

MEMO – ARIZONA ABORTION LAWS & POLICIES POST-DOBBS

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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 abortion access in the state. [Disagreements](#) between former Arizona Attorney General Mark Brnovich (R) and former Arizona Governor Doug Ducey (R) 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Parenthood of Tucson* \(1973\)](#) voided enforcement of the territorial-era law post-*Roe*, but the law was never repealed.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* \(2013\)](#) 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. The bill allowed medical exceptions, but disallowed exceptions 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 expressly did not repeal Arizona's territorial 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](#), but the Reason Ban remained in place while the ruling was [appealed](#) to the Ninth Circuit Court of Appeals.

On October 30, 2023, the Ninth Circuit [affirmed](#) that challengers had standing to sue because the law forbid them from providing medical services they otherwise would, resulting in lost profits. Consequently, the challengers' arguments against the Reason Ban and Personhood Provision proceeded ahead.

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

expressly declined to “harmonize” the two bans. As her ruling failed to clarify which ban would take precedence, Planned Parenthood again [terminated abortion services](#).

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.

The case was then appealed to the Arizona Supreme Court, which heard oral arguments on [December 12, 2023](#). Anti-abortion challengers made [several distinct arguments](#), notably claiming that the pre-*Roe* ban was not repealed by the legislature and therefore should remain in effect today. Additionally, challengers suggested that the 15-week ban and the pre-*Roe* ban do not conflict. Finally, challengers argued that the legislature which passed the 15-week ban intended to keep the pre-*Roe* ban in place, evidenced by inclusion of language in the bill that the new law did not repeal the pre-*Roe* ban or any other pre-*Roe* abortion laws.

Planned Parenthood [counter-argued](#) that the legislature did not intend to outlaw abortion when it passed the 15-week ban, because the ban was [modeled after the Mississippi law](#) at issue in *Dobbs*. Mississippi’s law expressly included a trigger provision that explicitly enabled a statewide abortion ban on the overturning of *Roe*. Arizona lawmakers, however, stripped this provision out when they passed the 15-week ban. If the Arizona legislature wanted the pre-*Roe* ban to trigger on *Roe*’s overturning despite passing a 15-week ban, then it would have stated this, as the Mississippi lawmakers did. Finally, Planned Parenthood [agreed that](#) if the Court favored harmonization of the two laws, the pre-*Roe* ban could be read to fully prevent *non-physicians* from performing abortions, but that the 15-week ban should still enable *physicians* to provide abortion care during the first 15 weeks of pregnancy. The Court is now considering all of these arguments. Its opinion is expected by June 30, 2024.

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 Arizona 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 the 2023 first regular legislative session, Governor Hobbs [vetoed](#) the following 3 bills limiting access to reproductive health services:

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

Other Arizona Abortion Restrictions

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 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. \(2002\)](#);
- Only licensed physicians can perform surgical abortions or prescribe abortion-inducing drugs. [A.R.S. §§ 36-2155](#);
- Delivery of abortion-inducing drugs by mail or courier service is prohibited. [A.R.S. §36-2160](#);
- Physicians cannot perform abortions on minors without parental or judicial consent. [A.R.S. § 36-2152](#).
- Telehealth abortions are banned. [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 \(1997\)](#), 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. Notably, the *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* which may avoid immediate reversal of the injunction. [Woods, 982 F. Supp. at 1378-79](#) (“[T]he term ‘partial birth abortion,’ without a sufficient description, can reasonably be interpreted differently by people of common intelligence.”).

Abortion on the Arizona Ballot in 2024?

Arizonans may have the opportunity to enshrine abortion protections in the state constitution during the 2024 election through a [ballot initiative](#) organized by [Arizona for Abortion Access](#). The language in the [“Arizona Abortion Access Act”](#) ensures that every individual has the fundamental

right to abortion which may not be interfered with by the state. Specifically, the amendment prohibits the state from enacting any law that:

- Restricts or prohibits abortion **before** fetal viability;
- Restricts or prohibits an abortion that will preserve the mental or physical health of the mother pursuant to determinations made by the treating healthcare provider; or
- Penalizes anyone who aids or assists one's right to an abortion.

To qualify for the 2024 ballot, the initiative must obtain a sufficient number of [valid signatures](#) from registered voters before July 3, 2024, though circulators often target [higher signature counts than required](#) to insulate initiative measures from legal challenges. If the initiative makes the ballot, it could be passed via a simple majority vote among Arizona voters on November 5, 2024.