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17 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
18 **IN AND FOR THE COUNTY OF PIMA**

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

21 Plaintiffs,

22 v.

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

25 Defendants,

26 and

27 CLIFFTON E. BLOOM, as guardian ad litem of
28 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**

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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.

1 (2022). Therefore, the sole basis for the Second Amended Final Judgment—the U.S.
2 Supreme Court’s recognition of a federal right to abortion—has been “overruled,” and
3 this Court must now grant relief from that judgment consistent with the U.S. Supreme
4 Court’s directive that “the authority to regulate abortion must be returned to the people
5 and their elected representatives.” *Id.*

6 The Arizona Legislature has never acquiesced in the conclusion that former § 13-
7 211 is unconstitutional. Rather, in anticipation that the U.S. Supreme Court could
8 overrule *Roe*, the Legislature has repeatedly preserved Arizona’s statutory prohibition on
9 performing abortions except to save the life of the mother. Four years after the Second
10 Amended Final Judgment, the Legislature enacted H.B. 2054, which re-codified § 13-211
11 as § 13-3603. *See* 1977 Ariz. Sess. Laws ch. 142, § 99 (1st Reg. Sess.). And since then,
12 Arizona courts have recognized this 1977 law as “re-enact[ing]” or “enact[ing]” this
13 statutory provision anew. *Summerfield v. Super. Ct.*, 144 Ariz. 467, 476 (1985); *Vo v.*
14 *Super. Ct.*, 172 Ariz. 195, 201 (App. 1992). And just this year, even while enacting a 15-
15 week gestational age limitation on abortions prior to the issuance of the *Dobbs* opinion
16 (when it was uncertain how the Supreme Court would rule), the Legislature also
17 expressly included in the session law that the 15-week gestational age limitation does not
18 “[r]epeal, by implication or otherwise, section 13-3603, Arizona Revised Statutes, or any
19 other applicable state law regulating or restricting abortion.” *See* 2022 Ariz. Sess. Laws
20 ch. 105, § 2 (2d Reg Sess.).

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

1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 Leading up to *Roe*, Arizona repeatedly enforced the prohibitions in former § 13-
3 211. There are multiple published opinions stemming from convictions under this
4 statute. *See, e.g., State v. Wahlrab*, 19 Ariz. App. 552 (1973) (noting Wahlrab was
5 convicted under § 13-211 but vacating conviction because “although [the court]
6 disagree[s] with the [*Roe v. Wade*] opinion we are bound by the U.S. Supreme Court
7 decision”); *State v. Kever*, 10 Ariz. App. 354 (1969) (reversing conviction under § 13-
8 211 based on reasonable doubt but not questioning the law’s constitutionality); *State v.*
9 *Boozer*, 80 Ariz. 8 (1955) (affirming conviction under § 13-211, as previously codified in
10 1939 Code § 43-301); *Hightower v. State*, 62 Ariz. 351 (1945) (same); *Kinsey v. State*, 49
11 Ariz. 201 (1937) (affirming conviction under § 13-211, as previously codified in 1928
12 Code § 4645).² Similarly, in the instant case, the former Pima County Attorney testified
13 during deposition that § 13-211 “would be enforced as any other criminal statute[,]” and
14 “during oral argument, in response to questioning by the court, the deputy county
15 attorney advised the court that the office of the County Attorney for Pima County will
16 uphold the statutes and that prosecution is always a matter of proof.” *Planned*
17 *Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 312 (1972).

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

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27 ² Section 13-211 can be traced back to section 243 of the 1901 penal code, and when the
28 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.

1 or arrange for the performance of abortions.” *Nelson*, 19 Ariz. App. at 143. The named
2 Defendants are the Arizona Attorney General and the Pima County Attorney. Final
3 Judgment at 2.³ In addition, intervention was granted for a Guardian ad Litem of the
4 unborn child of plaintiff Jane Roe and all other unborn infants similarly situated. *Id.*

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

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

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

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

26 ³ A similar complaint was filed in Maricopa County against the Attorney General and
27 Maricopa County Attorney (Maricopa County Superior Court Case No. C249461).
Neither the Court of Appeals Opinions in *Nelson* and *Marks* nor the Second Amended
28 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.

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

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

18 [W]e are unable to find that appellees have sustained their burden of
19 overcoming the presumption in favor of constitutionality. After every
20 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.

21 Appellees’ complaints against the abortion statutes are peculiarly within the
22 field occupied by the legislature and any problem concerning abortion
23 should be solved by that body. We can only reiterate that we are not a
super-legislature.

24 In view of our disposition of this case we need not decide the cross-appeal.
25 The judgment of the trial court is reversed, the case is remanded and the
26 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.

27 *Id.*

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1 But less than three weeks later, the U.S. Supreme Court issued *Roe* and *Doe*. The
2 court of appeals then issued an Opinion on Rehearing, which vacated its prior panel
3 opinion on the sole and express ground of the binding nature of these two cases. *Nelson*,
4 19 Ariz. App. at 152; *see also* U.S. Const. art. VI (“The Constitution ... of the United
5 States shall be the supreme law of the land; and the judges in every state shall be
6 bound thereby... .”); *McLaughlin v. Jones*, 243 Ariz. 29, 35 ¶25 (2017) (“The United
7 States Supreme Court’s interpretation of the Constitution is binding on state court
8 judges... .”).⁵ The combined effect of the panel opinion (*Nelson*, 19 Ariz. App. at
9 142–50) and Opinion on Rehearing (*id.* at 152), taken as a whole, was to affirm the prior
10 judgment of this Court on the sole ground of the newly recognized federal constitutional
11 right to abortion. *See id.* at 152 (using word “[a]ccordingly” to modify the vacatur of the
12 prior panel opinion; expressly and solely basing its reasoning on the court being “bound
13 by” U.S. Supreme Court decisions interpreting the Constitution; and providing no other
14 reasoning or suggestion that the Court of Appeals had changed its position on the other
15 issues presented on appeal and addressed in the prior panel opinion).

16 After the Opinion on Rehearing, further appellate review was denied and
17 jurisdiction was returned to this Court, which then entered the Second Amended Final
18 Judgment “[p]ursuant to the Mandate of the Court of Appeals, Division II.” Second
19 Amended Final Judgment at 1. The Second Amended Final Judgment declared former
20 A.R.S. §§ 13-211 through -213 unconstitutional. Second Amended Final Judgment at 3.
21 It also permanently enjoined the Arizona Attorney General and Pima County Attorney,
22 and all successors, agents, servants, employees, attorneys, and all persons in active
23 concert or participation with them, from taking any action or threatening to take any
24 action to enforce the provisions of A.R.S. §§ 13-211 through -213. Second Amended
25 Final Judgment at 4.

26 The Legislature, however, did not acquiesce in the declaration that these laws were
27 unconstitutional but rather took affirmative steps to ensure their continuing validity in the

28 _____
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.

1 event that *Roe* was overruled. In 1977, the Legislature re-enacted former § 13-211 as
2 § 13-3603, former § 13-212 as § 13-3604, and former § 13-213 as § 13-3605. *See* 1977
3 Ariz. Sess. Laws ch. 142, § 99 (1st Reg. Sess.).⁶ The Arizona courts have at least twice
4 expressly recognized this 1977 law as “re-enact[ing]” or “enact[ing]” the new statutes.
5 *See Summerfield*, 144 Ariz. at 476; *Vo*, 172 Ariz. at 201. In 2021, the Legislature
6 repealed § 13-3604, indicating its intent not to continue criminalizing abortion as to the
7 mother of an unborn child. *See* 2021 Ariz. Laws ch. 286, § 3 (1st Reg. Sess.). But the
8 Legislature did not likewise repeal § 13-3603. And this year, even while it enacted a 15-
9 week gestational age limitation on abortions prior to the issuance of the *Dobbs* opinion
10 (when it was uncertain how the Supreme Court would rule), the Legislature also
11 expressly included in the session law that the 15-week gestational age limitation does not
12 “[r]epeal, by implication or otherwise, section 13-3603, Arizona Revised Statutes, or any
13 other applicable state law regulating or restricting abortion.” *See* 2022 Ariz. Sess. Laws
14 ch. 105, § 2 (2d Reg Sess.).

15 Then on June 24, 2022, the U.S. Supreme Court issued its opinion in *Dobbs*,
16 overruling *Roe* and thereby paving the way for § 13-3603 to continue in effect
17 unimpeded, as the Legislature intended. In *Dobbs*, the Supreme Court “h[e]ld that the
18 Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and
19 the authority to regulate abortion must be returned to the people and their elected
20 representatives.” *Dobbs*, 142 S. Ct. at 2279. *Dobbs* further recognized that “States may
21 regulate abortion for legitimate reasons, and when such regulations are challenged under
22 the Constitution, courts cannot ‘substitute their social and economic beliefs for the
23 judgment of legislative bodies.’” *Id.* at 2283–84. “These legitimate interests include
24 respect for and preservation of prenatal life at all stages of development[.]” *Id.* at 2284
25 (citing *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007)). Ultimately, *Dobbs* held
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28 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.”

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

3 This Motion seeks to set aside the Second Amended Final Judgment’s permanent
4 injunction, as applied to A.R.S. § 13-3603, prospectively because such prospective
5 application is no longer equitable, and it seeks to similarly eliminate any prospective
6 effect of the declaratory judgment as to that statute.

7 ARGUMENT

8 **I. Relief from the Second Amended Final Judgment is warranted under Rule** 9 **60(b)(5)**

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

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

13 Rule 60(b)(5) permits relief where “applying [the judgment] prospectively is no
14 longer equitable.” This portion of Rule 60(b)(5), which allows a judgment to be set aside
15 when prospective application is no longer equitable, “encompasses the traditional power
16 of a court of equity to modify its decree in light of changed circumstances.” *Frew ex rel.*
17 *Frew v. Hawkins*, 540 U.S. 431, 441 (2004); *see also Wright & Miller*, Judgment
18 Satisfied or No Longer Equitable, 11 Fed. Prac. & Proc. Civ. § 2863 (3d ed.).⁷ “[I]t is
19 appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an
20 injunction or consent decree can show ‘a significant change either in factual conditions or
21 in law.’” *Agostini v. Felton*, 521 U.S. 203, 215 (1997). Under Rule 60(b)(5), “[a] court
22 may recognize subsequent changes in either statutory or decisional law.” *Id.*; *see also*
23 *Horne v. Flores*, 557 U.S. 433, 447 (2009) (Rule 60(b)(5) relief appropriate when a
24 significant change in either factual conditions or in law renders continued enforcement of
25 the judgment detrimental to the public interest). In fact, “[a] court errs when it refuses to
26 modify an injunction or consent decree in light of such changes.” *Agostini*, 521 U.S. at

27 ⁷ Because the grounds in Arizona Rule 60(b) are “identical” to Federal Rule of Civil
28 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)).

1 215. The U.S. Supreme Court has even rejected the notion that Rule 60(b)(5) does not
2 apply where a movant uses it “not as a means of *recognizing* changes in the law, but as a
3 vehicle for *effecting* them.” *Id.* at 238; *id.* at 239 (granting “a party’s request under Rule
4 60(b)(5) to vacate a continuing injunction entered some years ago in light of a bona fide,
5 significant change in subsequent law”).

6 Similarly, in *Edsall v. Superior Court*, the Arizona Supreme Court recognized that
7 Rule 60(b)(5) can be used to reopen final orders where there has been “a change in the
8 law affecting substantial rights of a litigant.” 143 Ariz. 240, 243 (1984). And the Ninth
9 Circuit has “recognized as settled that ‘[w]hen a change in the law authorizes what had
10 previously been forbidden, it is an abuse of discretion for a court to refuse to modify an
11 injunction founded on superseded law.’” *California v. EPA*, 978 F.3d 708, 715 (9th Cir.
12 2020) (quoting *Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986)); *see also*
13 *Prudential Ins. Co. of Am. v. Nat’l Park Med. Ctr., Inc.*, 413 F.3d 897, 903 (8th Cir.
14 2005) (“When prospective relief is at issue, a change in decisional law provides sufficient
15 justification for Rule 60(b)(5) relief.”).

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

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

24 It is beyond dispute that *Dobbs* represents a change in the very law that was the
25 sole and express basis for the Second Amended Final Judgment. Before *Roe*, Arizona
26 had repeatedly enforced the criminal ban (codified then as § 13-211) on performing
27 abortions other than to save the life of the mother by bringing prosecutions against
28 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

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

6 That *Roe* was the sole impediment to enforcement of Arizona’s abortion statute is
7 further supported by other Court of Appeals decisions addressing the abortion statutes.
8 *See, e.g., Wahlrab*, 19 Ariz. App. at 553 (citing *Nelson* and vacating conviction because
9 “although [the court] disagree[s] with the [*Roe v. Wade* opinion we are bound by the
10 U.S. Supreme Court decision”); *see also State v. New Times, Inc.*, 20 Ariz. App. 183, 185
11 (1973) (citing *Nelson* and *Wahlrab*, noting that the issue of the constitutionality of the
12 state laws “at this juncture, is essentially moot,” and reasoning the court “need only say
13 that we are bound by the conclusions previously reached by the courts, most notably the
14 [U.S.] Supreme Court”). Years later, the Court of Appeals similarly “note[d] that the
15 abortion statutes, as currently codified, may be unenforceable under the constitutional
16 principles articulated in *Roe*....” *Vo*, 172 Ariz. at 202 n.6 (citing *Wahlrab* and *Nelson*).

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

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

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

8 Moreover, this change in the law and facts “affect[s] substantial rights of a
9 litigant.” *Edsall*, 143 Ariz. at 243. There are two classes of litigants in this action whose
10 substantial rights are affected. First, the Attorney General and Pima County Attorney are
11 enjoined from taking any action to enforce § 13-211, a duly-enacted statute of the
12 Arizona Legislature. When prosecutors act to enforce state law they act on behalf of the
13 state to enforce its sovereign interests in carrying out its criminal laws. In fact, the
14 Plaintiffs made that precise allegation in this case. *See Marks*, 17 Ariz. App. at 312
15 (“The petitioners were permitted to amend the complaint to include an allegation that the
16 State of Arizona, through its prosecuting authorities, intended to enforce the abortion
17 statutes through appropriate action.”). Erroneously depriving a State of the ability to
18 enforce its laws, even for a brief period, is a form of irreparable injury. *See Maryland v.*
19 *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (brackets and citation
20 omitted) (“Any time a state is enjoined by a court from effectuating statutes enacted by
21 representatives of its people, it suffers a form of irreparable injury.”); *Abbott v. Perez*,
22 138 S. Ct. 2305, 2324 n.17 (2018) (“[T]he inability to enforce its duly enacted plans
23 clearly inflicts irreparable harm on the State”). Thus the continued existence of the
24 Second Amended Final Judgment going forward affects the substantial rights of the State,
25 through its enjoined prosecutors.

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

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

10 Plaintiffs’ prior arguments regarding overbreadth and the right of physicians to
11 practice their chosen profession do not establish that A.R.S. § 13-3603 is unconstitutional
12 and therefore do not provide bases to deny relief now. The Court of Appeals specifically
13 addressed—and rejected—those arguments. *See Nelson*, 19 Ariz. App. at 149–50. The
14 overbreadth argument was based on the lack of exceptions for rape and “defective
15 fetuses.” The Mississippi abortion law in *Dobbs* did not contain an exception for rape,
16 and yet the U.S. Supreme Court upheld the law as constitutional. *See* 142 S. Ct. 2284; *id.*
17 at 2344 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (“The Mississippi law at issue
18 here, for example, has no exception for rape or incest[.]”). And nothing outside of the
19 decisions in *Roe* and *Casey* and their now-abrogated progeny cast doubt on the panel
20 opinion’s conclusion that “[i]t is . . . within the province of the state legislature to weight
21 the competing interests and enact, as the legislature has done in this state, a statute which
22 prohibits all abortions except those necessary to save the life of the mother.” *Nelson*, 19
23 Ariz. App. at 150. The right to practice one’s profession argument is akin to an argument
24 under *Lochner*, and the argument clearly fails under rational basis review. *See Conn v.*
25 *Gabbert*, 526 U.S. 286, 291–92 (1999) (explaining that the right to choose one’s field of
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27 ⁸ The District of Arizona has preliminarily enjoined certain Arizona government officials
28 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.

1 private employment is “a right which is nevertheless subject to reasonable government
2 regulation”).

3 Finally, this motion is made in a “reasonable time” under Rule 60(c)(1). “[W]here
4 a change in law is the basis for [a Rule 60(b)] motion, the date of the challenged order
5 provides little guidance in measuring its timeliness; valid grounds for reconsideration
6 may arise long after a final judgment has been entered.” *Bynoe v. Baca*, 966 F.3d 972,
7 980 (9th Cir. 2020). Timeliness in this instance is measured “as of the point in time when
8 the moving party has grounds to make [a Rule 60(b)] motion, regardless of the time that
9 has elapsed since the entry of judgment.” *Id.* This Motion is plainly timely.

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

12 In the alternative, if the Court does not grant relief under Rule 60(b)(5), relief is
13 warranted under Rule 60(b)(6) because the overruling of *Roe* is an extraordinary
14 circumstance that justifies relief. *See Kemp v. United States*, 142 S. Ct. 1856, 1865
15 (2022) (Sotomayor, J., concurring) (Rule 60(b)(6) is available “to reopen a judgment in
16 extraordinary circumstances, including a change in controlling law” (citing cases)); *see*
17 *also Edsall*, 143 Ariz. at 243 (Rule 60(b)(5) and (6) “have been used liberally in
18 reopening otherwise final court orders where there has been a change in the law affecting
19 substantial rights of a litigant.”). While the relief requested fits squarely within the
20 contours of Rule 60(b)(5), if the Court disagrees, relief under Rule 60(b)(6) is equally
21 appropriate here.

22 **III. Notice Regarding Rule 25 Motions**

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

28 _____
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

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

10 CONCLUSION

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

15 RESPECTFULLY SUBMITTED this 13th day of July, 2022.

16 MARK BRNOVICH
17 ATTORNEY GENERAL

18 By: /s/ Brunn (Beau) W. Roysden III

19 Brunn (Beau) W. Roysden III (No. 028698)

20 Michael S. Catlett (No. 25238)

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25 *Attorneys for Defendant Mark Brnovich*

26 *Attorney General of the State of Arizona*

27
28 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.

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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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*Attorneys for Eric Hazelrigg, M.D., proposed Successor-in-Interest to Clifton E. Bloom,
as guardian ad litem of unborn child of Plaintiff Jane Roe and all other unborn infants
similarly situated*

By: /s/ Brunn W. Roysden III