

MEMO – ARIZONA ABORTION LAWS & POLICIES POST-DOBBS

JENNIFER L. PIATT, J.D.
RESEARCH SCHOLAR & CENTER CO-DIRECTOR

Lauren Krumholz and Heather McCoy, Senior Legal Researchers
Isabella Goldsmith, Emma Smith and Kyrrah Berthiaume, Legal Researchers

June 21, 2024

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 an 1864 ([pre-Roe](#)) full abortion ban and a [15-week abortion ban](#) were codified in law, resulting in [uncertainty](#) about abortion access in the state. In early May 2024, after intense litigation and Arizona Supreme Court involvement, the Arizona legislature passed and Governor Katie Hobbs signed legislation [repealing Arizona's pre-Roe abortion ban](#).

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](#)) outlaws all abortions except those necessary to save a mother's life, imposing a 2–5-year prison sentence on violators. This ban 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Parenthood of Tucson \(1973\)*](#) voided enforcement of the territorial-era law post-*Roe*, but the law was never repealed.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 state laws restricting or regulating abortion were similarly enjoined, causing additional legal confusion. 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. In the bill's construction notes, legislators stated that S.B. 1164 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 prevented them from providing medical services they otherwise would, resulting in lost profits, allowing their challenges to move forward.

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* 1864 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 1864 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 1864 ban, [prompting](#) Planned Parenthood to re-open termination services.

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 1864 ban was not repealed by the legislature and that the 15-week ban and the 1864 ban do not conflict. Challengers also argued that the legislature which passed the 15-week ban intended to keep the 1864 ban in place, evidenced by inclusion of language in the bill’s notes of construction that the new law did not repeal the 1864 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 1864 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 1864 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.

On April 9, 2024, the Arizona Supreme Court issued a [4-2 decision](#) in favor of upholding the 1864, near-total abortion ban. The Court held that the ban, which was passed before Arizona became a state, had not been repealed by any subsequent legislation. Further, the Court concluded that the legislature’s intent was to retain the ban on the books, despite its passing of the 15-week ban in March 2022 before the issuance of *Dobbs*.

The majority’s reasoning centered on the language in the construction notes of the 15-week ban stating that the legislature did not intend to create an affirmative right to abortion or to repeal the 1864 ban. Essentially, the Court concluded that the legislature passed the 15-week ban only because of *Roe*, which, until [June 24, 2022](#), protected the individual constitutional right to abortion. The majority then determined that the 15-week ban and the 1864 full ban could both be enforced simultaneously. In the [majority’s words](#), “physicians are now on notice that all abortions, except those necessary to save a woman's life, are illegal, . . . and that additional criminal and regulatory sanctions may apply to abortions performed after fifteen weeks' gestation.”

In contrast, dissenting Vice Chief Justice Timmer and Chief Justice Brutinel would have read the two laws to harmonize them, finding abortions unlawful in the state except where permitted by the 15-week ban. Among other issues, the dissenters questioned the majority's indication that the legislature only passed the 15-week ban because of *Roe*, as *Roe* itself would not have allowed a 15-week abortion ban; it provided an individual constitutional right to abortion up until the point of fetal viability, which scientific evidence suggests roughly sits at [24 weeks](#). The dissenters also indicated that they would not have relied on the 15-week ban's construction notes to interpret the 15-week ban, as on its face, the ban was not ambiguous. It clearly allowed physician-performed abortions up to 15 weeks gestation. According to the dissenters, the fact that the 15-week ban did not expressly state it was providing a "right" to abortion is of no consequence. Comparing the same with common speed limits, Justice Timmer explained that individuals know in a 45 mile per hour zone that they do not necessarily have a "right" to drive under that speed limit, but they still, critically, have the knowledge they will not face prosecution if they do so.

The 1864 full abortion ban provides a brief exception in cases where abortion is necessary to save the life of the mother, but the ban does not provide definitions or guiding language that providers can use when making life and death determinations. The Arizona Supreme Court expressly refused to address this issue, explaining that it had not been briefed and was not properly before the Court.

Following the Court's ruling on April 9, 2024, on May 1, the Arizona legislature [passed H.B. 2677](#) to repeal the 1864 ban, which Governor Katie Hobbs (D) signed into law on May 2. As mentioned above, the [Arizona State Constitution](#) stipulates that this new legislation will go into effect 90 days after the close of the current legislative session.

After the Supreme Court's decision, but before the repeal took place, Attorney General Kris Mayes (D) asked the Arizona Supreme Court to stay their decision for 90 days while she considers a potential appeal to the Arizona Supreme Court. On May 13, the Arizona Supreme Court granted this request, [placing enforcement of the 1864 ban](#) on pause through August 12. Additionally, a [prior court order](#) prohibits enforcement for 45 days after the Supreme Court's final judgment. Combining the total time awarded by these two orders, Attorney General Mayes' [indicated](#) that the earliest the 1864 ban could take effect would be September 26, 2024. Because the Arizona legislature's session ended on June 15, the general effective date for legislation passed during the session is September 14, 2024, meaning that there will be no period of time where the 1864 ban can be enforced in the state. Arizona will thus continue to operate under the current 15-week ban passed in 2022.

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. As of April 2, 2024, Arizona for Abortion Access said it gathered [506,892](#) petition signatures. If the initiative makes the ballot, it could be passed via a simple majority vote among Arizona voters on November 5, 2024.