

MEMO – ARIZONA ABORTION LAWS & POLICIES POST-DOBBS

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September 25, 2023

On June 24, 2022, in *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court discarded the constitutional right to abortion that it had guaranteed nearly 50 years earlier in *Roe v. Wade*. Just a day later, 8 (of 9) Arizona abortion clinics halted their abortion operations. While Arizona was not among the 13 states that enacted trigger laws banning abortion upon *Roe's* overturning, it was among the states where both a pre-Roe full abortion ban and a 15-week abortion ban were codified in law, resulting in uncertainty about the state of Arizona abortion law. Disagreements between former Arizona Attorney General Mark Brnovich and former Arizona Governor Doug Ducey as to whether the 15-week ban or the full ban took precedence added to the confusion. Legal challenges soon ensued asking the courts to "harmonize" the two laws.

As documented in this memorandum, *Roe's* overturning prompted a series of legal and political challenges in Arizona, implicating abortion access, potential criminal liability, tension between government officials, election ramifications, and other concerns detailed below.

Key Provisions in Arizona's Post-Dobbs Abortion Legal Landscape

The interplay of several distinct statutes and injunctions in Arizona created a confusing legal situation when *Dobbs* was decided. Initially codified by the first territorial Legislature of Arizona in 1864 and revised and adopted by the state in 1901, Arizona's pre-*Roe* abortion ban (A.R.S. § 13-3603) outlawed all abortions except those necessary to save a mother's life. As a criminal prohibition, it imposed a 2-5 year prison sentence on violators and remained largely unchanged until the U.S. Supreme Court's decision in *Roe v. Wade*. A court injunction issued in *Nelson v. Planned Parenthood of Tucson, Ariz. App. 142, 152, 505 P.2d 580 (Ct. App. Ariz. 1973)* voided enforcement of the territorial-era law post-*Roe*, but the law was never repealed. Consequently, the injunction was open to legal challenge when *Roe* was overturned in *Dobbs*.

Additional legal complications arise due to other state laws restricting or regulating abortion, some of which were similarly enjoined. For example, a ban on abortions after 20 weeks with an

exception only for medical emergencies (codified in 2012 at [A.R.S. 36-2159](#)) was enjoined by [Isaacson v. Horne, 716 F.3d 1213 \(9th Cir. 2013\)](#) pursuant to the pre-*Dobbs* right to pre-viability abortions. On April 27, 2021, former Arizona Governor Doug Ducey signed [Senate Bill 1457](#) into law. It imposed what's known as a "Reason Ban" on abortions—banning abortions for "genetic abnormalities"—and created a "Personhood Provision," granting fertilized eggs, embryos, and fetuses personhood status. S.B. 1457 also required Arizona statutes to be read as applying equally to persons as to unborn fetuses.

On [March 30, 2022](#), just a few months ahead of *Dobbs*' release, Governor Ducey signed [Senate Bill 1164](#), criminalizing abortions performed after 15 weeks, with allowed medical exceptions, but not in cases of rape or incest. Physicians who violate the ban are guilty of a [Class 6 felony](#), typically punishable by 4-24 months in prison. S.B. 1164 included statements that it did not repeal Arizona's total abortion ban or create a state right to an abortion.

Isaacson v. Brnovich: Arizona's Reason Ban and Personhood Provision

Plaintiffs in *Isaacson v. Brnovich* [sought](#) to enjoin Arizona's Reason Ban and Personhood Provision from going into effect in 2021. In a September 2021 order, U.S. District Court Judge Douglas L. Rayes [enjoined the Reason Ban but denied the plaintiffs' request to enjoin the Personhood Provision, finding it unenforceable under Roe](#). The plaintiffs appealed to the Ninth Circuit, where the case was awaiting resolution [when](#) the U.S. Supreme Court decided *Dobbs*.

As noted, after *Dobbs*, most [abortion clinics in Arizona closed](#) in light of profound legal ambiguities. On June 30, 2022, the U.S. Supreme Court [vacated the prior injunction](#) in *Isaacson v. Brnovich* on the Reason Ban, but litigation reopened as to the Personhood Provision. On July 11, 2022, Judge Rayes [blocked](#) the Personhood Provision, finding it unconstitutionally vague given uncertainties over state enforcement of Arizona statutes under this new interpretation. Some abortion providers [reopened after Judge Rayes' ruling](#), and one Planned Parenthood clinic reopened in August 2022. The Reason Ban remained in place while the ruling was [appealed](#) to the Ninth Circuit Court of Appeals.

Arizona's 15-Week Ban and Pre-Statehood Total Abortion Ban

On July 13, 2022, former Attorney General Brnovich [asked an Arizona trial court to lift the injunction](#) placed on Arizona's pre-*Roe* abortion ban in 1973. He argued that *Dobbs* rendered the 1973 injunction "[no longer equitable](#)." Planned Parenthood Center of Tucson [responded](#) on July 20, 2022, arguing that lifting the injunction would be inconsistent with actions taken by the legislature recognizing abortion as lawful, including the passage of a number of statutes allowing abortions to be performed and regulating abortion care.

On September 22, 2022, Pima County Arizona Superior Court Judge Kelli Johnson granted Brnovich's motion for relief, effectively allowing the pre-*Roe* ban to take effect. Judge Johnson declined to "harmonize" the two bans, choosing to focus solely on lifting the ban. As her ruling failed to clarify which ban would take precedence, Planned Parenthood again [terminated its abortion services](#) following the ruling's issuance.

After the trial court declined to [stay](#) its ruling, Planned Parenthood sought emergency relief from the Arizona Court of Appeals. On October 7, 2022, the Court of Appeals [blocked the trial court order](#). “Arizona courts,” stated the court, “have a responsibility to attempt to harmonize all of this state’s relevant statutes” in the interests of legal clarity. The court’s decision once again temporarily blocked the pre-*Roe* ban, [prompting](#) Planned Parenthood to re-open termination services soon after.

On December 30, 2022, the Court of Appeals reached a final decision, [holding](#) that the two laws could be harmonized. Under the court’s logic, the full abortion ban could apply to *non-doctors* attempting to provide abortions in state while the 15-week ban would allow *doctors* to provide abortions up to that point in a pregnancy. In essence, abortions could be performed by licensed physicians legally in Arizona up to 15 weeks of pregnancy. This resolution may only be temporary as the case was taken up on appeal on August 22, 2023 by the [Arizona Supreme Court](#).

Arizona Gubernatorial Authorities

[On November 14, 2022](#), Katie Hobbs (D) defeated Kari Lake, becoming the next Governor of Arizona. Governor Hobbs has taken multiple steps to protect access to reproductive health services. On June 23, 2023, she [issued](#) an executive order consolidating the power to prosecute abortion law violations, normally held by county attorneys, with State Attorney General Kris Mayes (D). Attorney General Mayes pledged not to prosecute abortion-related crimes [on her campaign website](#) and [was cited as having no plans to prosecute abortions](#) after Governor Hobbs’ June 2023 executive order. Twelve of the state’s 15 county attorneys [signed a letter opposing the executive order](#) as an attempt to undermine their discretion, but none have formally sued to challenge the order.

During 2023’s first regular legislative session, Governor Hobbs [vetoed](#) 143 bills, including 3 bills limiting access to reproductive health services:

- (1) [H.B. 2427](#) proposed increasing penalties for aggravated assault against pregnant victims, potentially building a justification for [fetal personhood](#) in the state;
- (2) [S.B. 1600](#) would have mandated that medical personnel provide life-saving care for all babies “born alive,” even those born without any potential for survival; and
- (3) [S.B. 1146](#) which would have prohibited the state treasurer from allocating funds to abortion facilities and advocacy groups.

Ballot measures proposing constitutional amendments either enshrining or prohibiting access to reproductive health services have also been proposed in Arizona. Prior to the fall 2022 midterm elections, Arizonans for Reproductive Freedom introduced a ballot initiative to enshrine the right to abortion in the state constitution, but it [failed](#) to collect the required number of signatures in the short time it was circulated prior to the state elections deadline. Arizona abortion activists [plan to renew](#) ballot initiative measures for the 2024 election.

Ongoing Litigation

Arizona Attorney General Kris Mayes [declined to defend](#) the Reason Ban at issue in *Isaacson v. Mayes* before the Ninth Circuit. However, President of the Arizona Senate Warren Petersen and Speaker of the Arizona House of Representatives Ben Toma, both Republicans, intervened to defend the law. The case is [currently on “hold” in the district court](#), pending the Ninth Circuit’s decision on the “Reason” ban following oral arguments on September 11, 2023.

Attorney General Mayes also [declined to challenge the Arizona Court of Appeals’ ruling](#) on Arizona’s pre-*Roe* ban. [Dr. Eric Hazelrigg](#), an obstetrician who directs several Arizona “anti-abortion pregnancy centers,” [appealed the ruling](#) to the Arizona Supreme Court in March 2023 as a *guardian ad litem* for unborn fetuses. Yavapai County Arizona Attorney [Dennis McGrane sought to intervene](#) and appeal the decision as well. McGrane’s petition was granted [when the Arizona Supreme Court agreed to hear the appeal](#). Oral arguments are scheduled for December 12, 2023.

Other AZ Restrictions on Abortion

Multiple, additional legal restrictions beyond Arizona’s 15-week ban remain in place as briefly listed below:

- Abortions cannot be performed without a 24-hour waiting period as well as counseling and ultrasound requirements. A.R.S. §§ [36-2153](#), [36-2156](#), and [36-2158](#);
- State and federal funding cannot be used for abortions except to save the pregnant individual’s life, to preserve the pregnant individual’s health, or for victims of rape or incest. A.R.S. §§ [35-196.02](#) and [20-121](#), as modified by regulations and the Arizona Supreme Court’s ruling in *Simat Corp., v. Ariz. Health Care Cost Containment Sys.*, 203 Ariz. 454, 56 P.3d 28 (Ariz. 2002);
- Only licensed physicians can perform surgical abortions or prescribe abortion-inducing drugs in Arizona, and delivering abortion-inducing drugs by mail or courier service is prohibited. [A.R.S. §§ 36-2155, 36-2160](#);
- Physicians cannot perform abortions on minors without parental or judicial consent ([A.R.S. § 36-2152](#)) and are prohibited from providing telehealth abortions. [A.R.S. § 36-3604](#).
- A partial-birth abortion ban, [A.R.S. § 13-3603.01](#), is currently enjoined by [Planned Parenthood of S. Ariz., Inc. v. Woods](#), 982 F. Supp. 1369 (D. Ariz. 1997), but subject to potential reversal on similar reasoning to former Attorney General Brnovich’s petition to lift the injunction on the pre-*Roe* abortion ban. With that said, though, the *Planned Parenthood v. Woods* decision also includes reasoning based on the vagueness of the non-medical term “partial birth abortion,” a separate legal argument not closely linked with *Roe v. Wade* which may avoid immediate reversal of the injunction. [Planned Parenthood v. Woods](#), 982 F. Supp. 1369, 1378-79 (“[T]he term ‘partial birth abortion’, without a sufficient description, can reasonably be interpreted differently by people of common intelligence.”).