ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. KELLIE JOHNSON

CASE NO. C127867

DATE: September 22, 2022

PLANNED PARENTHOOD CENTER OF TUCSON, INC;
PLANNED PARENTHOOD OF ARIZONA, et al
Plaintiffs

vs.

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

**UNDER ADVISEMENT RULING**

**UNDER ADVISEMENT RULING: ATTORNEY GENERAL'S MOTION TO SUBSTITUTE DR. ERIC HAZELRIGG AS INTERVENOR AND GUARDIAN AD LITEM AND ATTONREY GENERAL'S MOTION FOR RELIEF FROM JUDGMENT**

Pending before the Court and fully briefed are the Attorney General's Motion to Substitute Dr. Eric Hazelrigg as Intervenor and Guardian ad Litem and Motion for Relief from Judgment. Also pending if the Motion to Substitute is denied is Dr. Eric Hazelrigg's and Choice Pregnancy Center's Motion to Intervene. The Court has read the briefing submitted and considered the arguments of counsel made at the August 19, 2022, hearing. For the reasons set forth below, the Court grants the Motion to Substitute and the Motion for Relief from Judgment.

**FACTS AND PROCEDURAL HISTORY**

On July 22, 1971, Planned Parenthood Center of Tucson Inc.[1], 10 physicians,[2] and "Jane Doe," an anonymous pregnant woman who sought to have an abortion, filed the Complaint in this matter. The Complaint

[1] The parties agreed to substitute Planned Parenthood Arizona, Inc. as the Plaintiff in this matter due to corporate mergers resulting in a new corporate identity.

[2] At the hearing on August 19, 2022, the deaths of original Plaintiffs Pollock, McEvers, Costin, Lilien, Brunsting and Trisler were noted on the record. Plaintiffs Bloomfield, Rafael, and Edelberg have filed no responses after service of the motions.

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named the Arizona Attorney General and the Pima County Attorney as Defendants and asked the Court to declare then A.R.S. §§13-211–213 unconstitutional under both the Arizona and United States Constitutions. The Complaint also asked the Court to enter a permanent injunction against the Defendants enjoining them from enforcing or threatening to enforce the specified statutes.

In October 1971, the Court appointed Dr. Clifton Bloom as guardian ad litem for the unborn child of Jane Roe[3] and "all other unborn infants similarly situated." After the Court appointed Dr. Bloom as guardian ad litem, the parties stipulated to Dr. Bloom's intervention. Although Plaintiffs stipulated to allow intervention, Plaintiffs reserved objections to Dr. Bloom's appointment and reserved the right to move to terminate his intervention later. It is unclear whether the Court allowed intervention as permissive or as of right. Dr. Bloom participated as Intervenor and remained a party until the case concluded. Plaintiffs never sought to terminate intervention and did not raise any issue regarding the appointment and intervention on appeal. Dr. Bloom is now deceased.

The case proceeded to trial in 1971. Initially, the trial judge dismissed the case for lack of a justiciable controversy. The Court of Appeals reversed that ruling and ordered the trial judge to decide the case on the merits. *See, Planned Parent Ctr. Of Tucson v. Marks,* 17 Ariz. App. 308, 313 (1972). On September 29, 1972, the trial judge found the statutes at issue unconstitutional. The Attorney General, Pima County Attorney, and Intervenor appealed the ruling. The Court of Appeals reversed the trial judge and upheld the challenged laws as constitutional. *See, Nelson v. Planned Parenthood Ctr. of Tucson Inc.,* 19 Ariz. App. 142 (1973).

Less than 3 weeks later, the United States Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). On rehearing, the Court of Appeals vacated its opinion on the sole and express grounds of the binding nature of the United States Supreme Court decisions. After further appellate review was denied, the trial judge, as required by the Court of Appeals' mandate, entered judgement declaring

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the statutes unconstitutional. The judgement also permanently enjoined the Attorney General, the 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 the challenged statutes.

In the almost fifty years since the trial judge entered judgment, the Arizona Legislature has passed several statutes concerning abortion. In 1977, the Legislature re-enacted A.R.S. §§13-211-213 as §§13-3603-3605. In 2021, the Legislature repealed §13-3604, but left intact §13–3603, which criminalizes abortions except to save the life of a pregnant woman. Most recently in 2022, the Legislature enacted a 15-week gestational age limitation on abortion. The legislature 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." 2022 Ariz. Sess. Laws ch. 105, §2 (2d Reg. Sess.).

On June 24, 2022, the United States Supreme Court overruled *Roe v. Wade* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The Supreme Court held that the Constitution does not confer a right to abortion, and that "the authority to regulate abortion must be returned to the people and their elected representatives." *Dobbs*, 142. S. Ct. at 2279. The Attorney General's motions for substitution and for Rule 60(b)(5) relief followed the *Dobbs* decision.

**LEGAL ANALYSIS**

**1. Motion to Substitute Dr. Eric Hazelrigg**

The Attorney General asks the Court to appoint Dr. Eric Hazelrigg in the place of now deceased Dr. Bloom as guardian ad litem, and to substitute Dr. Hazelrigg as Intervenor under Ariz. R. Civ. P. 25(a)(1). Planned Parenthood opposes the request but did not object to Dr. Hazelrigg's participation in the briefing and argument

[3] Prior to trial, the original Plaintiff Jane Doe had an abortion out of state and was dismissed from the case. The Court substituted Jane Roe as Plaintiff. Jane Roe also had an abortion out of state and was dismissed from the case prior to trial.

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on the Motion for Relief From Judgment. The Pima County Attorney takes no position on the Motion to Substitute.

In support of his request for substitution, the Attorney General argues that the Court, by previously appointing Dr. Bloom as guardian ad litem and then permitting his intervention, found intervention to be appropriate. The Attorney General argues that based on this previous finding, it is appropriate to allow an intervenor to continue in the role previously permitted. Planned Parenthood argues that it was improper to appoint a guardian fifty years ago, and that the Court should not permit the error to continue by allowing the substitution now.

The Court agrees with Planned Parenthood that the record is unclear as to why the Court determined intervention was appropriate. However, the parties stipulated to Dr. Bloom's intervention "without waiving any right to subsequent motions to quash the appointment of Clifton Bloom as guardian ad litem... and motions to terminate the intervention of the said guardian ad litem." *Minute Entry October 15, 1971.* No party, including Planned Parenthood, ever moved to quash Dr. Bloom's appointment or terminate his intervention. Instead, Dr. Bloom, represented by counsel, was permitted to participate as Intervenor through trial and two appellate processes. Dr. Bloom remained a party in intervention in 1973 when the Court entered the judgement from which the Attorney General now seeks relief.

Planned Parenthood makes several arguments in support of its position that appointment of a guardian ad litem was inappropriate during the original proceedings and remains inappropriate today. The Attorney General argues Planned Parenthood has waived their objections by never moving to terminate or otherwise challenge the intervention. The Attorney General also cites the law of the case doctrine as a basis for why the Court should not revisit the previous decision on intervention.

The Court agrees Planned Parenthood's objections are waived, or, under the law of the case doctrine, should not be reconsidered in the context of the Attorney General's Motion for Relief From Judgment. Planned

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Parenthood had multiple opportunities to challenge intervention during the initial proceedings at the trial and appellate levels. By allowing the matter to proceed to final judgment and appeal without challenging intervention, Planned Parenthood waived any objections it previously preserved.

Additionally, under the law of the case doctrine, "a court acts within its discretion in 'refusing to reopen questions previously decided in the same case by the same court or a higher appellate court' unless 'an error in the first decision renders it manifestly erroneous or unjust or when a substantial change occurs in essential facts or issues, in evidence, or in the applicable law.'" *See, Associated Aviation Underwriters v. Wood,* 209 Ariz. 137, 150-51, ¶40 (App. 2004), (quoting *State v.* Wilson, 207 Ariz. 12 ¶9 (App. 2004)). Planned Parenthood has not demonstrated that the original decision permitting intervention was "manifestly erroneous or unjust." While the Court recognizes there may be procedural irregularities surrounding the previous decision to permit intervention, it declines to address the merits of the issue given the procedural posture of the case. Additionally, the Court finds permitting continued intervention is not prejudicial to Planned Parenthood.

**1. Motion for Relief from Judgment**

Ariz. R. Civ. P. 60(b)(5) allows the Court to relieve a party from a final judgment if "applying it prospectively is no longer equitable." Rule 60(b)(5) relief is appropriate when "the party seeking relief from an injunction can show a significant change either in factual conditions or in law." *Agostini v. Felton,* 521 U.S. 203, 215 (1997). In determining whether relief under Rule 60(b)(5) is appropriate, "a court may recognize subsequent changes in either statutory or decisional law." *Id.*

The parties do not dispute that relief is appropriate under Rule 60(b)(5). Planned Parenthood agrees that *Dobbs* resulted in a significant change in the law and agrees that it is not equitable to enforce the judgment as originally entered. The parties disagree on the scope of the relief that should be granted. The Attorney General argues that the judgment should be vacated entirely because it was based solely on *Roe* which has been overruled. Planned Parenthood argues that fully vacating the judgment fails to acknowledge statutes which the

Legislature passed over the last five decades, will create conflicts in Arizona law concerning abortion, and is inequitable given the harms at stake. Planned Parenthood argues the Court "has a duty to harmonize all of the Arizona Legislature's enactments as they exist today," and asks the Court to issue a modified injunction to "make clear that A.R.S §13–3603 can be enforceable in some respects but does not apply to abortions provided by licensed physicians under the regulatory scheme the Legislature enacted over the last 50 years." The Pima County Attorney joins in Planned Parenthood's request for a modified injunction.

The Attorney General argues that this Court's inquiry under Rule 60(b)(5) is narrow, and that the rule does not permit the Court to undertake the statutory analysis suggested by Planned Parenthood. Additionally, the Attorney General argues that Planned Parenthood's request for the Court to harmonize the laws and enter a modified injunction based on statutes enacted after the entry of the judgment is procedurally flawed. The Court agrees with the Attorney General's arguments.

The controlling Complaint seeks relief solely on constitutional grounds. The judgment entered in 1973 was based solely on those constitutional grounds. The Court finds modifying the injunction to harmonize laws not in existence when the Complaint was filed, on grounds for relief not set forth in the Complaint, is procedurally improper in the context of a Rule 60 (b)(5) motion. As discussed in the Attorney General's briefs, Planned Parenthood may move to amend its Complaint after relief is granted, or may file a new action to seek relief it believes appropriate.

Additionally, the requested modified injunction which would carve out an exception for physicians, is not consistent with the plain language of A.R.S. §13-3603 which contains no such exception. Significantly, when passing laws concerning abortion when *Roe v. Wade* was law, the Legislature repeatedly disclaimed that the statutes it enacted were creating a right to abortion. *See, e.g., Attorney General's Reply to Planned Parenthood's Opposition to Motion for Relief From Judgment page 6, lines 6-25.* Similarly, when enacting the

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15- week law, the Legislature specifically stated the statute did not repeal A.R.S. §13-3603. *See*, 2022 Ariz. Sess. Laws ch. 105 § 2 (2d Reg. Sess.).

Planned Parenthood urges the Court to consider other equitable factors in its decision. While the Court has considered those factors, the Court finds those factors do not make considering or entering the modified injunction procedurally or legally appropriate. The Court finds that because the legal basis for the judgment entered in 1973 has now been overruled, it must vacate the judgment in its entirety. The Court finds an attempt to reconcile fifty years of legislative activity procedurally improper in the context of the motion and record before it. While there may be legal questions the parties seek to resolve regarding Arizona statutes on abortion, those questions are not for this Court to decide here.

Accordingly,

**IT IS ORDERED** the Attorney General's Motion to Substitute Dr. Eric Hazelrigg as guardian ad litem and intervenor is ***GRANTED.***

**IT IS FURTHER ORDERED** that Eric Hazelrigg, M.D. is substituted for Clifton E Bloom as Intervenor and guardian ad litem for all unborn children.

**IT IS FURTHER ORDERED** Dr. Hazelrigg's Motion for Intervention is ***DENIED AS MOOT.***

**IT IS FURTHER ORDERED** the Attorney General's Motion for Relief from Judgment is ***GRANTED.***

**IT IS FURTHER ORDERED** that the Second Amended Declaratory Judgment and Injunction signed by the Court on March 27, 1973, and filed on or about the same date, no longer has any prospective application as to A.R.S. § 13-3603.

**IT IS FURTHER OREDERED** that no matters remain pending, and this ruling is entered as a final judgment under Ariz. R. Civ. P. 54 (c).

/s/
**HON. KELLIE JOHNSON**
(ID: 1ac4b254-274c-45ee-a977-80287bc82a23)

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