ARIZONA COURT OF APPEALS

DIVISION TWO

PLANNED PARENTHOOD ARIZONA, INC., et al., Plaintiffs/Appellants, v. MARK BRNOVICH, Attorney General of the State of Arizona, et al., Defendants/Appellees, and Dr. ERIC HAZELRIGG, as guardian ad litem of all Arizona unborn infants, Intervenor/Appellee.	Case No.: 2CA-CV-2022-0116 Pima County Superior Court Case No. C127867

ANSWERING BRIEF OF INTERVENOR-APPELLEE DR. ERIC HAZELRIGG

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INTRODUCTION

The trial court held—and all parties agreed—that *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022), effected a significant change in the law by overruling *Roe v. Wade*, 410 U.S. 113 (1973), such that it was no longer equitable to apply a 1973 judgment based solely on *Roe*. These conditions empowered the trial court to exercise broad discretion to grant relief from the judgment under Arizona Rule of Civil Procedure 60(b), and this Court should affirm that discretionary decision.

Appellants instead ask this Court to rewrite A.R.S. § 13-3603 and repeal most of its protections under the guise of statutory construction, asserting that the trial court erred in refusing to "harmonize" all Arizona abortion laws in a manner that would allow most abortions to continue. Realizing that courts lack authority to harmonize statutes in the absence of ambiguity or statutory conflict, Appellants desperately try to manufacture a conflict between § 13-3603 and other laws, which they mischaracterize as "allowing" or "permitting" abortion. But no such conflict exists because all of the abortion laws contain prohibitory and restrictive—not permissive—language with respect to committing abortions. Indeed, multiple overlapping prohibitions do not give rise to ambiguity or conflict, much less *permission* to perform the doubly condemned act. Arizona's abortion statutes are already harmonious: § 13-3603 orchestrates comprehensive protection for unborn children from the deadly harms of abortion, and when *Roe* temporarily silenced § 13-3603, other laws intoned parts of that same protection.

Appellants ask the Court to overlook the obvious context: the Legislature was shackled from enacting comprehensive protections during the *Roe* era, yet the Legislature *never* enacted laws with language affirmative permitting abortion. To the contrary, the Legislature consistently confirmed its intention to retain the comprehensive protections of § 13-3603 and to protect unborn life to the greatest extent possible. Just four years after *Roe*, the Legislature re-enacted § 13-3603. *See* 1977 Ariz. Sess. Laws ch. 142, § 99 (1st Reg. Sess.). The *Roe*-era laws exclusively used language that prohibits and restricts abortion, and the laws expressly confirmed the Legislature's intent to *not* recognize or promote any right to abortion. And just this year, the Legislature expressly declared its intent to retain § 13-3603 when it enacted an overlapping law protecting the lives of unborn children after 15 weeks' gestation. *See* 2022 Ariz. Sess. Laws ch. 105, § 2 (2d Reg. Sess.).

Now that Arizona may again pursue its legitimate interests in protecting unborn children from elective abortion, the trial court properly exercised its discretion in vacating the judgment burdening § 13-3603. This Court should affirm that decision and reject Appellants' attempt to rewrite the unambiguous text of Arizona laws.

STATEMENT OF THE CASE

To comply with Ariz. R. Civ. App. P. 13(b)(1) & (h), Dr. Hazelrigg adopts by reference the statement of the case set forth in Appellees' Answering Brief.

STATEMENT OF THE ISSUES

To comply with Ariz. R. Civ. App. P. 13(b)(1) & (h), Dr. Hazelrigg adopts by reference the statement of the issues set forth in Appellees' Answering Brief.

ARGUMENT

I. It is axiomatic that this Court affirms Rule 60(b) decisions absent an abuse of discretion, and Appellants' attempt to impose de novo review misreads both the law and the facts.

Trial courts have exceedingly broad discretion in deciding whether to grant relief from a judgment under Rule 60(b), and this Court will affirm such decisions absent manifest abuse of discretion. *Aloia v. Gore*, 252 Ariz. 548, 551 ¶ 11 (App. 2022) (citing *Rogone v. Correia*, 236 Ariz. 43, 48 ¶ 12 (App. 2014)); *Angelica R. v. Popko in & for Cnty. of Maricopa*, 253 Ariz. 84, ¶ 10 (App. 2022) ("The granting or denying a motion to set aside a judgment is reviewed for an abuse of discretion"); *Water Works Condo. Ass'n, Inc. v. Jonas*, No. 1 CA-CV 18-0502, 2020 WL 113373, at *3 (Ariz. Ct. App. Jan. 9, 2020) (same); *State ex rel. Brnovich v. Culver*, 240 Ariz. 18, 19–20 ¶¶ 1–4 (Ct. App. 2016) (reviewing trial court's ruling on a motion for relief from judgment for abuse of discretion); *Morris v. Giovan*, 225 Ariz. 582, 583 ¶¶ 1–6 (Ct. App. 2010) (same); *Delbridge v. Salt River Project Agr. Imp. & Power Dist.*, 182 Ariz. 46, 53–54 (App. 1994) ("A decision to vacate and set aside a judgment is within the sound discretion of the trial court, and we will not disturb the decision absent a

clear abuse of discretion"); *Tovrea v. Nolan*, 178 Ariz. 485, 490–91 (Ct. App. 1993) ("We will not disturb the trial court's decision on a motion to set aside a judgment absent an abuse of discretion").

Arizona's rule mirrors the standard in federal courts.[1] "As is recognized in many cases, a motion for relief from a judgment under Rule 60(b) is addressed to the discretion of the court," and "[a]ppellate review is limited to determining whether the district court abused its discretion." 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2857 (3d ed.) (citing *Savarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140, 146 (9th Cir. 1975)). Like Arizona's appellate courts, a federal court of appeals "will not set aside the district court's exercise of discretion unless it is persuaded that under the circumstances of the particular case the action of the district court is an abuse of discretion." *Id.* § 2872. Importantly, when the trial court's Rule 60(b) decision involves references to the underlying complaint and procedural history, appellate courts "defer to the district court's ringside view of the proceedings, including its understanding of the underlying complaint," and "will affirm absent a definite and firm conviction that the trial court

[1] Because Arizona Rule 60(b) is identical to its federal counterpart, 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. App. Dec. 18, 2017) (quoting *Est. of Page v. Litzenburg*, 177 Ariz. 84, 93 (App. 1993)); Ariz. R. Sup. Ct. 111(c)(1)(C).

committed a clear error of judgment." *Brown v. Tenn. Dep't of Fin. & Admin.*, 561 F.3d 542, 545 (6th Cir. 2009) (cleaned up).

A. The same discretionary standard applies for decisions regarding entitlement to relief and remedies granted.

Here, the trial court was presented with a specific question: whether to grant a motion seeking relief from prospective application of a final judgment, dated March 27, 1973, which declared A.R.S. § 13-3603 unconstitutional and enjoined the Attorney General and the Pima County Attorney from "taking *any* action or threatening to take *any* action to enforce [its] provisions . . . against all persons."[2] Exercising its broad discretion, the trial court decided to grant the motion and provide straightforward relief from prospective application of the 1973 Judgment as it was written. [ROA 64 ep 5–6]. Because the trial court's order constitutes a decision to grant relief under Rule 60(b), this Court should affirm it absent a clear abuse of discretion.

Appellants try to manufacture a distinction between the standard of review governing decisions regarding *entitlement* to Rule 60(b) relief and the standard of review governing decisions regarding the particular *remedy* granted. [*See* Planned Parenthood's OB, 10/25/2022 p 20]. But the same standard of review applies. The particular relief granted under Rule 60(b) is itself a decision within the trial court's discretion. *See* 11

[2] *See* Second Am. Declaratory J. & Inj. Pursuant to Mandate of the Ct. of App. (Mar. 27, 1973) ("1973 Judgment"), attached as Exhibit A, at 4. When the 1973 Judgment issued, § 13-3603 was numbered as § 13-211.

Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2857 (citing *Hritz v. Woma Corp.*, 732 F.2d 1178, 1182 (3d Cir. 1984)). Because Rule 60(b) relief is designed to remedy the injustice that would result from prospective application of a judgment, remedial decisions are integral to the trial court's discretionary Rule 60(b) analysis.

In any event, Appellants' forced distinction wouldn't change the standard of review because remedial decisions under Rule 60(b)(5) derive from the trial court's equitable powers. *See* 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2851; *Di Vito v. Fid. & Deposit Co. of Md.*, 361 F.2d 936, 939 (7th Cir. 1966) (recognizing that "relief provided by Rule 60(b) is equitable in character"). "Fashioning an equitable remedy is within the trial court's discretion, and such remedies will not be disturbed on appeal absent an abuse of that discretion." *Hiatt v. Shah*, 238 Ariz. 579, 582 ¶ 7 (Ct. App. 2015).

B. The trial court's well-reasoned decision rested on the scope of the pleadings, not on construction of statutes or interpretation of court rules.

Separate and apart from a trial court's decision to grant relief from a judgment under Rule 60(b), this Court may review de novo decisions that interpret and construe statutes. *See Pima Cnty. v. Maya Constr. Co.*, 158 Ariz. 151, 155 (1988). But here, Appellants do not allege that the trial court engaged in statutory construction and made an error in the process. [*See* Planned Parenthood's OB 10/25/2022 p 2, 19-27]. To the contrary,

Appellants complain that the trial court did *not* undertake statutory construction as they had requested. Thus, statutory construction does not provide a basis for reviewing the trial court's decision de novo.

Similarly, this Court may review interpretations of court rules de novo to determine whether the trial court has correctly applied the law. *Aloia*, 252 Ariz. at 551 ¶ 11. Appellants argue that the trial court's entire decision is subject to de novo review simply because it applied a court rule—Rule 60(b)—to grant comprehensive relief from the 1973 Judgment as written rather than undertaking their "harmonization" project to rewrite the judgment as they desired. Appellants are wrong for at least two reasons.

First, the trial court's decision to grant relief from the judgment as written did not result from an interpretation of court rules or from construction of any statute. Instead, the trial court's decision was driven by the scope of the underlying complaint and judgment themselves. [*See* ROA 64 ep 6]. According to the trial court, "the controlling Complaint seeks relief solely on constitutional grounds" and the "judgment entered in 1973 was based solely on those constitutional grounds." *Id.* The trial court reasoned that Appellants' request to rewrite § 13-3603 was improper, *not* due to an analysis of court rules or statutes, but because Appellants' request involved "grounds for relief not set forth in the Complaint" based on laws and circumstances "not in existence when the Complaint was filed." *Id*. The fact that the trial court rested its decision

on the scope of the Complaint—not on an interpretation of Rule 60(b)—is confirmed by the trial court's suggestion that Appellants' request could conceivably *become* proper upon amendment of the Complaint. *Id.*

This is precisely the type of case where appellate courts "defer to the district court's ringside view of the proceedings, including its understanding of the underlying complaint," and affirm absent abuse of discretion. *Brown*, 561 F.3d at 545. Simply put, de novo review does not apply because the trial court's decision was not an interpretation of court rules or a construction of statutes, but a straightforward application of Rule 60(b) to the procedural circumstances in this case.

Second, Appellants' theory is contrary to law. To begin, Appellants' reliance on *Aloia* is misplaced. There, the Court did not impose de novo review on *all* decisions applying Rule 60(b) as a court rule, but rather, held that the trial court lacked jurisdiction based on a *separate* court rule. *See Aloia*, 252 Ariz. 548, 551 ¶ 12. If credited, Appellants' theory—and their misguided reading of *Aloia*—would eviscerate the well-established rule that Rule 60(b) decisions are reviewed for abuse of discretion, and could impose de novo review on *every* decision under Rule 60(b) because such decisions necessarily involve application of that court rule to a particular case.

For these reasons, de novo review is inappropriate, and this Court should affirm the trial court's decision as a routine and proper exercise of its discretion. This Court has repeatedly held that "the burden is on

the appellant to show affirmatively a manifest abuse of discretion." *Joy v. Raley*, 24 Ariz. App. 584, 584 (1975) (citing *Cano v. Neill*, 12 Ariz. App. 562 (1970)). Appellants have not even identified the proper standard of review, much less affirmatively proven abuse of discretion. This Court should affirm.

II. The trial court did not abuse its discretion by granting straightforward relief from the 1973 Judgment.

Three principles govern a trial court's analysis under Rule 60(b)(5). First, if prospective application of a judgment is no longer equitable, courts may relieve a party from that judgment. Ariz. R. Civ. P. 60(b)(5). Second, a significant change in the law—whether by judicial decision or statute—may satisfy the condition that prospective application of a judgment or order is no longer equitable. *See Agostini v. Felton*, 521 U.S. 203, 215 (1997). Third, when the conditions of Rule 60(b) are satisfied, trial courts have broad discretion in deciding the appropriate remedy, which may include complete vacatur, modification, or placing conditions upon relief from the judgment. *See* 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure §§ 2851, 2857 (citing *Hritz v. Woma Corp.*, 732 F.2d 1178, 1182 (3d Cir. 1984)); *see Hiatt*, 238 Ariz. at 582.

Here, the trial court recounted these principles and noted the parties' *agreement* "that it is not equitable to enforce the judgment as originally entered" because "*Dobbs* resulted in a significant change in the law," and therefore, "relief is appropriate under Rule 60(b)(5)." [ROA 64

p 5]. Because *Dobbs* effected a significant change in the law that unquestionably rendered prospective application of the 1973 Judgment inequitable, the trial court correctly—indeed, inescapably—concluded that it "may relieve [the Attorney General and the Pima County Attorney] from [the 1973 judgment]." Ariz. R. Civ. P. 60(b). Because the trial court was plainly empowered to relieve the Attorney General from the 1973 judgment, it acted within its discretion by doing so.

A. The trial court reasonably concluded that vacatur was superior to Appellants' modification proposal.

Having found that the conditions of Rule 60(b) were satisfied, the trial court reasonably concluded that the 1973 judgment should be vacated. To begin, Rule 60(b) itself imposes no limitation on the relief that the court may grant, *see* Ariz. R. Civ. P. 60(b), and when the conditions of Rule 60(b) are satisfied, the trial court has discretion to vacate the judgment completely. *See, e.g., State v. Ornelas*, 15 Ariz. App. 580, 583 (1971). Further, because the language of the 1973 judgment broadly prohibited the Attorney General and Pima County Attorney from taking *any* action or threatening to take *any* action to enforce § 13-3603 against *all* persons, it was reasonable to vacate a judgment with such broad prohibitions if *any* enforcement action against *any* person is now permissible.

Several additional factors weighed in favor of vacatur and against Appellants' request for modification. This Court has recognized that "the

issues in a legal dispute are shaped by the parties' pleadings," such that a judgment "'must be within the issues formed by the pleadings,' and the trial court cannot award greater or different relief than that sought." *In re Est. of Olson*, No. 1 CA-CV 08-0403, 2009 WL 1311081, at *1 ¶ 5 (Ariz. Ct. App. May 12, 2009) (citing *Wall v. Super. Ct. of Yavapai Cnty.*, 53 Ariz. 344, 354-55 (1939)).[3] For this reason, "a trial court cannot reach beyond the parties' pleadings and resolve a case on a ground not asserted" in the Complaint. *Id* at ¶ 6. (collecting cases). Here, the trial court correctly noted that Appellants' request for modification did not relate to the constitutionality of § 13-3603 itself, which was the sole ground for relief alleged in the underlying Complaint. [ROA 64 ep 6]. The trial court also observed that Appellants' request for modification involved laws not in existence when the Complaint was filed, such that the parties did not have notice and an opportunity to litigate those issues below. *Id.*

Finally, the trial court recognized that Appellants' proposal for harmonization—carving out an exception for physicians and allowing the overwhelming majority of abortions, which occur before 15 weeks' gestation—would frustrate the express intent of the legislature. *Id.* "'Our goal in interpreting statutes is to ascertain and give effect to the intent of our legislature,' and the plain language of the statute is the best and most reliable indicator of that intent." *State v. Lockwood*, 222 Ariz. 551,

[3] Dr. Hazelrigg cites this memorandum decision under Ariz. Sup. Ct. R. 111(c)(1)(C).

553 ¶ 4 (Ct. App. 2009) (quoting *State v. Garcia*, 219 Ariz. 104, ¶ 6 (App. 2008)). Here, the plain language of the statute does not provide an exception for physicians. A.R.S. § 13-3603. When passing laws under *Roe v. Wade*, the Legislature repeatedly clarified that its statutes were not intended to create a right to abortion.[4] And when recently enacting additional protection for unborn life after 15 weeks' gestation, the Legislature expressly stated that it did not repeal § 13-3603. 2022 Ariz. Sess. Laws ch. 105 § 2 (2d Reg. Sess.). Because the trial court reasonably considered these factors, and given the additional reasons for declining Appellants' request in Section III below, the trial court acted within its discretion to vacate the 1973 Judgment rather than rewrite it in a manner that defies the Legislature's plain intent.

B. Appellants' *post hoc* arguments miss the mark.

Appellants make two misguided arguments to suggest that the trial court was limited to granting only partial relief from the 1973 judgment,

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[4] *See* 2009 Ariz. Sess. Laws ch. 172 § 6 (1st Reg. Sess.) ("This act does not create or recognize a right to an abortion and does not make lawful an abortion that is currently unlawful"); 2017 Ariz. Sess. Laws ch. 133 § 7 (1st Reg. Sess.) ("This act does not create or recognize a right to abortion. It is not the intention of this act to make lawful an abortion that is currently unlawful"); 2021 Ariz. Sess. Laws ch. 286, § 17 (1st Reg. Sess.) ("This act does not create or recognize a right to an abortion and does not make lawful an abortion that is currently unlawful."); 2022 Ariz. Sess. Laws ch. 105, § 2(1) (2d Reg. Sess.) ("This act does not: 1. Create or recognize a right to abortion or alter generally accepted medical standards. The Legislature does not intend this act to make lawful an abortion that is currently unlawful.").

and only after completing a comprehensive construction of all Arizona abortion regulations. [*See* Planned Parenthood's OB p 18–32]. Both arguments fail.

First, Appellants attack a straw man, mischaracterizing the trial court and Appellees as arguing that courts must either grant complete relief from a judgment or deny all relief. To be sure, whether the conditions of Rule 60(b)(5) are satisfied is indeed a "yes-or-no" question because a significant change in the law has either occurred or it has not, and prospective application of the judgment is either equitable or it is not. *See* Ariz. R. Civ. P. 60(b)(5). But a separate question—what particular relief to provide—is not necessarily binary. Courts have discretion in fashioning equitable remedies, *Hiatt*, 238 Ariz. at 582, such that courts may "vacate, modify, or set aside" judgments. *See State v. Ornelas*, 15 Ariz. App. 580, 583 (1971).

Dr. Hazelrigg does not dispute that, in theory, modification is one of several possible remedies that courts might consider under Rule 60(b). But Appellees correctly assert that, upon concluding that the conditions of Rule 60(b) are satisfied, a trial court has broad discretion in fashioning the remedy, and complete vacatur is certainly one option within the court's discretion. *See, e.g., Aloia*, 252 Ariz. At 553 ¶ 20 (citation omitted) (providing that Rule 60 gives courts "ample power to vacate judgments"). For the reasons explained above, the trial court acted well within its discretion in vacating the 1973 Judgment and acted reasonably in

denying Appellants' requested modification. And as explained in Section III, *infra*, embarking on a universal construction of all abortion laws was both unnecessary and improper. The trial court did not abuse its discretion in vacating the 1973 Judgment.

Second, Appellants attack another straw man, mischaracterizing the trial court and Appellees as asserting that courts can only consider changes in decisional law—not statutes—when evaluating motions under Rule 60(b). [Planned Parenthood's OB p 23–27]. Not so. The trial court expressly noted that a significant change in "either statutory or decisional law" can serve as the basis for showing that prospective application of a judgment is no longer equitable. [*See* ROA 64 p 5] (quoting *Agostini*, 521 U.S. at 215).

Here, no party alleged that a change in statutory law renders prospective application of the 1973 Judgment inequitable. To the contrary, Appellants argue that changes in statutory law require *continued application* of the 1973 Judgment to allow most abortions (95% of which occur prior to 15 weeks' gestation) and to retain injunctive relief for most of the individuals committing abortions (licensed physicians). [*See* Planned Parenthood's OB p 33–36].[5] Both parties exclusively identified a change in decisional law—*Dobbs*—as the reason why

[5] *Abortions in Arizona: 2020 Abortion Report*, ARIZ.. DEP'T OF HEALTH SERV., 16 (Sept. 21, 2021), https://bit.ly/3d7wkAt (reporting that 95% of Arizona abortions occur at 15 weeks' gestation or sooner).

prospective application of the 1973 Judgment inequitable. [*See* ROA 64 p 5]. The trial court did not abuse its discretion by citing a change in decisional law as the relevant justification for relief identified by all parties. And for the reasons explained below, Section III, the trial court also did not abuse its discretion in making its remedial decision to grant complete relief from the 1973 judgment without construing extraneous statutes to rewrite and repeal § 13-3603.

Because vacatur is plainly within the trial court's power and multiple reasonable considerations warranted denial of Appellants' modification proposal, the trial court did not abuse its discretion by vacating the 1973 Judgment.

III. The trial court did not abuse its discretion in declining to construe, rewrite, and largely repeal Section 13-3603.

This case is about § 13-3603. Of the many statutes that Appellants now rush to consider, only § 13-3603 was challenged in the Complaint and addressed in the 1973 Judgment from which the trial court granted relief. Accordingly, the trial court's central concern was to ascertain the Legislature's intent in enacting § 13-3603 and then determine whether it is equitable for the law to remain enjoined.

Appellants argue that the trial court was obligated to consider extraneous statutes related to the same subject matter as part of this analysis, suggesting the existence of statutory ambiguity or conflict. [*See* Planned Parenthood's OB p 33]. But no such ambiguity or conflict exists.

And in any event, Appellants' proposed harmonization is untenable because it would repeal § 13-3603 and directly contradict the express intent of the Legislature.

A. Statutory construction and harmonization are improper because Section 13-3603 is not ambiguous.

Arizona courts interpret statutes with one goal: to give effect to the Legislature's intent. *E.g., Glazer v. State*, 244 Ariz. 612, 614 (2018) (quoting *State ex rel. DES v. Pandola*, 243 Ariz. 418, 419 ¶ 6 (2018)). "The best indicator of that intent is the statute's plain language," and "when that language is unambiguous, *we apply it without resorting to secondary statutory interpretation principles*." *Id.* at ¶ 9. (quoting *SolarCity Corp. v. Ariz. Dep't of Revenue*, 243 Ariz. 477, 480 ¶ 8 (2018)) (emphasis added). Indeed, only upon a finding of ambiguity may a court "consult 'secondary interpretation methods, such as the statute's subject matter, historical background, effect and consequences, and spirit and purpose.'" *Romero-Millan v. Barr*, 253 Ariz. 24, ¶ 13 (2022) (quoting *Redgrave v. Ducey*, 251 Ariz. 451, 457 ¶ 22 (2021)).

For this reason, "courts do not resort to other statutes if the statute being construed is clear and unambiguous." 2B Sutherland Statutory Construction § 51:1 (7th ed.) (citing *United States v. Stewart*, 311 U.S. 60 (1940)). "Courts look to other statutes pertaining to the same subject matter that contain similar terms only if a statute's ordinary meaning and legislative history fail to provide sufficient guidance about a term's meaning." *Id.* at n.2 (citing *Fed. Trade Comm'n v. Shire ViroPharma,*

Inc., 917 F.3d 147 (3d Cir. 2019)). Thus, in the absence of ambiguity, it is improper for courts to consider and harmonize related statutes, and courts instead "adhere to the plain language of the statute, leaving any deficiencies or inequities to be corrected by the legislature." *Bowslaugh v. Bowslaugh*, 126 Ariz. 517, 519 (1979).

Appellants' attempt to manufacture an opportunity for "harmonization," *i.e.*, repeal, stumbles out of the gate because the very cases that they cite confirm that ambiguity of the statute in question is a predicate for harmonization with other laws. *Compare* Planned Parenthood's OB p 31–32, *with State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970) (beginning with the general rule that courts may look to extraneous laws when the statute in question "is uncertain and on its face susceptible to more than one interpretation," and under those circumstances, "a statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent"); *Desert Waters, Inc. v. Super. Ct. In & For Pima Cnty.*, 91 Ariz. 163, 168 (1962) ("We may, *when a constitutional provision is not clear upon its face*, consider extrinsic materials to ascertain the intent," and in that scenario, "[s]tatutes that are in pari materia should be read together and harmonized if at all possible") (emphasis added); *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 330 ¶ 12 (2001) ("If a statute is clear and unambiguous, we generally apply it without using other means of construction" but "when an ambiguity or contradiction exists . . . we attempt to determine legislative intent by interpreting the statutory

scheme as a whole" and "attempt to harmonize their language to give effect to each"); *Sw. Gas Corp. v. Indus. Comm'n of Ariz.*, 200 Ariz. 292, 297 ¶ 16 (Ct. App. 2001) ("*When statutory language gives rise to differing interpretations*, we will adopt the interpretation that is most harmonious with the statutory scheme and legislative purpose") (emphasis added) (cleaned up); *Metzler v. BCI Coca-Cola Bottling Co. of L.A.*, 235 Ariz. 141, 144–45 ¶ 13 (2014) (holding that "if the text is ambiguous," the court may consider extraneous statutes and will "seek to harmonize, whenever possible, related statutory and rule provisions").

Here, Appellants do not allege—much less demonstrate—that the language of § 13-3603 is ambiguous itself. Nor could they. The plain language of the statute forbids any person from providing, supplying, or administering abortion drugs and from employing any means to procure an abortion, unless necessary to save the life of the mother. A.R.S. § 13-3603. Indeed, the parties acknowledge that the plain language of the statute, if applied, would prevent nearly all abortions in Arizona, except those necessary to save the mother's life. [*See* Planned Parenthood's OB p 42]. Because § 13-3603 is itself unambiguous, it is unnecessary and improper for the Court to harmonize it with extraneous statutes.

B. Statutory construction and harmonization are improper because Section 13-3603 is not in conflict with other laws.

Harmonization of statutes is improper in the absence of statutory ambiguity or conflict. *See Craig*, 200 Ariz. at 330 ¶ 13. Failing to identify any ambiguity in the statute itself, Appellants assert that the trial court

was obligated to construe, rewrite, and repeal § 13-3603 based on an alleged conflict with other laws. [*See* Planned Parenthood's OB p 30–33]. But no such conflict exists. Appellants' arguments fail for at least five reasons.

No direct contradiction in statutory language. First, no conflict arises because the relevant statutes exclusively contain *prohibitory* or *restrictive* language with respect to committing an abortion, and none of the laws contain language affirmatively permitting abortion that could give rise to a conflict. *See* A.R.S. § 13-3603 (making it a crime for any person to commit any abortion not required to save the life of the mother, with no language affirmatively permitting abortion); A.R.S. § 36-2155 (providing that an "individual who is not a physician shall not perform a surgical abortion," with no language affirmatively permitting abortion); A.R.S. § 36-2322 (providing that "a physician may not" perform abortions after 15 weeks' gestation in the absence of medical emergency and imposing reporting requirements for violations, with no language affirmatively permitting abortion); A.R.S. § 36-2153 (providing that an abortion "shall not be performed or induced" without voluntary and informed consent and a 24-hour waiting period, with no language affirmatively permitting abortion); A.R.S. § 36-2160 (restricting provision of abortion-inducing drugs by anyone other than a qualified physician, with no language affirmatively permitting abortion); A.R.S. § 36-2161 (imposing reporting requirements for any abortions committed, including any medical judgment that a medical emergency existed, with

no language affirmatively permitting abortion); A.R.S. § 36-449.02 (imposing licensing and operating requirements on abortion facilities without affirmative language permitting abortions).

Simply put, multiple overlapping prohibitions do not give rise to a contradiction, much less *permission* to perform the doubly condemned act. Thus, Appellants cannot establish any direct conflict between language in one law prohibiting abortion and language in another law permitting it. This alone is fatal to Appellants' theory because harmonization is only appropriate when the "language" of statutes contradict one another. *See Craig*, 200 Ariz. at 330.

No implied contradiction from silence. Second, lacking any language affirmatively permitting abortion, Appellants attempt a syllogistic sleight of hand, suggesting that any *lack* or *limitation* of a prohibition should be inversely understood as evidencing a positive intention to "allow" abortion. [*See* Planned Parenthood's OB p 2, 30, 32, 34, 37, 42]. For example, Appellants assert that the 15-week Law affirmatively "allows" abortion prior to 15 weeks' gestation, in conflict with § 13-3603. *Id.* at 42. But silence or limited restrictions on abortion during the first 15 weeks—a forbearance forced upon the Legislature by *Roe* and *Casey*—do not evidence affirmative intent to *permit* abortion in the first 15 weeks. To the contrary, the Legislature expressly clarified that the 15-week Law *does not* "[r]epeal, by implication or otherwise, section 13-3603, Arizona Revised Statutes, or any other applicable state law regulating or restricting abortion." *See* 2022 Ariz. Sess. Laws ch. 105,

§ 2 (2d Reg. Sess.). And in any event, courts harmonize the "language" in separate statutes, not their silence. *See Craig*, 200 Ariz. at 330. So the Legislature's forbearance or limitation of abortion prohibitions—mandated under *Roe*—also fails to present any conflict with § 13-3603.

No implied contradiction from circumstances. Third, retreating from the language of the statutes altogether, Appellants suggest that *Roe*-era laws "allowed" abortions to occur *in practice*, giving rise to an alleged conflict with § 13-3603. [*See* Planned Parenthood's OB p 30]. But as mentioned above, courts harmonize the "language" of separate statutes, not the circumstances surrounding them. *See Craig*, 200 Ariz. at 330 ¶ 13. And this argument remarkably overlooks the context: *Roe* and *Casey* muzzled and shackled Legislatures, preventing them from extending certain protections for unborn children. Even in the face of such interference, the Legislature consistently demonstrated its intention to protect unborn life from abortion to the greatest extent possible. Just four years after *Roe*, the Legislature re-codified and re-enacted § 13-3603. *See* 1977 Ariz. Sess. Laws ch. 142, § 99 (1st Reg. Sess.). During the *Roe* era, the Legislature repeatedly expressed its intention to limit abortion. *See supra*, note 4. And just this year, the Legislature emphasized that it wished to retain and enforce § 13-3603 in addition to its 15-week Law. *See* 2022 Ariz. Sess. Laws ch. 105, § 2 (2d Reg. Sess.). Accordingly, the practical circumstances show consistency with § 13-3603, not conflict.

No basis for applying canons of construction. Fourth, Appellants improperly urge application of statutory construction principles that only apply when the language of statutes directly contradict one another. For example, Appellants suggest that more recent and specific statutes govern over older and more general statutes, such that the 15-week Law displaces the terms of § 13-3603. [Planned Parenthood's OB p 32]. But that rule only applies when the language of the relevant statutes is plainly "inconsistent." *See Desert Waters*, 91 Ariz. at 171. As explained above, Appellants have failed to demonstrate any inconsistency in the statutory language.

Harmony is possible, so repeal is not. Fifth and finally, Appellants' proposed harmonization is improper because it would largely repeal § 13-3603 when the statute's comprehensive protections can be read in harmony with the other laws. A finding of implied repeal is "disfavored," and it is only possible "when conflicting statutes *cannot* be harmonized to give each effect and meaning." *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 7 (2013) (emphasis added). The plain language of § 13-3603 forbids any person from committing any abortion at any time unless it is necessary to preserve the mother's life. A.R.S. § 13-3603. But Appellants' proposal would repeal and rewrite the statute beyond recognition, creating an exception for licensed physicians (who commit most abortions), and making abortion legal through 15 weeks (when the overwhelming majority of unborn Arizona children are killed by abortion). [*See* Planned Parenthood's OB p 33–35].

Repeal is improper and unnecessary because the statutes can be synthesized in a way that gives effect to each: all persons are prohibited from committing any abortion at any time unless necessary to save the life of the mother. A.R.S. § 13-3603. A separate, overlapping violation occurs if the person is a physician and performs an abortion after 15 weeks' gestation that is not necessary to save the life of the mother, which is a medical emergency. A.R.S. § 36-2322(A). A separate, overlapping violation occurs if the person is not a physician yet performs a surgical abortion, whether or not in the context of a medical emergency. A.R.S. § 36-2155. A separate, overlapping violation occurs if the person is not a qualified physician yet provides abortion drugs, whether or not in the context of a medical emergency. A.R.S. § 36-2160. And for those abortions that sadly occur to save the life of the mother, which constitutes a medical emergency, the facility must comply with the relevant licensing, operating, informed consent, waiting period, and reporting requirements. A.R.S. §§ 36-2322(c), 36-2161; 36-449.02; 36-2153.

In other words, the various laws provide overlapping and aggravated offenses for violations in addition to § 13-3603, and the statutes regulating the commission of abortion apply to those situations when the mother's life is in danger. To be sure, this synthesis protects far more unborn lives than Appellants' proposal. But that's a good thing, and it best reflects the Legislature's longstanding intent, representing the will of the people of Arizona. Because it is entirely possible to read the

statutes without repealing or rewriting § 13-3603, courts are obligated to do so.

The trial court acted within its discretion in declining Appellants' request to construe, harmonize, and implicitly repeal § 13-3603. This Court should affirm its well-reasoned decision.

CONCLUSION

For the reasons stated above, this Court should affirm the trial court's decision granting relief under Rule 60(b) by vacating the 1973 Judgment.

RESPECTFULLY SUBMITTED this 8th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Ariz. R. Civ. App. P. Rules 4 and 6, the undersigned counsel certifies that Intervenor-Appellee Dr. Eric Hazelrigg's Response to Appellants' Opening Briefs uses proportionately spaced typeface, Century Schoolbook 14 point, and complies with the requirements of Rules 4 and 6.

s/ Mark A. Lippelmann
Mark A. Lippelmann

Attorney for Eric Hazelrigg, M.D., intervenor and guardian ad litem of all Arizona unborn infants

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2022, Intervenor-Appellee Dr. Eric Hazelrigg electronically filed his Response to Appellants' Opening Briefs and served a copy of the same, via email on the following persons:

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EXHIBIT A

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
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