

Case No. C127867
HON. KELLIE JOHNSON

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14 **Application for Pro Hac Vice Forthcoming*

15 *Attorneys for Plaintiff Planned Parenthood Arizona, Inc.,*
16 *successor-in-interest to Plaintiff Planned Parenthood Center*
of Tucson, Inc.

17
18 **ARIZONA SUPERIOR COURT**

19 **PIMA COUNTY**

20 **PLANNED PARENTHOOD CENTER OF**) No. C127867
TUCSON, INC., et al.,)

21 Plaintiffs,)

22 v.)

23 **MARK BRNOVICH, Attorney General of the**)
State of Arizona, et al.,)

24 Defendants,)

25)

26)

**PLANNED PARENTHOOD ARIZONA'S
RESPONSE TO DEFENDANTS' RULE
60(b) MOTION FOR RELIEF FROM
JUDGMENT**

(Assigned to the Hon. Kellie Johnson)

1 and)
2 CLIFTON E. BLOOM, as guardian ad litem of)
3 unborn child of plaintiff Jane Roe and all other)
4 unborn infants similarly situation,)
5 Intervenor.)

6 INTRODUCTION

7 For nearly 50 years, abortion has been legal in Arizona and relied on by pregnant
8 Arizonans and their families to decide whether, when, and how they want to welcome children.
9 It is also the subject of ongoing debate and legislation by Arizonans’ elected representatives who
10 have invested significant time and political capital to pass and modify abortion laws over the last
11 50 years. The result is a complex statutory scheme that regulates the provision of abortion by
12 licensed physicians.

13 Most recently, the Legislature passed, and Governor Ducey signed, a law permitting
14 physicians to provide abortions up until 15 weeks of pregnancy¹ (“15-week Law”), which will
15 take effect September 24, 2022. Unlike other state legislatures around the country that passed
16 “trigger” abortion bans in anticipation of the U.S. Supreme Court’s decision in *Dobbs v. Jackson*
17 *Women’s Health Organization*, the Arizona Legislature passed the 15-week Law.

18 Since *Dobbs* overturned *Roe v. Wade*, providers in Arizona have been left to navigate
19 inconsistent statements by elected officials about the status of the laws. Specifically, it has been
20 entirely unclear whether state officials—notwithstanding the mosaic of more recent abortion
21 statutes that permit abortion performed by physicians—believe they have the authority to enforce
22 a criminal ban on abortion, which can be traced back to 1864 and is currently codified as
23 A.R.S. § 13-3603 (the “Territorial Law”), to criminalize otherwise legal, physician-provided
24 abortions. For weeks, state officials, including Defendant Attorney General Brnovich (the
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26 ¹ Pregnancy is commonly measured from the first day of a pregnant person’s last menstrual
period or LMP. A full-term pregnancy is around 40 weeks LMP.

1 “AG”), either refused to state which abortion laws are in effect or gave inconsistent positions on
2 the matter, even though A.R.S. § 13-3603 has been enjoined since 1973. This confusion brought
3 abortion services to a halt across the state.

4 The AG has moved this Court for full relief from the judgment and injunction against
5 A.R.S. § 13-3603 and has asked this Court to “return[] [the law] to what it was prior to
6 *Roe*”—blatantly ignoring that Arizona’s statutory code today includes dozens of laws that
7 plainly permit physicians to provide abortions. Att’y Gen’s Mot. for Relief from J. (“Mot.”) at
8 10.²

9 Contrary to the AG’s arguments, this Court has a duty to harmonize *all* of the Arizona
10 Legislature’s enactments as they exist today. Doing so here would result in a modification of
11 this Court’s judgment to make clear that A.R.S. § 13-3603 can be enforceable in some respects
12 but does *not* apply to abortions provided by licensed physicians under the regulatory scheme the
13 Legislature enacted over the last 50 years. Indeed, the State will not be harmed if all laws the
14 Legislature enacted are harmonized, rather than granting the AG an undemocratic windfall in
15 the full reanimation of a long-dead law. On the other hand, irreparable harm will befall Arizonans
16 if this Court’s 1973 injunction is modified to allow the State to enforce A.R.S. § 13-3603 in a
17 manner that criminalizes nearly all abortions in the state.

18 **BACKGROUND**

19 **I. The Territorial Law**

20 As the State acknowledges, A.R.S. § 13-3603 was first enacted when Arizona was still a
21 U.S. Territory, long before women were allowed to vote. Mot. at 3 n.2. A.R.S. § 13-3603 was
22 formerly codified as § 13-211 and codified in a different part of the code prior to that. In fact,
23 this near total criminal ban on abortion is so antiquated that it can be traced back to 1864 when
24 the 1st Arizona Territorial Legislature enacted the “Howell Code” as a basis for Arizona’s law.

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26 ² Among other procedurally improper arguments, the AG has also moved to substitute Dr. Eric Hazelrigg as intervenor and guardian ad litem in this case. PPAZ will oppose this motion.

1 The Howell Code, attached as Exhibit A, included a ban on providing abortions that is
2 substantially similar to A.R.S. § 13-3603. A.R.S. § 13-3603 today provides:

3 A person who provides, supplies or administers to a pregnant woman, or procures
4 such woman to take any medicine, drugs or substance, or uses or employs any
5 instrument or other means whatever, with intent thereby to procure the miscarriage
6 of such woman, unless it is necessary to save her life, shall be punished by
imprisonment in the state prison for not less than two years nor more than five
years.

7 A.R.S. § 13-3603, in effect, bans the provision of abortion, except when necessary to save a
8 pregnant person's life. It does not contain any exceptions to allow abortions in the case of threats
9 to the patient's health, rape, or incest. A.R.S. § 13-3603 was operative from its passage until
10 enjoined by an Order of this Court in 1973. Ex. A to Mot.

11 **II. *Planned Parenthood Center of Tucson, Inc. v. Nelson***

12 In 1971, the Planned Parenthood Center of Tucson, Inc.—a predecessor organization to
13 Planned Parenthood Arizona, Inc. (“PPAZ”)—and several medical providers filed suit in Pima
14 County Superior Court, arguing that the Territorial Law³ violated the Arizona and U.S.
15 Constitutions. Ex. B to Mot. After a bench trial, the trial court agreed with the plaintiffs, entered
16 a declaratory judgment that the Territorial Law violated federal and state law, and permanently
17 enjoined enforcement of the Territorial Law. Ex. C to Mot.

18 The court of appeals disagreed with that conclusion and reversed. *Nelson v. Planned*
19 *Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. App. 142, 150 (1973). However, ten days later, the
20 U.S. Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973). On January 30, 1973, the court
21 of appeals granted plaintiffs-appellees’ motion for rehearing and held that its “former opinion is
22 vacated.” *Nelson*, 19 Ariz. App. at 152. It further stated that, based on *Roe*, “the decision of the
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24 ³ At issue in the case were two other statutes: A.R.S. § 13-3604 (formerly § 13-212), which
25 criminalized soliciting an abortion, and A.R.S. § 13-3605 (formerly § 13-213), which
26 criminalized advertising abortion and contraception. Neither are at issue here; A.R.S. § 13-3604
has been repealed and the AG is not seeking to vacate or modify the injunction as to
A.R.S. § 13-3605. Mot. at 1 n.1.

1 [Nelson] trial court is affirmed except that part of the decision limiting the effect of the decision
2 to the parties only is modified in that the statutes in question are unconstitutional as to all.” *Id.*
3 This Court then entered a modified order and permanently enjoined the taking of action or
4 threatening to take action to enforce the Territorial Law as to all persons. Ex. A to Mot.

5 **III. Abortion Laws Enacted Since 1973**

6 In the nearly five decades since 1973 (and since *Roe*), the Legislature has enacted a
7 complex regulatory scheme that recognizes and regulates abortion as a lawful medical procedure
8 in our state. This includes, for example:

- 9 • A.R.S. § 36-2301.01(A) (1984) (amended 2017) (allowing the performance of an
10 abortion up to viability, meaning approximately 24-weeks, with limited exceptions
11 to “preserve the life or health of the woman” after viability) (the “Post-viability
12 Law”);
- 13 • A.R.S. § 36-449.01, et seq. (1999) (amended 2021) (requirements for the licensure
14 and operation of abortion facilities, including but not limited to, pre-abortion
15 screening procedures, equipment that must be present in the facility, and
16 procedures to be followed after an abortion is provided)⁴;
- 17 • A.R.S. § 36-2155 (2009) (prohibiting anyone other than a “physician” from
18 performing a “surgical abortion”), A.R.S. § 36-2160 (2021) (stating “[a]n
19 abortion-inducing drug may be provided only by a qualified physician”) (the
20 “Physician-only Laws”⁵);

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22 ⁴ See also A.A.C. R9-10-101(1); A.A.C. R9-10-902(C)(6); A.A.C. R9-10-1501 *et seq.*
(implementing A.R.S. § 36-449.01 *et seq.*).

23 ⁵ There are a collection of statutes and administrative rules that prohibit anyone other than a
24 licensed physician from providing abortions and related services (the “Physician-only Laws”).
25 See A.R.S. §§ 32-1606(B)(12) (prohibiting the State Nursing Board from “decid[ing] scope of
26 practice relating to abortion”); 32-2531(B) (prohibiting physician assistants from performing
“surgical abortions”); 32-2532(A)(4) (prohibiting physician assistants from performing
medication abortions); 36-449.03(C)(3) (requiring a physician to be “available” at a clinic at

- 1 • A.R.S. § 36-2153 et seq. (2009) (amended 2021) (requiring patients to give
2 informed consent, provided certain information is given 24 hours prior to abortion)
3 (the “24-hour Law”);
- 4 • A.R.S. § 36-2161 (2010) (amended 2021) (requiring a hospital or health care
5 facility where abortions are performed to submit reports to the Department of
6 Health Services (“Department”) that must include, among other things,
7 demographic information about the patient, informed consent, whether any
8 complications occurred, and fetal tissue disposition).

9 Further, the Legislature has repeatedly amended Title 13 (*i.e.* criminal code) laws on
10 abortion since 1973. In 1997, the Legislature enacted A.R.S. § 13-3603.01, prohibiting
11 “partial-birth abortion.” Then, in 2011, it passed A.R.S. § 13-3603.02, prohibiting abortions
12 “based on . . . sex or race.” *Id.* In 2021, it amended A.R.S. § 13-3603.02 to also prohibit abortions
13 “sought solely because of a genetic abnormality of the child,” (the “Reason Law”); *Isaacson v.*
14 *Brnovich*, 563 F. Supp. 3d 1024 (D. Ariz. 2021), *vacated*, No. 21-1609, 2022 WL 2347565 (U.S.
15 June 30, 2022). The Legislature provided an exception for medical emergencies (which is
16 broader than the exception in the Territorial Law) in the race and sex-selective abortion
17 which medication or aspiration abortions are performed); 36-449.03(D)(5), (G)(4), (5), (8)
18 (requiring a physician to estimate the gestational age of the fetus, to be physically present at, or
19 in the vicinity of, a clinic where medication or aspiration abortions are performed, to provide
20 counseling, and to provide specific follow-up); 36-2152(A), (B), (H)(1), (M) (permitting only
21 physicians to provide minors with abortion services); 36-2153(A) (requiring physicians to
22 provide counseling), (E) (prohibiting non-physicians from performing “surgical abortion”); 36-
23 2155 (same); 36-2156(A) (requires “the physician who is to perform the abortion” or “the
24 referring physician” to facilitate provision of an ultrasound); 36-2158(A) (requiring physicians
25 to provide information “orally and in person”); 36-2160 (“[a]n abortion-inducing drug may be
26 provided only by a qualified physician”); 36-2161(A)(16), (20)–(21), (D) (requiring “the
physician performing the abortion” to create certain records); 36-2162.01(A), (C) (requiring
physicians to complete certain records as either the “referring physician” or the “physician who
is to perform the abortion”). The Physician-only Laws also include the following regulations:
A.A.C. R9-10-1507(B)(2), (3); A.A.C. R9-10-1509(A)(2), (B)(1), (5), (C), (D)(3)(a); A.A.C.
R9-10-1510(B)(1); and A.A.C. R9-10-1512(A)(6) and (D)(3)(d).

1 prohibition and the Reason Law. A.R.S. §§ 13-3603.02(A); 36-2151(9). In the same bill that
2 passed the Reason Law, the Legislature repealed A.R.S. § 13-3604, removing the ability to
3 prosecute people who seek an abortion.

4 **A. 2022 Legislative Session**

5 During the 2022 legislative session, the Legislature considered but did not pass several
6 bills regarding abortion. Namely, it considered adding a new section, A.R.S. § 13-3604, that
7 would have prohibited medication abortion. H.B. 2811, 55th Leg., 2nd Reg. Sess. (Ariz. 2022).
8 It also considered a privately-enforced ban on abortion after approximately six weeks LMP. S.B.
9 1339, 55th Leg., 2nd Reg. Sess. (Ariz. 2022); H.B. 2483, 55th Leg., 2nd Reg. Sess. (Ariz. 2022).

10 Ultimately, the Legislature instead passed the 15-week-Law, S.B. 1164, which provides
11 that “[e]xcept in a medical emergency, a physician may not perform, induce or attempt to
12 perform or induce an abortion” after 15 weeks LMP. S.B. 1164, 55th Leg., 2nd Reg. Sess. (Ariz.
13 2022). After signing S.B. 1164 into law, Governor Ducey announced that “the law of the land
14 today in Arizona is the 15-weeks’ law . . . and that will remain the law,” even if the Supreme
15 Court decides to overrule *Roe v. Wade*.⁶

16 **B. *Dobbs v. Jackson Women’s Health Organization* and Aftermath**

17 On June 24, 2022, the U.S. Supreme Court upheld Mississippi’s ban on abortions after
18 15 weeks LMP. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022).
19 Immediately following the *Dobbs* decision, the AG released a statement that “[t]he Arizona
20 Legislature passed an identical law to the one upheld in *Dobbs*, which will take effect in
21 approximately 90 days.”⁷ The AG also highlighted his defense of the Reason Law on his Twitter
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24 ⁶ Howard Fischer, *Arizona Gov. Ducey: abortion illegal after 15 weeks*, KAWC (Apr. 24, 2022),
25 <https://www.kawc.org/news/2022-04-24/arizona-gov-ducey-abortion-illegal-after-15-weeks>.

26 ⁷ Ariz. Att’y Gen., *Arizona Attorney General Mark Brnovich Applauds Supreme Court Decision to Protect Life* (June 24, 2022), <https://www.azag.gov/press-release/arizona-attorney-general-mark-brnovich-applauds-supreme-court-decision-protect-life>.

1 account.⁸

2 The Republican Caucus of the Senate, however, issued a press release claiming that
3 “effective immediately is ARS 13-3603,” but that S.B. 1164, once it becomes effective, will
4 operate “in addition to ARS 13-3603.”⁹ On June 26, 2022, Maricopa County Attorney Rachel
5 Mitchell appeared on a television news program and stated that after *Dobbs* “[s]ome abortion is
6 going to be illegal in terms of the providers providing it,” that “it is complicated,” that some
7 abortion statutes have been “found to be unconstitutional,” that the *Nelson* injunction is still in
8 effect, and that this was going to be a “complex question for the courts.”¹⁰ A spokesman for
9 Governor Ducey maintained that “the governor’s intention was clear” when he signed the law
10 that abortions should only be banned after 15 weeks.¹¹

11 Although the AG did not initially take the position that A.R.S. § 13-3603 would take
12 effect post-*Dobbs*—and despite being subject to the *Nelson* injunction—on June 30, 2022, he
13 posted on Twitter that his office had determined that “ARS 13-3603 is back in effect and will
14 not be repealed in 90 Days by SB1164.” The tweet added, “[w]e will soon be asking the court to
15 vacate the injunction which was put in place following *Roe v. Wade* in light of the *Dobbs*
16 decision earlier this month.”¹² Two weeks later he filed the present motion.

17 ⁸ Mark Brnovich (@GeneralBrnovich), Twitter (June 24, 2022, 7:47 AM),
18 <https://twitter.com/GeneralBrnovich/status/1540345852715098113>.

19 ⁹ See AZSenateRepublicans (@AZSenateGOP), Twitter (June 24, 2022, 11:39 AM),
20 [https://twitter.com/AZSenateGOP/status/1540404293315964930?s=20&t=dhnDUIqZVdw0rS](https://twitter.com/AZSenateGOP/status/1540404293315964930?s=20&t=dhnDUIqZVdw0rSUy6dIVJA)

21 ¹⁰ *Rachel Mitchell weighs in on the past and future of abortion in Arizona*, 12News (June 26,
22 2022), [https://www.12news.com/video/news/politics/sunday-square-off/sunday-square-off-](https://www.12news.com/video/news/politics/sunday-square-off/sunday-square-off-rachel-mitchell-on-the-past-and-future-of-abortion-in-arizona/75-f43ab60f-2b64-4a38-8ec1-86bb651111c9)
[rachel-mitchell-on-the-past-and-future-of-abortion-in-arizona/75-f43ab60f-2b64-4a38-8ec1-](https://www.12news.com/video/news/politics/sunday-square-off/sunday-square-off-rachel-mitchell-on-the-past-and-future-of-abortion-in-arizona/75-f43ab60f-2b64-4a38-8ec1-86bb651111c9)
[86bb651111c9](https://www.12news.com/video/news/politics/sunday-square-off/sunday-square-off-rachel-mitchell-on-the-past-and-future-of-abortion-in-arizona/75-f43ab60f-2b64-4a38-8ec1-86bb651111c9).

23 ¹¹ *Arizona has 2 abortion laws on the books. The governor and legislators can’t agree which*
24 *one is in force*, 12News (updated June 29, 2022), [https://www.12news.com/article/](https://www.12news.com/article/news/politics/governor-ducey-gop-lawmaker-disagree-abortion-law/75-4154b84e-9211-43c3-8dd7-5a5973b7dc04)
[news/politics/governor-ducey-gop-lawmaker-disagree-abortion-law/75-4154b84e-9211-43c3-](https://www.12news.com/article/news/politics/governor-ducey-gop-lawmaker-disagree-abortion-law/75-4154b84e-9211-43c3-8dd7-5a5973b7dc04)
[8dd7-5a5973b7dc04](https://www.12news.com/article/news/politics/governor-ducey-gop-lawmaker-disagree-abortion-law/75-4154b84e-9211-43c3-8dd7-5a5973b7dc04).

25 ¹² Mark Brnovich (@GeneralBrnovich), Twitter (June 29, 2022, 3:34 PM),
26 <https://twitter.com/GeneralBrnovich/status/1542275229925249024?s=20&t=SnCquVRA2z9oe>

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LEGAL STANDARD

“A party seeking modification or dissolution of a final permanent injunction [under Rule 60(b)(5)] bears the burden of establishing a significant change in facts or law warranting revision or dissolution of the injunction because applying it prospectively is no longer equitable.” *Tegowski v. Bareiss*, No. 2 CA-CV 2018-0155, 2019 WL 2157785, at *2 ¶ 6 (Ariz. App. May 17, 2019) (quotation omitted).¹³ Under Rule 60(b)(5), “[a] court may recognize subsequent changes in either statutory or decisional law.” *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

The AG makes an alternate argument under Rule 60(b)(6). Mot. at 13. PPAZ does not dispute that Rule 60(b)(5) is the appropriate vehicle for the AG’s request. Therefore, the Court should not reach the Rule 60(b)(6) question. *See, e.g., Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988) (motions for relief under Rule 60(b)(6) require a showing of “extraordinary circumstances” that is mutually exclusive of grounds covered under the other subdivisions of the Rule); *Edsall v. Superior Ct. In & For Pima Cnty.*, 143 Ariz. 240, 243 (1984) (cleaned up) (same).

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ARGUMENT

I. Dobbs Warrants a Modified Judgment Regarding A.R.S. § 13-3603, Not Vacatur.

There is no question that the *Dobbs* decision overturned *Roe v. Wade*. This affects the Court’s 1973 order enjoining § 13-3603 since that injunction was based on *Roe*, and PPAZ agrees that a modification of the order is warranted. *See* Ex. A to Mot. But the effect of *Dobbs* is only one part of the wholly changed legal landscape in Arizona since 1973.¹⁴ Therefore, this

OmpQB0S1g; *Arizona’s Attorney General Says a Pre-1901 Abortion Ban is Enforceable*, NPR (June 30, 2022), <https://www.npr.org/2022/06/30/1108871251/arizonas-attorney-general-says-pre-1901-abortion-ban-is-enforceable>.

¹³ PPAZ cites this memorandum decision under Ariz. Sup. Ct. R. 111(c)(1)(C).

¹⁴ The AG asserts without explanation that, post-*Dobbs*, “[t]he law has therefore returned to what it was prior to *Roe*, and for Arizona this means the well-reasoned panel opinion in *Nelson*.” Mot. at 10. To the extent the AG means that the court of appeals panel opinion in *Nelson* is somehow revived, this is simply not the case. “A vacated judgment lacks force or effect and places parties

1 Court should not unqualifiedly grant the AG’s motion, because simply granting the relief the AG
2 requests, Mot. at 14, is too blunt a remedy as it ignores—and implicitly repeals—other applicable
3 laws.

4 As discussed above and as the AG acknowledges, Mot. at 2, the Legislature has
5 “authorize[d] what had previously been forbidden,” *California v. EPA*, 978 F.3d 708, 715 (9th
6 Cir. 2020) (quotation omitted) (cited in Mot. at 9), under A.R.S. § 13-3603 by passing the less-
7 restrictive statutes that have governed since 1973 and continue to govern abortion in Arizona. A
8 proper Rule 60(b)(5) analysis, therefore, requires this Court to consider not only the change in
9 decisional law but also statutory law when determining the new bounds of the injunction. *See*
10 *Agostini*, 521 U.S. at 215 (“A court may recognize subsequent changes in either statutory or
11 decisional law.”). To do so, this Court must consider the mosaic of laws regulating abortion that
12 have been passed since 1973—including, for example, the Physician-only Laws and most
13 recently the 15-week Law—and reconcile those laws with A.R.S. § 13-3603. This is because
14 when “statutes relate to the same subject matter, [courts] construe them together as though they
15 constitute one law,” *Fleming v. State Dep’t of Pub. Safety*, 237 Ariz. 414, 417 ¶ 12 (2015), and
16 “whenever possible, [courts must] adopt a construction that reconciles one with the other, giving
17 force and meaning to all statutes involved,” *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327,
18 333 ¶ 28 (2001).

19 Such an analysis is well-within Rule 60(b)(5)’s scope. *See, e.g., Agostini*, 521 U.S. at 223,
20 238–39 (analyzing under Rule 60(b)(5) whether and to what extent the law had changed since
21 injunction entered); *Texas v. Alabama-Coushatta Tribe*, 918 F.3d 440, 447 (5th Cir. 2019)
22 (noting that review of district court’s denial of Rule 60(b)(5) relief from permanent injunction
23 “turns on whether a judicial precedent—holding that the Restoration Act and IGRA conflict and
24 that the former, not the latter, applies to the Tribe’s gaming activity—or a later contrary agency
25 _____
26 in the position they occupied before entry of the judgment.” *Nielson v. Patterson*, 204 Ariz. 530,
533 ¶ 12 (2003). Because the court of appeals vacated the panel opinion in *Nelson* on rehearing,
“nothing remain[s]” of it. *Id.*

1 interpretation should control”); *Williams v. Butz*, 843 F.2d 1335, 1339 (11th Cir. 1988) (noting
2 that it was “a question for the district court on remand” whether the prospective injunctive relief
3 at issue should be “either vacated or modified” to comport with the intent for more recently-
4 promulgated federal regulation), *abrogated on other grounds by Blackmun v. Wille*, 980 F.2d
5 691 (11th Cir. 1993); *see also Sys. Fed’n No. 91, Ry. Emps. Dep’t, AFL-CIO v. Wright*, 364 U.S.
6 642, 647 (1961) (“There is . . . no dispute but that a sound judicial discretion may call for the
7 modification of the terms of an injunctive decree if the circumstances, whether of law or fact,
8 obtaining at the time of its issuance have changed, or new ones have since arisen.”).¹⁵

9 **II. A.R.S. § 13-3603 Must be Harmonized with the Legislature’s Subsequently**
10 **Enacted Scheme of Regulation for Abortion Providers.**

11 A.R.S. § 13-3603 and Arizona’s current regulatory scheme for abortion “relate to the
12 same subject matter,” *Fleming*, 237 Ariz. at 417 ¶ 12, because A.R.S. § 13-3603 prohibits
13 “procur[ing] the miscarriage” unless “necessary to save [the woman’s] life,” and Arizona’s other
14 abortion laws, such as the Physician-only Laws, Post-viability Law, and the Reason Law, would
15 instead allow abortion in a broader range of circumstances. Courts thus must construe all these
16 provisions “together as though they constitute one law.” *Fleming*, 237 Ariz. at 417 ¶ 12. In doing
17 so and when possible, they should “avoid interpretations that result in contradictory provisions.”
18 *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, 195 ¶ 9 (2016).

19 When interpreting and harmonizing statutes, courts “first look to the plain language of
20 the statute as the most reliable indicator of its meaning.” *Advanced Prop. Tax Liens, Inc. v.*
21 *Sherman*, 227 Ariz. 528, 531 ¶ 14 (App. 2011); *see also Ridgell v. Ariz. Dep’t of Child Safety*,
22 253 Ariz. 61, ¶ 15 (App. 2022). “When an ambiguity or contradiction exists, however, [courts]
23 attempt to determine legislative intent by interpreting the statutory scheme as a whole and
24 consider the statute’s context, subject matter, historical background, effects and consequences,

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26 ¹⁵ As the AG stated, Arizona Rule 60(b)(5) and Fed. R. Civ. P. 60(b)(5), as well as their analyses,
are identical. *See Mot.* at 8 n.7.

1 and spirit and purpose.” *UNUM Life Ins. Co. of Am.*, 200 Ariz. at 330 ¶ 12 (quotation omitted).
2 And, importantly, “when there is conflict between two statutes, the more recent, specific statute
3 governs over the older, more general statute.” *In re Guardianship/Conservatorship of Denton*,
4 190 Ariz. 152, 157 (1997) (quotation omitted).

5 **A. The Plain Language of Many Arizona Laws Makes Clear that Physicians**
6 **May Provide Abortion.**

7 The plain language of Arizona’s more recent, more specific statutes regulating abortion
8 supports a harmonized reading of those laws together with A.R.S. § 13-3603. The text of the
9 Physician-only Laws and Post-viability Law, for example, is clear: licensed physicians are
10 allowed to provide abortions up until those gestational ages, while A.R.S. § 13-3603’s
11 prohibition applies to non-physicians. This interpretation properly gives effect to *all* the
12 Legislature’s enactments. And it stands far apart from the untenable interpretation the AG posits:
13 that A.R.S. § 13-3603—which is over one hundred years old—somehow preempts a host of other
14 subsequently enacted laws and criminalizes nearly all abortions in Arizona, even abortions
15 performed by physicians within the longstanding framework established by the Legislature.

16 Such a reading would not only nullify decades of laws passed by the people’s elected
17 representatives, but it also would conflict with the presumption that the “more recent, specific
18 statute governs over an older, more general statute,” since each of the more recently enacted
19 statutes provide more specific regulations for abortion than A.R.S. § 13-3603. *UNUM Life Ins.*
20 *Co.*, 200 Ariz. at 333 ¶ 29 (cleaned up). Through this same lens, the Court can also harmonize
21 A.R.S. § 13-3603 and the recently-enacted 15-week Law¹⁶: The Legislature chose, more recently

22
23 ¹⁶ The 15-week Law is not effective until September 24, 2022, which is 90 days after the
24 legislative session ended. But because the same analysis applies to the harmonization of that law
25 with A.R.S. § 13-3603, this Court should provide clarity for PPAZ and the public at large as to
26 how the 15-week Law should be harmonized once it is in effect. There is nothing to suggest that
it will not become law; no application for serial number to refer the bill has been filed with the
Secretary of State. *See Initiative, Referendum and Recall Applications*, State of Ariz. Sec’y of
State, <https://apps.arizona.vote/info/irr/2022-general-election/33/0> (last updated July 11, 2022).

1 and specifically, to allow licensed physicians to provide abortions up until 15 weeks LMP, while
2 A.R.S. § 13-3603’s prohibition applies to non-physicians.

3 The AG points to language in S.B. 1164 (the 15-week Law), stating that that law does not
4 “[r]epeal, by implication or otherwise, section 13-3603, Arizona Revised Statutes, or any other
5 applicable state law regulating or restricting abortion,” to support his argument. Mot. at 7. But
6 PPAZ does not argue that A.R.S. § 13-3603 has been repealed; rather, according to Arizona law,
7 S.B. 1164 must be harmonized with more recent legislative enactments. Indeed, the AG ignores
8 the second half of the sentence he cites: it in fact continues by saying that it also does not repeal,
9 “*any other* applicable state law regulating or restricting abortion” (emphasis added). This clause
10 logically must be read to include, for example, Arizona’s Physician-only Laws. The
11 Legislature’s intent therefore was to preserve the ability to have all its abortion laws coexist. The
12 AG’s argument further ignores the section on “legislative intent” in S.B. 1164, which states that
13 “[t]his legislature intends through this act and any rules and policies adopted hereunder, to
14 restrict the practice of nontherapeutic or elective abortion to the period up to fifteen weeks of
15 gestation.” S.B. 1164, 55th Leg., 2nd Reg. Sess. (Ariz. 2022). Nothing in this unequivocal
16 statement supports the AG’s position that the Legislature intended to impose a near total criminal
17 ban on abortion.

18 **B. Other Indications Similarly Support This Harmonization.**

19 Other relevant indicators of statutory intent also support a harmonized reading. For
20 example, the “context of the statute,” *Glazer v. State*, 237 Ariz. 160, 163 ¶ 12 (2015) (quotation
21 omitted), refers to an interpretation that “give[s] effect to an entire statutory scheme,” *Backus v.*
22 *State*, 220 Ariz. 101, 104 ¶ 10 (2009). *See also Oaks v. McQuiller*, 191 Ariz. 333, 334 ¶ 5 (App.
23 1998) (interpreting a claim brought under a single workers’ compensation statute within “the
24 context of the entire statutory scheme” of workers’ compensation statutes “of which it is a part,”
25 which was designed to protect workers, not tortfeasors). The context of A.R.S. § 13-3603 is that
26 it exists as only one part of a robust regulatory scheme that Arizona has developed for abortion

1 providers over the last 50 years. In fact, the Legislature enacted some of these more specific laws
2 in the same title and chapter as § 13-3603, which is further evidence that the provisions must be
3 read harmoniously. *See supra* Section III.

4 Further, the historical background, purpose, and effect of Arizona’s abortion laws,
5 including the imminent 15-week Law, also support this harmonization. Other proposed
6 legislation that was *not* passed by the Legislature in the most recent session proves that the
7 currently elected lawmakers considered and rejected other more stringent regulations on
8 abortion. As noted above, *supra* Section III.A, the Legislature considered—but failed to
9 pass—a law criminalizing all medication abortion. H.B. 2811, 55th Leg., 2nd Reg. Sess. (Ariz.
10 2022). It also considered and failed to pass a privately enforced prohibition on abortions after
11 approximately 6 weeks LMP. S.B. 1339, 55th Leg., 2nd Reg. Sess. (Ariz. 2022); H.B. 2483, 55th
12 Leg., 2nd Reg. Sess. (Ariz. 2022). And 2022 was no outlier; indeed, during the prior session in
13 2021, the Legislature considered (but failed to pass) two bills that would have replaced
14 A.R.S. § 13-3603 altogether and made abortion eligible for prosecution under the homicide
15 chapter—proving that the Legislature knew how to pass more restrictive criminal abortion laws.
16 *See* H.B. 2650, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 2878, 55th Leg., 1st Reg. Sess. (Ariz.
17 2021).

18 Beyond that, unlike many other state legislatures that passed “trigger laws” under which
19 restrictive abortion laws would immediately spring into place upon the U.S. Supreme Court
20 overruling *Roe v. Wade*, Arizona’s Legislature did not do so.¹⁷ *See, e.g.,* La. Rev. Stat. § 40:1061

21
22 ¹⁷ The AG argues that, by recodifying § 13-3603, the 1977 Legislature “took affirmative steps
23 to ensure [its] continuing validity in the event that *Roe* was overruled.” Mot. at 6–7. But this
24 ignores the actual history of abortion legislation in Arizona. In 1977–78, the Legislature re-
25 codified *all* of Arizona’s criminal statutes in an effort to modernize the criminal code. *See, e.g.,*
26 *State v. Gunnison*, 127 Ariz. 110, 111 n.1 (1980) (“[C]itations to criminal statutes in this opinion
are to the Arizona Revised Statutes in force prior to 1 October 1978, when the most recent
criminal code and laws revised pursuant to it became effective.”); *State v. Heylmun*, 147 Ariz.
97, 99 n.1 (App. 1985) (“We also note the definition of ‘offense’ in § 13–105(18) was adopted

1 (“The provisions of this Act shall become effective immediately upon, and to the extent
2 permitted, by the occurrence of any of the following circumstances: (1) Any decision of the
3 United States Supreme Court which reverses, in whole or in part, *Roe v. Wade* . . . , thereby,
4 restoring to the state of Louisiana the authority to prohibit abortion.”).¹⁸ This background of the
5 Legislature’s decision to not pass a trigger law or other more restrictive abortion bans, and
6 instead pass the 15 Week Law, demonstrates that the extreme position the AG is taking in his
7 Motion—that nearly all abortions should be banned in the state—is squarely at odds with the
8 intent of the Legislature. Indeed, Governor Ducey and Senate Republicans have stated that the
9 15-week Law will be the operative law upon its effective date in September—a statement that
10 the AG also agreed with until reversing course on Twitter several days later.¹⁹

11 Because a harmonized interpretation of Arizona’s abortion statutes exists (under which
12 meaning can be given to all the Legislature’s enactments), this Court should give them that effect
13 and reject the AG’s request to dissolve the prior judgment of this Court in full without
14 modification (which would instead nullify decades of legislative work and dozens of
15 enactments). *Cf. State ex rel. Montgomery v. Brain*, 244 Ariz. 525, 531 ¶ 21 (App. 2018) (courts
16 should interpret statutes “sensibly to avoid reaching an absurd conclusion” (quotation omitted)).

17 **III. The Equities Weigh Strongly Against Granting Unqualified Relief from Judgment.**

18 Under the “flexible standard” of Rule 60(b)(5), *Bredfeldt v. Greene*, No. 2 CA–CV 2016–
19 0198, 2017 WL 6422341, at *3 ¶ 10 (Ariz. App. Dec. 18, 2017) (quotation omitted),
20 consideration is given to whether applying the injunction prospectively “is no longer equitable,”
21

22 as part of the revised criminal code in 1978.”). This was therefore not an effort specific to
23 A.R.S. § 13-3606, but instead a wide-ranging code maintenance effort.

24 ¹⁸ See also Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s*
25 *What Happens When Roe is Overturned*, Guttmacher Inst. (June 6, 2022),
<https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned>.

26 ¹⁹ Ariz. Att’y Gen., *supra* note 7 (“The Arizona Legislature passed an identical law to the one
upheld in *Dobbs*, which will take effect in approximately 90 days.”); Brnovich, *supra* note 12.

1 *Tegowski*, 2019 WL 2157785, at *2 ¶ 6 (quoting Ariz. R. Civ. P. 60(b)(5)).²⁰ Here, PPAZ
2 acknowledges that some modification of the judgment is appropriate, but the AG’s requested
3 relief is not equitable and does not account for the harms at stake.

4 *First*, the State will not be harmed by modifying the injunction in a manner that
5 harmonizes *all* of Arizona’s laws, as PPAZ urges. But modifying the injunction to allow the
6 State to “bring[] prosecutions against doctors who perform . . . abortions,” Mot. at 9,²¹ would
7 nullify in one fell swoop dozens of duly enacted laws, which have been passed more recently
8 and which deal more specifically with the subject matter—thereby actually *preventing* the State
9 from carrying out all its duly enacted laws. *Cf. Abbott v. Perez*, __ U.S. __, 138 S. Ct. 2305,
10 2324 n.17 (2018) (“[I]nability to enforce its duly enacted plans clearly inflicts irreparable harm
11 on the State.”).

12 *Second*, the real-world result of nullifying dozens of more recently enacted statutes and
13 “return[ing] [the law] to what it was prior to *Roe*,” Mot. at 10, would impose grievous irreparable
14 harm to thousands of Arizonans of all racial and ethnic backgrounds,²² reproductive age,²³

15 ²⁰ PPAZ cites the two memorandum decisions in this paragraph under Ariz. Sup. Ct. R.
16 111(c)(1)(C).

17 ²¹ The AG states that the first court of appeals opinion in *Nelson* “framed the purpose” of the
18 Territorial Law on abortion provision as, in part, “to protect the health and life of pregnant
19 women by keeping them from incompetent abortionists.” Mot. at 4–5 (quoting *Nelson*, 19 Ariz.
20 App. at 144). This concern is clearly no longer valid given that in the past 50 years, Arizona has
21 enacted a complex statutory scheme that regulates abortion and allows only licensed physicians
22 to perform abortions. Arizona public data confirms that complications are highly rare and non-
23 fatal. *See* Marguerite L.S. Kemp et al., Ariz. Dep’t of Health Servs., *Abortions in Arizona: 2020*
Abortion Report (Sept. 21, 2021), <https://azdhs.gov/documents/preparedness/public-health-statistics/abortions/2020-arizona-abortion-report.pdf>. The Department’s report is a public record
of which the Court can take judicial notice. *See, e.g., Hernandez v. Frohmiller*, 68 Ariz. 242,
258 (1949).

24 ²² Approximately 40.5% of the abortions among Arizona residents in 2020 were to people who
25 self-identified as “Hispanic or Latinos;” 35.5% Non-Hispanic White; 12.1% Black/African
26 American; 2.8% American Indian or Alaska Native; 4.2% Asian or Pacific Islander; and 2.5%
of multiple races. Kemp et al., *supra* note 19, at 8 tbl.4.

²³ The age range for Arizonans receiving abortions in 2020 was 10 to 50 years, with the average
age being 27.1 years. Kemp et al., *supra* note 19, at 6.

1 relational, marital, and familial status²⁴, and education levels²⁵ who decide to have abortions.
2 According to the most recent publicly available vital statistics data compiled from reports
3 submitted by PPAZ and other abortion providers in the state to the Department, 13,273 abortions
4 were provided in Arizona in 2020.²⁶ Publicly available data also confirm that Arizonans decide
5 to have abortions for many different reasons, including because of their medical or personal
6 emotional/mental health; because they were victims of domestic violence, sexual assault, or
7 physical abuse; because they are unprepared to have a child at that time, or do not desire another
8 child; or because of financial, work, career, unemployment, or education reasons that prevent
9 them from being able to have a child.²⁷ Denying thousands of Arizonans control over their
10 reproductive lives by denying them the ability to have a safe, legal abortion provided by a
11 licensed physician under Arizona’s existing laws—particularly when such a result lacks popular
12 electoral support, as evidenced by the Legislature’s recent enactment of the 15-week
13 law—would gravely harm the public interest.

14 CONCLUSION

15 For all these reasons, PPAZ requests that the State’s Rule 60(b) Motion for Relief from
16 Judgment should be granted in part and denied in part. The Court should issue a modified
17 injunction making clear that Defendants Mark Brnovich, Attorney General of the State of
18 Arizona, and Laura Conover, County Attorney of Pima County, Arizona, their successors,
19 agents, servants, employees, attorneys, and all persons in active concert or participation with
20

21
22 ²⁴ Close to 15% of abortion patients in 2020 reported they were married, and approximately 55%
23 reported having given birth to one or more children. Kemp et al., *supra* note 19, at 9 fig.2, 11
tbl.5.

24 ²⁵ While the education status of almost half of Arizonans who received an abortion in 2020 was
25 unknown, approximately 20% had completed 12 years of education, and approximately 20%
some postsecondary education. Kemp et al., *supra* note 19, at 10 fig.3.

26 ²⁶ Kemp et al., *supra* note 19, at 4. 92.5% of abortions were performed prior to 13 weeks
gestational age, *id.* at 14 tbl.7, and 99.6% in an abortion clinic, *id.* at 19 tbl.12.

²⁷ Kemp et al., *supra* note 19, at 16 tbl.9.

1 them,²⁸ are permanently enjoined from taking any action or threatening to enforce the provisions
2 of A.R.S. § 13-3603 with respect to abortions provided by licensed physicians who are
3 authorized to do so consistent with Arizona’s duly enacted laws and regulations, including
4 A.R.S. § 36-2155 and A.R.S. § 36-2160. A proposed order is submitted simultaneously for the
5 Court’s consideration.

6 RESPECTFULLY SUBMITTED this 20th day of July, 2022.

7 **COPPERSMITH BROCKELMAN PLC.**

8 By: /s/ D. Andrew Gaona

9 D. Andrew Gaona

10 Kristen Yost

11 **PLANNED PARENTHOOD FEDERATION OF AMERICA**

12 Diana O. Salgado*

13 Sarah Mac Dougall *

14 Catherine Peyton Humphreville*

15 **Application for Pro Hac Vice Forthcoming*

16 *Attorneys for Plaintiff Planned Parenthood Arizona,*
17 *Inc., successor-in-interest to Plaintiff Planned*
18 *Parenthood Center of Tucson, Inc.*

19 ORIGINAL of the foregoing efiled and
20 COPY sent by email on July 20, 2022, to:

21 The Honorable Kellie Johnson
22 Civil Presiding Judge
23 Pima County Superior Court
24 Roxanne Lee, Judicial Assistant
25 rlee@sc.pima.gov
26

28 This prohibition therefore applies to the county attorney of each county in Arizona. *See*
A.R.S. § 11-532(A)(1) (county attorneys carry out prosecutions “on behalf of the state.”); *see*
also Crosby-Garbotz v. Fell in & for Cnty. of Pima, 246 Ariz. 54, 60 ¶ 24 (2019) (rejecting the
State’s argument that there was no mutuality of parties between a state agency and the county
attorney because, even though “different legal offices handle different cases,” the State is still “a
party in both actions” and because the Attorney General’s Office represented the state agency in
the earlier proceedings and “has supervisory authority over county attorneys”
(citing A.R.S. § 41-193(A)(4))).

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21 *to Clifton E. Bloom, as guardian ad litem of unborn child of*
Plaintiff Jane Roe and all other unborn infants similarly situated

22 /s/ Diana J. Hanson
23
24
25
26

Exhibit A

THE HOWELL CODE.

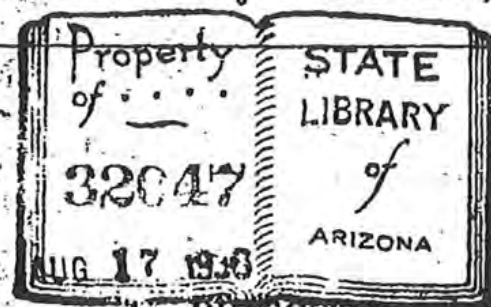
ADOPTED BY THE

First Legislative Assembly

OF THE

TERRITORY OF ARIZONA.

Session begun on the Twenty-sixth day of September,
and ended on the Tenth day of November, 1864, at Prescott.



PRESCOTT:

OFFICE OF THE ARIZONA MINER,

OFFICIAL PAPER OF THE TERRITORY,

1865.

CODE.

[PUBLIC—No. 23.]

AN ACT to confirm the apportionment and amend certain laws of the Territory of Arizona.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the apportionment of members of the legislative assemblies of the Territory of Arizona, elected and convened in the years eighteen hundred and sixty-six, eighteen hundred and sixty-seven, and eighteen hundred and sixty-eight, made by the governor in accordance with the laws of said Territory, be, and is hereby, declared legal and valid under the organic act.

SEC. 2. *And be it further enacted,* That an election for members of the next legislative assembly, and for all township, county, and district officers, and for delegate to the forty-second Congress of the United States, shall be held upon the Tuesday after the first Monday of November, in the year eighteen hundred and seventy, and the governor shall order such election by proclamation to be issued not less than two months previous to said day. In said proclamation he shall declare the number of members of each branch of the legislature to which each county or district of said Territory shall be entitled, and such apportionment shall be based upon the population as shown by the census to be taken in the year eighteen hundred and seventy, under the law of the United States, and if such census is not completed in time, then the apportionment shall be made according to the population as shown by the best information to be obtained. Said election shall be conducted in conformity to the laws of the Territory and of Congress; and the term of office of all township, county, and district officers shall expire upon the thirty-first day of December, eighteen hundred and seventy, and that of all officers elected as herein provided shall begin upon the first day of January, eighteen hundred and seventy-one.

SEC. 3. *And be it further enacted,* That the persons thus elected to the next legislative assembly shall meet at the Capitol on the second Wednesday in January, eighteen hundred and seventy-one.

SEC. 4. *And be it further enacted,* That the governor shall fill by appointment all vacancies in township, county, or district offices in said Territory, until the thirty-first day of December, eighteen hundred and seventy; and until the same time he may remove township, county, and district officers, and fill their places whenever in his judgment the public interest will be promoted thereby.

SEC. 5. *And be it further enacted,* That justices of the peace in said Territory of Arizona shall not have jurisdiction of any matter in controversy where the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed three hundred dollars.

Approved, March 23, 1870.

CERTIFICATE.

TERRITORY OF ARIZONA,

OFFICE OF THE SECRETARY.

I, RICHARD C. McCORMICK, Secretary of the Territory of Arizona, do hereby certify that the HOWELL CODE, as herein contained, is printed as passed by the first Legislative Assembly of the Territory, according to the enrolled copy upon file in my office.



WITNESS my hand and the Seal of the Territory, given at Prescott, this first day of December, A. D. eighteen hundred and sixty-four.

RICHARD C. McCORMICK,

Secretary of the Territory.

With greetings and best wishes to
S L. Kinsan Esq Tucson Arizona. Please accept
this copy of the "Howell Code" which for many
years I have treasured as a treasure as it was
my first companion in practice in Tucson
32 years ago.
I know you will cherish and preserve the
old pioneer copy of the first born laws of
Arizona
Tucson January 1st 1904

Sincerely
R C Hughes

THE ORGANIC ACT.

AN ACT to provide a temporary government for the Territory of ARIZONA, and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED: That all that part of the present Territory of New Mexico situate west of a line running due south from the point where the south-west corner of the Territory of Colorado joins the northern boundary of the Territory of New Mexico to the southern boundary line of said Territory of New Mexico, be, and the same is hereby, erected into a temporary government by the name of the Territory of Arizona: Provided, that nothing contained in the provisions of this act shall be construed to prohibit the Congress of the United States from dividing said Territory or changing its boundaries in such manner and at such time as it may deem proper: Provided, further, that said government shall be maintained and continued until such time as the people residing in said Territory shall, with the consent of Congress, form a State government, republican in form, as prescribed in the Constitution of the United States, and apply for and obtain admission into the Union as a State, on an equal footing with the original States.

SEC. 2. And be it further enacted, that the government hereby authorized shall consist of an executive, legislative, and judicial power. The executive power shall be vested in a governor. The legislative power shall consist of a council of nine members, and a house of representatives of eighteen. The judicial power shall be vested in a supreme court, to consist of three judges, and such inferior courts as the Legislative Council may by law prescribe; there shall also be a secretary, a marshal, a district-attorney, and a surveyor-general for said Territory, who, together with the governor and judges of the supreme court, shall be appointed by the President, by and with the advice and consent of the Senate, and the term of office for each, the manner of their appointment, and the powers, duties, and the compensation of the governor, legislative assembly, judges of the supreme court, secretary, marshal, district attorney, and surveyor-general aforesaid, with their clerks, draughtsman, deputies, and sergeant-at-arms, shall be such as are conferred upon the same officers by the act organizing the Territorial government of New Mexico, which subordinate officers shall be appointed in the same manner, and not exceed in number those created by said act; and acts amendatory thereto, together with all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act, are hereby extended to and continued in force in the said Territory of Arizona, until repealed or amended by future legislation: Provided, that no salary shall be due or paid the officers created by this act until they have entered upon the duties of their respective offices within the said Territory.

Sec. 3. And be it further enacted, that there shall neither be slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted; and all acts and parts of acts, either of Congress or of the Territory of New Mexico, establishing, regulating, or in any way recognizing the relation of master and slave in said Territory, are hereby repealed.

Approved February 24, 1863.

viction thereof, be punished by imprisonment in the Territorial prison for any term not exceeding three years nor less than one year, and be fined in a sum not exceeding one thousand dollars.

SEC. 42. If any person shall willingly and knowingly carry or deliver any written challenge, or verbally deliver any message intended as, or purporting to be a challenge, or shall be present at the fighting of any duel as aforesaid as a second, or aid or give countenance thereto, such person being duly convicted thereof, shall be punished by imprisonment in the Territorial prison for any term not exceeding three years nor less than one year, and be fined in a sum not exceeding one thousand dollars.

SEC. 43. If any person shall post another, or in writing or print shall use any reproachful or contemptuous language to or concerning another for not fighting a duel, or for not sending or accepting a challenge, he shall be imprisoned in the county jail for a term not exceeding six months, and fined in any sum not exceeding one thousand dollars.

SEC. 44. If any person shall, without deadly weapons, upon previous concert and agreement, upon any wager, or for money or any other reward, fight one with another, upon conviction thereof, they or either or any of them, and all persons present aiding and abetting, shall be punished by imprisonment in the Territorial prison for a term not exceeding two years. Should death ensue to any person in such fight, the person or persons causing such death shall be punished by imprisonment in the Territorial prison for a term not more than ten nor less than three years.

SEC. 45. Every person who shall wilfully and maliciously administer or cause to be administered to or taken by any person, any poison or other noxious or destructive substance or liquid, with the intention to cause the death of such person, and being thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than ten years, and which may extend to life. And every person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than two years nor more than five years: Provided, that no physician shall be affected by the last clause of this section, who in the discharge of his professional duties deems it necessary to produce the miscarriage of any woman in order to save her life.

SEC. 46. Mayhem consists in unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless. If any person shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, ear, or lip, or disable any limb or member of another, or shall voluntarily and of purpose put out an eye or eyes, every such person shall be guilty of mayhem, and on conviction shall be punished by imprisonment in the Territorial prison for a term not less than one nor more than five years.

SEC. 47. Rape is the carnal knowledge of a female, forcibly and against her will. Every person of the age of fourteen years and upwards, who shall have carnal knowledge of any female child under the age of ten years, either with or without her consent, shall be adjudged to be guilty of the crime of rape, and shall be punished by imprisonment in the Territorial pri-