. Supreme Court's decisions in *Roe* and *Doe* to vacate prior panel opinion upholding abortion restrictions). While *Roe* (and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)) previously represented the law on abortion, on June 24, 2022, the U.S. Supreme Court "h[e]ld that the Constitution does not confer a right to abortion" and that "*Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279

[1] The Second Amended Final Judgment also declared unconstitutional and enjoined former A.R.S. § 13-212, renumbered in 1977 as A.R.S. § 13-3604, which applied to a woman who obtained an abortion, and former A.R.S. § 13-213, renumbered in 1977 as A.R.S. § 13-3605. This Motion does not seek relief from judgment as to these statutes.

(2022). Therefore, the sole basis for the Second Amended Final Judgment—the U.S. Supreme Court's recognition of a federal right to abortion—has been "overruled," and this Court must now grant relief from that judgment consistent with the U.S. Supreme Court's directive that "the authority to regulate abortion must be returned to the people and their elected representatives." *Id.*

The Arizona Legislature has never acquiesced in the conclusion that former § 13-211 is unconstitutional. Rather, in anticipation that the U.S. Supreme Court could overrule *Roe*, the Legislature has repeatedly preserved Arizona's statutory prohibition on performing abortions except to save the life of the mother. Four years after the Second Amended Final Judgment, the Legislature enacted H.B. 2054, which re-codified § 13-211 as § 13-3603. *See* 1977 Ariz. Sess. Laws ch. 142, § 99 (1st Reg. Sess.). And since then, Arizona courts have recognized this 1977 law as "re-enact[ing]" or "enact[ing]" this statutory provision anew. *Summerfield v. Super. Ct.*, 144 Ariz. 467, 476 (1985); *Vo v. Super. Ct.*, 172 Ariz. 195, 201 (App. 1992). And just this year, even while enacting a 15-week gestational age limitation on abortions prior to the issuance of the *Dobbs* opinion (when it was uncertain how the Supreme Court would rule), the Legislature also expressly included 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.).

This Motion seeks relief under Arizona Rule of Civil Procedure 60(b)(5) and (6) from prospective application of the declaratory and injunctive relief in the Second Amended Final Judgment as applied to A.R.S. § 13-3603. This is consistent with principles of equity, the Legislature's intent in re-enacting this provision following the Second Amended Final Judgment, and the Supreme Court's express return in *Dobbs* of the authority to regulate abortion to the people and their elected representatives.

FACTUAL AND PROCEDURAL BACKGROUND

Leading up to *Roe*, Arizona repeatedly enforced the prohibitions in former § 13-211. There are multiple published opinions stemming from convictions under this 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] Similarly, in the instant case, the former Pima County Attorney testified during deposition that § 13-211 "would be enforced as any other criminal statute[]," and "during oral argument, in response to questioning by the court, the deputy county attorney advised the court that the office of the County Attorney for Pima County will uphold the statutes and that prosecution is always a matter of proof." *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 312 (1972).

Against this backdrop of enforcement, Planned Parenthood Center of Tucson, Inc. ("Planned Parenthood"); ten named physicians ("Named Physicians"); and "Jane Doe," an anonymous pregnant woman who wished to have an abortion, filed the Complaint in this case on July 22, 1971. *See* Exhibit B (the "Complaint"). The Complaint sought declaratory and injunctive relief, alleging that "except for the risk of criminal prosecution," Planned Parenthood would refer some of its clients to physicians in order that abortions could be performed "although the procedures were not necessary to save the lives of such pregnant women," and Named Physicians "would respectively perform

[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.

or arrange for the performance of abortions." *Nelson*, 19 Ariz. App. at 143. The named Defendants are the Arizona Attorney General and the Pima County Attorney. Final Judgment at 2.[3] In addition, intervention was granted for a Guardian ad Litem of the unborn child of plaintiff Jane Roe and all other unborn infants similarly situated. *Id.*

The case proceeded to trial in late 1971. Second Amended Final Judgment at 1. After trial, the case was dismissed for lack of a justiciable controversy, but the Court of Appeals reversed, and ordered this Court to "proceed to a resolution of the case on its merits." *Marks*, 17 Ariz. App. at 313. This Court then filed a memorandum opinion on September 29, 1972, which held

> that a fetus is not a person entitled to Fourteenth Amendment rights and does not have constitutionally protected rights; that A.R.S. § 13-211 is overbroad and violates the fundamental right of marital and sexual privacy of women guaranteed by the Ninth and Fourteenth Amendments to the United States Constitution; and that A.R.S. § 13-211 also violates the constitutional rights of physicians who attend to the medical needs of pregnant women because it denies each physician his right to practice medicine in a manner which permits him to fulfill his professional ethical obligation to his patient.

Nelson, 19 Ariz. App. at 143. This Court entered an Amended Declaratory Judgment and Injunction in favor of Planned Parenthood and the Named Doctors on October 2, 1972 (Exhibit C).[4] The Attorney General, Pima County Attorney, and Guardian ad Litem then appealed to the Court of Appeals. Second Amended Final Judgment at 2.

The Court of Appeals issued a well-reasoned opinion that reversed on all grounds and upheld the challenged laws as constitutional. *Nelson*, 19 Ariz. App. at 142–50. As a threshold matter, the Court of Appeals made clear that its analysis did not hinge on whether a fetus is a person entitled to Fourteenth Amendment rights but rather framed the purpose of the Arizona abortion statutes as "to embody the belief in the right to life and the necessity of preserving human life even when the existence of 'human life' is

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[3] A similar complaint was filed in Maricopa County against the Attorney General and Maricopa County Attorney (Maricopa County Superior Court Case No. C249461). Neither the Court of Appeals Opinions in *Nelson* and *Marks* nor the Second Amended Final Judgment say anything about that case or the Maricopa County Attorney.

[4] By this time, "Jane Roe" had been substituted for "Jane Doe," *Nelson*, 19 Ariz. App. at 143, but the Second Amended Final Judgment dismissed Jane Roe entirely from the action. Second Amended Final Judgment at 4.

problematic to some degree, and to protect the health and life of pregnant women by keeping them from incompetent abortionists … ." *Id*. at 144; *see also id.* at 147 (court need not decide whether a fetus is a "person" under the U.S. and Arizona Constitutions).

The court then addressed six different challenges to the statute brought by Plaintiffs. The court first rejected Plaintiffs' vagueness challenge, relying on *United States v. Vuitch*, 402 U.S. 62 (1971) and other cases. *Nelson*, 19 Ariz. App. at 146–47. Second, it rejected the argument that the abortion statutes violate women's rights under the Ninth Amendment to the U.S. Constitution. *Id.* at 147. Third, it rejected Plaintiffs' overbreadth challenge, which was brought on the ground that the law does not make exceptions for cases of rape or a "defective" fetus. *Id.* at 149. The court said "the legislature can legitimately decide that the primary consideration is the protection of life[.]" *Id.* Fourth, the court rejected the "claimed infringement of rights to conduct family planning, choice of medical treatment and freedom to follow the dictates of their profession … in the face of th[e Legislature's] valid exercise of the police power." *Id.* at 150. Fifth, the court rejected the argument that § 13-211 violates the establishment of religion or free exercise of religion. *Id.* Sixth, the court rejected the argument that the statute discriminates against poor women. *Id.* The court concluded as follows:

> [W]e are unable to find that appellees have sustained their burden of overcoming the presumption in favor of constitutionality. After every intendment has been indulged by us in favor of the validity of the statute we are also not satisfied beyond a reasonable doubt that the statutes are unconstitutional.
>
> Appellees' complaints against the abortion statutes are peculiarly within the field occupied by the legislature and any problem concerning abortion should be solved by that body. We can only reiterate that we are not a super-legislature.
>
> In view of our disposition of this case we need not decide the cross-appeal. The judgment of the trial court is reversed, the case is remanded and the trial court is ordered to enter a judgment in favor of appellants and against appellees denying injunctive relief and upholding the constitutionality of the statutes.

Id.

But less than three weeks later, the U.S. Supreme Court issued *Roe* and *Doe*. The court of appeals then issued an Opinion on Rehearing, which vacated its prior panel opinion on the sole and express ground of the binding nature of these two cases. *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… ."); *McLaughlin v. Jones*, 243 Ariz. 29, 35 ¶25 (2017) ("The United States Supreme Court's interpretation of the Constitution is binding on state court judges… .").[5] The combined effect of the 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 this 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 of Appeals had changed its position on the other issues presented on appeal and addressed in the prior panel opinion).

After the Opinion on Rehearing, further appellate review was denied and jurisdiction was returned to this Court, which then entered the Second Amended Final Judgment "[p]ursuant to the Mandate of the Court of Appeals, Division II." Second Amended Final Judgment at 1. The Second Amended Final Judgment declared former A.R.S. §§ 13-211 through -213 unconstitutional. Second Amended Final Judgment at 3. 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 action to enforce the provisions of A.R.S. §§ 13-211 through -213. 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

[5] The Opinion on Rehearing also directed this Court to modify its decision so "that the statutes in question are unconstitutional as to all." *Nelson*, 19 Ariz. App. at 152.

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.).[6] The Arizona courts have at least twice expressly recognized this 1977 law as "re-enact[ing]" or "enact[ing]" the new statutes. *See Summerfield*, 144 Ariz. at 476; *Vo*, 172 Ariz. at 201. 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. And 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 Court would rule), the Legislature also expressly included 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.).

Then on June 24, 2022, the U.S. Supreme Court issued its opinion in *Dobbs*, overruling *Roe* and thereby paving the way for § 13-3603 to continue in effect unimpeded, as the Legislature intended. 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." *Dobbs*, 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

[6] 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."

"[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion." *Id.*

This Motion seeks 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 it seeks to similarly eliminate any prospective effect of the declaratory judgment as to that statute.

ARGUMENT

I. Relief from the Second Amended Final Judgment is warranted under Rule 60(b)(5)

Relief from the Second Amended Final Judgment is warranted here under Rule of Civil Procedure 60(b)(5).

A. The Rule 60(b)(5) Standard

Rule 60(b)(5) permits relief where "applying [the judgment] prospectively is no longer equitable." This portion of Rule 60(b)(5), which allows a judgment to be set aside when prospective application is no longer equitable, "encompasses the traditional power of a court of equity to modify its decree in light of changed circumstances." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441 (2004); *see also Wright & Miller*, Judgment Satisfied or No Longer Equitable, 11 Fed. Prac. & Proc. Civ. § 2863 (3d ed.).[7] "[I]t 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). Under Rule 60(b)(5), "[a] court may recognize subsequent changes in either statutory or decisional law." *Id.*; *see also Horne v. Flores*, 557 U.S. 433, 447 (2009) (Rule 60(b)(5) relief appropriate when a significant change in either factual conditions or in law renders continued enforcement of the judgment detrimental to the public interest). In fact, "[a] court errs when it refuses to modify an injunction or consent decree in light of such changes." *Agostini*, 521 U.S. at

[7] Because the grounds in Arizona Rule 60(b) are "identical" to Federal Rule of Civil Procedure 60(b), Arizona courts "give 'great weight' to federal court interpretations of this rule." *Bredfeldt v. Greene*, No. 2 CA-CV 2016-0198, 2017 WL 6422341, at *2 ¶6 (Ariz. Ct. App. Dec. 18, 2017) (quoting *Estate of Page v. Litzenburg*, 177 Ariz. 84, 93 (App. 1993)).

215. The U.S. Supreme Court has even rejected the notion that Rule 60(b)(5) does not apply where a movant uses it "not as a means of *recognizing* changes in the law, but as a vehicle for *effecting* them." *Id.* at 238; *id.* at 239 (granting "a party's request under Rule 60(b)(5) to vacate a continuing injunction entered some years ago in light of a bona fide, significant change in subsequent law").

Similarly, in *Edsall v. Superior Court*, the Arizona Supreme Court recognized that Rule 60(b)(5) can be used to reopen final orders where there has been "a change in the law affecting substantial rights of a litigant." 143 Ariz. 240, 243 (1984). And the Ninth Circuit has "recognized as settled that '[w]hen a change in the law authorizes what had previously been forbidden, it is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law.'" *California v. EPA*, 978 F.3d 708, 715 (9th Cir. 2020) (quoting *Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986)); *see also Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 413 F.3d 897, 903 (8th Cir. 2005) ("When prospective relief is at issue, a change in decisional law provides sufficient justification for Rule 60(b)(5) relief.").

B. Prospective application of the Second Amended Final Judgment is no longer equitable following *Dobbs*

Here, the Attorney General is not using Rule 60(b)(5) as a vehicle for effecting legal change; that change has unequivocally occurred in *Dobbs*, which overruled *Roe* and *Casey* and abrogated numerous other cases recognizing a federal right to abortion. *Dobbs*, 142 S. Ct. at 2242. *Dobbs*, therefore, clearly represents a significant change in the law affecting substantial rights of the State (acting through the enjoined prosecutors), as well as the unborn.

It is beyond dispute that *Dobbs* represents a change in the very law that was the sole and express basis for the Second Amended Final Judgment. Before *Roe*, Arizona had repeatedly enforced the criminal ban (codified then as § 13-211) on performing abortions other than to save the life of the mother by bringing prosecutions against doctors who performed such abortions. *See supra* at page 3 (citing cases). And less than three weeks before *Roe*, the Arizona Court of Appeals held, in a well-reasoned and

thorough opinion, that this law was constitutional. *Nelson*, 19 Ariz. App. at 142–50. However, *Roe*'s recognition of a federal right to abortion changed everything. The Arizona Court of Appeals entered the Opinion on Rehearing, which summarily reversed its prior panel opinion upholding §§ 13-211 to -213, and this Opinion on Rehearing was based solely on the newly-recognized federal right in *Roe*.

That *Roe* was the sole impediment to enforcement of Arizona's abortion statute is further supported by other Court of Appeals decisions addressing the abortion statutes. *See, e.g.*, *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"). Years later, the Court of Appeals similarly "note[d] that the abortion statutes, as currently codified, may be unenforceable under the constitutional principles articulated in *Roe*…." *Vo*, 172 Ariz. at 202 n.6 (citing *Wahlrab* and *Nelson*).

On remand in this case, the Court expressly amended its prior judgment based exclusively on the Opinion on Rehearing and entered the Second Amended Final Judgment pursuant to the Court of Appeals' mandate, thereby enjoining the Attorney General and Pima County Attorney from taking any further action to enforce § 13-211. At that time, the Court also expanded the scope of persons covered by the injunction to include not only the plaintiffs and their patients, but all persons—again based expressly on the Opinion on Rehearing.

But when, on June 24, 2022, *Dobbs* overruled *Roe*, the Supreme Court returned the issue to the democratic process—specifically the States acting through their elected representatives or the people themselves. The law has therefore returned to what it was prior to *Roe*, and for Arizona this means the well-reasoned panel opinion in *Nelson*. Simply put, that opinion held § 13-211 was constitutional, and it rejected the various

challenges brought by Plaintiffs here. That opinion is even more clearly correct given the reasoning in *Dobbs*. There has thus been a change in the law, *i.e.*, a return to the pre-*Roe* understanding of the absence of a federal right to abortion. This change "authorizes what had previously been forbidden," *California*, 978 F.3d at 715 (citation omitted), which is the enforcement of the criminal prohibition on performing abortions except to save the life of the mother, and it would be "an abuse of discretion for [this] court to refuse to modify [the] injunction founded on superseded law." *Id.*

Moreover, this change in the law and facts "affect[s] substantial rights of a litigant." *Edsall*, 143 Ariz. at 243. There are two classes of litigants in this action whose substantial rights are affected. First, the Attorney General and Pima County Attorney are enjoined from taking any action to enforce § 13-211, a duly-enacted statute of the Arizona Legislature. When prosecutors act to enforce state law they act on behalf of the state to enforce its sovereign interests in carrying out its criminal laws. In fact, the Plaintiffs made that precise allegation in this case. *See Marks*, 17 Ariz. App. at 312 ("The petitioners were permitted to amend the complaint to include an allegation that the State of Arizona, through its prosecuting authorities, intended to enforce the abortion statutes through appropriate action."). Erroneously depriving a State of the ability to enforce its laws, even for a brief period, is a form of irreparable injury. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (brackets and citation omitted) ("Any time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) ("[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"). Thus the continued existence of the Second Amended Final Judgment going forward affects the substantial rights of the State, through its enjoined prosecutors.

Second, the unborn are also a represented party in this case, and their substantial rights are clearly affected. This Court granted intervention by Cliffton Bloom as Guardian ad Litem of the unborn children affected by abortion. Second Amended Final

Judgment at 1-2. And the Legislature has made clear that abortion affects the substantial rights of the unborn. *See Summerfield*, 144 Ariz. at 476 (citing several Arizona statutes to support the conclusion that "we also discern, in other areas of the law, a legislative goal of protecting the fetus"); *Vo*, 172 Ariz. at 201 n.6 (relying upon A.R.S. §§ 13-3603 to -3605 for the purpose of "ascertaining the scope of the protection the legislature intended to afford a fetus in enacting the existing criminal law"). Further, in 2021 the Legislature adopted an interpretation provision, § 1-219, which similarly informs that intervention should be permitted in this civil action.[8] Clearly the substantial rights of this litigant are also affected by the change of law in *Dobbs*.

Plaintiffs' prior arguments regarding overbreadth and the right of physicians to practice their chosen profession do not establish that A.R.S. § 13-3603 is unconstitutional and therefore do not provide bases to deny relief now. The Court of Appeals specifically addressed—and rejected—those arguments. *See Nelson*, 19 Ariz. App. at 149–50. The overbreadth argument was based on the lack of exceptions for rape and "defective fetuses." The Mississippi abortion law in *Dobbs* did not contain an exception for rape, and yet the U.S. Supreme Court upheld the law as constitutional. *See* 142 S. Ct. 2284; *id.* at 2344 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("The Mississippi law at issue here, for example, has no exception for rape or incest[.]"). And nothing outside of the decisions in *Roe* and *Casey* and their now-abrogated progeny cast doubt on the panel opinion's conclusion that "[i]t is . . . within the province of the state legislature to weight the competing interests and enact, as the legislature has done in this state, a statute which prohibits all abortions except those necessary to save the life of the mother." *Nelson*, 19 Ariz. App. at 150. The right to practice one's profession argument is akin to an argument under *Lochner*, and the argument clearly fails under rational basis review. *See Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999) (explaining that the right to choose one's field of

[8] The District of Arizona has preliminarily enjoined certain Arizona government officials from "enforcing A.R.S. § 1-219 as applied to abortion care that is otherwise permissible under Arizona law." *Isaacson v. Brnovich*, —F. Supp. 3d—, 2022 WL 2665932, *10 (D. Ariz. July 11, 2022). That preliminary injunction has no application here.

private employment is "a right which is nevertheless subject to reasonable government regulation").

Finally, this motion is made in a "reasonable time" under Rule 60(c)(1). "[W]here a change in law is the basis for [a Rule 60(b)] motion, the date of the challenged order provides little guidance in measuring its timeliness; valid grounds for reconsideration may arise long after a final judgment has been entered." *Bynoe v. Baca*, 966 F.3d 972, 980 (9th Cir. 2020). Timeliness in this instance is measured "as of the point in time when the moving party has grounds to make [a Rule 60(b)] motion, regardless of the time that has elapsed since the entry of judgment." *Id.* This Motion is plainly timely.

II. Alternatively, relief from the Second Amended Final Judgment is warranted under Rule 60(b)(6)

In the alternative, if the Court does not grant relief under Rule 60(b)(5), relief is warranted under Rule 60(b)(6) because the overruling of *Roe* is an extraordinary circumstance that justifies relief. *See Kemp v. United States*, 142 S. Ct. 1856, 1865 (2022) (Sotomayor, J., concurring) (Rule 60(b)(6) is available "to reopen a judgment in extraordinary circumstances, including a change in controlling law" (citing cases)); *see also Edsall*, 143 Ariz. at 243 (Rule 60(b)(5) and (6) "have been used liberally in reopening otherwise final court orders where there has been a change in the law affecting substantial rights of a litigant."). While the relief requested fits squarely within the contours of Rule 60(b)(5), if the Court disagrees, relief under Rule 60(b)(6) is equally appropriate here.

III. Notice Regarding Rule 25 Motions

In the years since entry of the Second Amended Final Judgment, there have been changes affecting the parties to this case that will be reflected in concurrent notices and a motion filed under Rule 25. On information and belief, the interest of Plaintiff Planned Parenthood has transferred to its current successor-in-interest, Planned Parenthood of Arizona, Inc. ("PPAZ").[9] On information and belief, of the ten Named Physicians, six

[9] The undersigned received an email from PPAZ's counsel indicating PPAZ's desire to be served and participate in this action. Consistent with that request, the Attorney General

have passed away, and the Attorney General will file a statement noticing death under Rule 25(a)(2). On information and belief, the other four Named Physicians are still alive, although none currently hold active physician licenses in Arizona. The current Attorney General and Pima County Attorney are substituted automatically as defendants under Rule of Civil Procedure 25(d). On information and belief, the Intervenor Cliffton E. Bloom, as Guardian ad Litem of the unborn child of plaintiff Jane Roe and all other unborn infants similarly situated, has passed away, and the Attorney General is filing a motion under Rule 25(a)(1) to substitute Dr. Eric Hazelrigg, an OB/GYN and Medical Director of Choices Pregnancy Centers of Greater Phoenix, Inc., as Guardian ad Litem.

CONCLUSION

For the foregoing reasons, Defendant the Attorney General respectfully requests that this Court grant relief under Arizona Rule of Civil Procedure 60(b)(5) or 60(b)(6) from prospective application of the declaratory and injunctive relief contained in the Second Amended Final Judgment as applied A.R.S. § 13-3603.

RESPECTFULLY SUBMITTED this 13th day of July, 2022.

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ATTORNEY GENERAL

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will serve PPAZ with a copy of this Motion and will cooperate to have the current successor-in-interest of Plaintiff Planned Parenthood substituted in as a party.

CERTIFICATE OF SERVICE

I certify that on July 13, 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:

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By: /s/ Brunn W. Roysden III