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16 **ARIZONA SUPERIOR COURT**

17 **PIMA COUNTY**

18 PLANNED PARENTHOOD ARIZONA, ) No. C127867  
19 INC., et al., )  
20 Plaintiffs, ) **PLANNED PARENTHOOD ARIZONA,**  
21 v. ) **INC.,’S EMERGENCY MOTION FOR**  
22 MARK BRNOVICH, Attorney General of the ) **STAY OF ORDER PENDING APPEAL**  
State of Arizona, et al., ) **(EXPEDITED CONSIDERATION**  
23 Defendants, ) **REQUESTED)**

24 (Assigned to the Hon. Kellie Johnson)  
25  
26

1 and )  
 2 ERIC HAZELRIGG, M.D., as guardian ad )  
 3 litem of unborn child of plaintiff Jane Roe and )  
 all other unborn infants similarly situation, )  
 4 Intervenor. )  
 5 )  
 6 )

7 Under Ariz. R. Civ. P. 62(e), Plaintiff Planned Parenthood Arizona, Inc. (“PPAZ”) moves  
 8 that this Court stay its September 23, 2022 Order modifying the Second Amended Declaratory  
 9 Judgment and Injunction so that it no longer has any prospective application to A.R.S. § 13-  
 10 3603, pending the outcome of PPAZ’s appeal.

11 Rule 62(e), Ariz. R. Civ. P., states that, “[w]hile an appeal is pending from an  
 12 interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or  
 13 refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an  
 14 injunction on such terms for bond, security, or otherwise that preserve the adverse party’s rights.”  
 15 Indeed, Rule 62(e), “allows the trial court to issue a stay that postpones the effect of the granting,  
 16 dissolution, or modification of the injunction.” *State ex rel. Corbin v. Tolleson*, 152 Ariz. 376,  
 17 378 (App. 1986) (emphasis omitted). Further, “[t]he trial court may make the orders necessary  
 18 to preserve the status quo during the appeal and to protect the unsuccessful party from any  
 19 irreparable harm that would occur from enforcing the ruling on the injunction.” *Id.*

20 A stay pending appeal is appropriate when the moving party establishes:

- 21 1. A strong likelihood of success on the merits;
- 22 2. Irreparable harm if the stay is not granted;
- 23 3. That the harm to the requesting party outweighs the harm to the party  
 24 opposing the stay; and
- 25 4. That public policy favors the granting of the stay.

1 *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, 410 ¶ 10 (2006) (en banc)  
2 (citations omitted). “The scale is not absolute, but sliding. Nor should the result turn on counting  
3 the factors that weigh on each side of the balance.” *Id.* at 410–11 ¶ 10. “Rather, the moving party  
4 may establish *either* 1) probable success on the merits and the possibility of irreparable injury;  
5 *or* 2) the presence of serious questions and that the balance of hardships tips sharply in favor of  
6 the moving party.” *Id.* (emphasis added) (cleaned up). PPAZ meets either standard.

7 Notably, to satisfy the second standard, the Court does not have to agree that PPAZ is  
8 likely to succeed on the merits of its request for a modified injunction harmonizing § 13-3603  
9 with Arizona’s other abortion-regulating laws in order to find that a stay is appropriate. Instead,  
10 it is enough that PPAZ proved there are serious questions regarding the proper scope of a  
11 statutory analysis under Rule 60(b) and the interaction among § 13-3603, the 15-Week Law, and  
12 Arizona’s other abortion statutes. Indeed, both parties submitted multiple rounds of briefing on  
13 the complex legal issues presented by AG Brnovich’s request to modify the Second Amended  
14 Judgment in this case. And that makes sense, given the complicated procedural posture, the  
15 intricate issues of statutory interpretation, and the extraordinarily unique historical and social  
16 circumstances surrounding the AG’s request.

17 In particular, citing *Agostini v. Felton*, 521 U.S. 203, 215 (1997), both parties agree that  
18 this Court has the authority to consider whether there has been a “significant change either in  
19 factual conditions or in law” since the final judgment was entered nearly 50 years ago. Att’y  
20 Gen’s Mot. for Relief from J. (“AG Mot.”) at 8; *see also id.* (acknowledging that “[u]nder Rule  
21 60(b)(5), ‘[a] court may recognize subsequent changes in either statutory or decisional law.’”  
22 (quoting *Agostini*, 521 U.S. at 215)). And both parties agree that the “U.S. Supreme Court has  
23 even rejected the notion that Rule 60(b)(5) does not apply where a movant uses it ‘not as a means  
24 of *recognizing* changes in the law, but as a vehicle for *effecting* them.’” AG Mot. at 9 (quoting  
25 *Agostini*, 521 U.S. at 238 (emphasis in original)). Plaintiffs also cited case law explaining that:  
26 (1) Rule 60(b) has a “flexible standard,” PPAZ’s Resp. to Defs.’ R. 60(b) Mot. for Relief from

1 J. at 14–15 (quoting *Bredfeldt v. Greene*, No. 2 CA-CV 2016-0198, 2017 WL 6422341, at \*3 ¶  
2 10 (Ariz. App. Dec. 18, 2017) (quotation omitted)); and, (2) “in deciding whether Rule 60 relief  
3 is warranted, the superior court must consider *the totality of facts and circumstances*, and,  
4 therefore, is afforded extensive discretion in deciding whether relief is appropriate,” PPAZ’s  
5 Resp. to Dr. Hazelrigg & Choices Pregnancy Ctrs.’ Proposed Reply in Supp. of Att’y Gen.’s  
6 Mot. for Relief from J. at 2–3 (quoting *AOW Mgmt. LLC v. Scythia Sols. LLC*, No. 1 CA-CV 20-  
7 0699, 2022 WL 2813523, at \*7 ¶ 36 (Ariz. App. July 19, 2022) (emphasis added) (cleaned up)).

8 Plaintiffs have thus presented, at minimum, a serious question as to whether this Court,  
9 in deciding the AG’s Motion, can consider the comprehensive statutory changes to Arizona law  
10 that have evolved over the past 50 years—including a law allowing abortions no greater than 15  
11 weeks that became law just days ago—and issue a modified judgment that effects those changes.  
12 Moreover, it can hardly be disputed that a serious question exists over how Arizona’s laws  
13 interact. *See* Order at 7. (“[T]here may be questions the parties seek to resolve regarding Arizona  
14 statutes[.]”). Indeed, within hours of the Court’s decision, Governor Doug Ducey stated that “as  
15 far as [he] is concerned, [the 15-week Law] takes effect as scheduled Saturday,” September 24.<sup>1</sup>  
16 And as Plaintiffs have pointed out in prior briefing, immediately after the U.S. Supreme Court  
17 issued the *Dobbs* decision, AG Brnovich himself said “[t]he Arizona Legislature passed an  
18 identical law to the one upheld in *Dobbs*, which will take effect in approximately 90 days,”<sup>2</sup>  
19 before reversing course and filing the motion to modify the judgment.

20 In addition, the balance of hardships also tips sharply in favor of PPAZ (and Arizonans  
21 more broadly) and weighs in favor of a stay. The health and safety of Arizonans will be  
22 compromised if § 13-3603 remains enforceable against physicians who perform abortions while

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23 <sup>1</sup> Howard Fischer, *Virtually all abortions in Arizona are now illegal, judge rules*, Tucson.com  
24 (September 23, 2022), [https://tucson.com/news/local/virtually-all-abortion-in-arizona-are-now-illegal-judge-rules/article\\_4591db6c-3b93-11ed-9c3a-13031cb22643.html](https://tucson.com/news/local/virtually-all-abortion-in-arizona-are-now-illegal-judge-rules/article_4591db6c-3b93-11ed-9c3a-13031cb22643.html).

25 <sup>2</sup> Ariz. Att’y Gen., *Arizona Attorney General Mark Brnovich Applauds Supreme Court Decision*  
26 *to Protect Life* (June 24, 2022), <https://www.azag.gov/press-release/arizona-attorney-general-mark-brnovich-applauds-supreme-court-decision-protect-life>.

1 PPAZ appeals this Court’s decision. As Plaintiffs predicted in briefing and argument, it is now  
2 unclear how § 13-3603 interacts with Arizona’s other abortion laws. While the Governor  
3 maintains that S.B. 1164, which he signed earlier this year, allows abortions to be performed  
4 within the 15-week limit set in that law, *supra* note 1, the Attorney General has intimated that  
5 under the Court’s ruling, § 13-3603 takes precedence over the 15-week limit.<sup>3</sup> As a result, PPAZ  
6 and other abortion providers throughout the state will be forced to steer away from providing  
7 abortions that are permissible under the clear language of the 15-week Law and the stated  
8 legislative intent. S.B. 1164, 55th Leg., 2nd Reg. Sess. (Ariz. 2022) (“This Legislature intends  
9 through this act and any rules and policies adopted hereunder, to restrict the practice of  
10 nontherapeutic or elective abortion to the period up to fifteen weeks of gestation.”). This  
11 confusion is untenable and creates serious due process concerns. *See* Pima Cnty. Att’y’s Joinder  
12 in PPAZ’s Resp. to Att’y Gen.’s Mot. for Relief from J. at 3 (“The lifting of the current  
13 injunction, without the necessary modification to harmonize with the Legislature’s subsequently  
14 enacted and less restrictive statutory scheme, will deny Arizonans of ordinary intelligence a  
15 reasonable opportunity to know what is prohibited[.]”).

16       Significantly, the lack of clarity regarding abortion law extends to how § 13-3603’s “life  
17 of the mother” exception relates to the contours of and emergency exceptions found in Arizona’s  
18 other abortion laws. For example, the resurrection of § 13-3603 and its supposed coexistence  
19 with Arizona’s other abortion statutes—now including S.B. 1164 as of this past Saturday—  
20 means that Arizona law allows abortion to save the life of the pregnant person (§ 13-3603), but  
21 it also requires a 24-hour waiting period pending the provision of certain information to the  
22 patient (A.R.S. § 36-2153 *et seq.* (2009)). The 24-hour waiting period law contains exceptions  
23 for specifically-defined “medical emergencies,” A.R.S. § 36-2151, but that definition is not  
24 identical to § 13-3603’s life exception. *Compare* A.R.S. § 13-3603 (“ . . . unless necessary to

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25 <sup>3</sup> Mark Brnovich (@GeneralBrnovich), Twitter (Sept. 23, 2022, 3:45 PM),  
26 <https://twitter.com/GeneralBrnovich/status/1573443589509910528?s=20&t=ctSGQLMBuCTMIXCcbeHpPw>.

1 save [the patient’s] life”) with A.R.S. § 36-2151 (“‘Medical emergency’ means a condition that,  
2 on the basis of the physician’s good faith clinical judgment, so complicates the medical condition  
3 of a pregnant woman as to necessitate the *immediate* abortion of her pregnancy to avert her death  
4 or for which a delay will create serious risk of substantial and irreversible impairment of a major  
5 bodily function.” (emphasis added)).

6 Confusion on the scope of these exceptions seemingly at odds with one another could  
7 lead to doctors hesitating to treat patients in dire medical situations. And this is not just a  
8 hypothetical concern. The conflicting messages from state officials earlier this summer in the  
9 wake of the *Dobbs* decision caused providers to hesitate before providing care, which will be the  
10 case once again.<sup>4</sup> The absence of a stay will deprive many pregnant Arizonans of health care  
11 they require for an indeterminate period of time, while this case makes its way through the  
12 appellate process.

13 Further, the AG cannot establish that a stay will cause *any* injury to the State. This is  
14 unsurprising because there will be no harm to the State if harm to its citizens is avoided while  
15 the case proceeds on appeal. In fact, the opposite is true: the Court’s order creates confusion over  
16 the meaning of Arizona’s laws and has the practical effect of nullifying dozens of duly enacted  
17 laws that were passed more recently and deal more specifically with the subject matter, including  
18 the 15-week Law that the Governor maintains should be the law of the land today. *Cf. Abbott v.*  
19 *Perez*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 2305, 2324 n.17 (2018) (“[I]nability to enforce its duly enacted  
20 plans clearly inflicts irreparable harm on the State.”).

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22 <sup>4</sup> See Kate Zernike, *Medical Impact of Roe Reversal Goes Well Beyond Abortion Clinics,*  
23 *Doctors Say*, N.Y. Times (Sept. 10, 2022), [https://www.nytimes.com/2022/09/10/us/abortion-](https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women.html)  
24 [bans-medical-care-women.html](https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women.html) (“Because [Arizona’s] old law punishes those who ‘aid and  
25 abet’ an abortion, an anesthesiologist worried that he might be prosecuted for putting a patient  
26 to sleep for an abortion. A neonatologist worried about liability for declining to resuscitate a  
fetus judged no longer viable. ‘We already work under a cloud of getting sued. That’s what we  
signed up for,’ [Scottsdale obstetrician] Dr. Kwatra said. ‘This is different. This is criminal  
liability, not civil liability. This is jail time.’”).

1 For all these reasons, Plaintiff PPAZ has established the presence of serious questions  
2 and that the balance of hardships tips sharply in its favor. PPAZ thus respectfully requests that  
3 this Court stay its September 23 order until the conclusion of PPAZ’s appeal. Given the harm  
4 PPAZ, its patients, and the general public will suffer in the absence of a stay, PPAZ also requests  
5 that the Court set an expedited briefing schedule with Defendants’ responses due September 27,  
6 2022, and PPAZ’s reply to be filed the following day—or rule on the stay motion without  
7 awaiting further briefing. A proposed form of order accompanies this Motion.

8 RESPECTFULLY SUBMITTED this 26th day of September, 2022.

9 **COPPERSMITH BROCKELMAN PLC**

10 By: /s/ D. Andrew Gaona

11 D. Andrew Gaona  
12 Kristen Yost

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20 ORIGINAL of the foregoing efiled and  
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