



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**Planned Parenthood Arizona, Inc., et al. v. Eric Hazelrigg, M.D.,
Guardian ad Litem, et al.
CV-23-0005-PR**

PARTIES:

Petitioners/Intervenors: Eric Hazelrigg, M.D., as guardian ad litem of unborn child of Plaintiff Jane Roe and all other unborn infants similarly situated

Dennis McGrane, Yavapai County Attorney

Respondents: Planned Parenthood Arizona, Inc., et al.

Amici Curiae in Support of Petitioners/Intervenors: American College of Pediatricians; Charlotte Lozier Institute & American Center for Law and Justice; American Association of Pro-Life Obstetricians and Gynecologists; The State of Arkansas and 16 other states; Speaker of the Arizona House of Representatives Ben Toma and President of the Arizona Senate Warren Petersen; Jill Norgaard, Former Representative, Arizona House of Representatives, District 18; Center for Arizona Policy; Arizona Life Coalition, the Frederick Douglass Foundation, and The National Hispanic Christian Leadership Conference; Christian Medical and Dental Association; Prolife Center at the University of St. Thomas (MN); and Mario Villegas and the Estate of Baby Villegas.

Amici Curiae in Support of Respondents: Arizona Attorneys for Criminal Justice; Family & Juvenile Law Association, University of Arizona, James Rogers College of Law; National Council of Jewish Women of Arizona; Amici Curiae Law Professors; Governor Katie Hobbs; League of Women Voters of Arizona and Arizona Business Owners; and American College of Obstetricians and Gynecologists, American Medical Association, Arizona Medical Association, and Society for Maternal-Fetal Medicine.

FACTS:

In 1864, the 1st Arizona Territorial Legislature enacted the Howell Code as a basis for Arizona's law. This Code included a ban on abortions applicable to "every person" and carrying a criminal penalty of "not less than two years nor more than five years," with an exception for a physician who "deems it necessary to produce the miscarriage of any woman in order to save her

life.” Howell Code, ch. 10, § 45 (1864).

The 1901 penal code, enacted while Arizona was still a territory, included a similar ban on abortion applicable to “every person” and with a mandatory criminal penalty of not less than two nor more than five years, with an exception for the life of the mother not restricted to physicians. Revised Statutes of Arizona Territory, Penal Code § 243 (1901).

In 1913, after it became a state, Arizona adopted a statutory provision identical to the 1901 penal code provision. See Revised Statutes of Arizona, Penal Code § 273 (1913). In 1971, the provision was codified as A.R.S. § 13-211 and stated as follows:

A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage 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.

A.R.S. § 13-211.

In 1971, Planned Parenthood sued in Pima County Superior Court in Case No. C127867 challenging the constitutionality of Arizona’s abortion statutes, including § 13-211, under both the federal and state constitutions. See *Planned Parenthood Center of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 312 (1972). In 1972, the trial court entered a declaratory judgment that the laws were unconstitutional and granted an injunction in favor of Planned Parenthood. However, the Arizona Court of Appeals reversed on all grounds, upholding the challenged laws as constitutional. *Nelson v. Planned Parenthood Center of Tucson, Inc.*, 19 Ariz. App. 142 (1973). In 1973, the United States Supreme Court (“SCOTUS”) decided *Roe v. Wade*, 410 U.S. 113 (1973) (“*Roe v. Wade*”), recognizing a right to abortion until the time of viability.

In light of this ruling by SCOTUS, the Arizona Court of Appeals vacated its prior opinion in Pima County Case No. C127867. *Nelson v. Planned Parenthood Center of Tucson, Inc.*, 19 Ariz. App. at 152 (Opinion on Rehearing). On March 27, 1973, the trial court issued a Second Amended Final Judgment declaring A.R.S. § 13-211 unconstitutional under *Roe v. Wade* and permanently enjoining enforcement of it (“the 1973 stay”).

In 1977, the Arizona Legislature recodified A.R.S. § 13-211 as § 13-3603. Thus, A.R.S. § 13-3603 is identical to former A.R.S. § 13-211 and provides as follows:

A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage 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.

On March 19, 2018, the Mississippi Legislature adopted a statute, Miss. Code Ann. § 41-41-191, designed to restrict the practice of nontherapeutic or elective abortion to the period

up to the fifteenth week of gestation with an exception for medical emergency or severe fetal abnormality. The Mississippi statute also contained a “construction” provision stating that “[i]t is not the intention of this section to make lawful an abortion that is otherwise unlawful.” *Jackson Women’s Health Organization v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019). However, the District Court in Mississippi held that the Act was unconstitutional under *Roe v. Wade* because “viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.” On May 17, 2021, SCOTUS granted review in this case, under the name *Dobbs v. Jackson Women’s Health Organization* (“*Dobbs*”).

On December 1, 2021, SCOTUS heard oral argument in *Dobbs* and began deliberating its outcome. In early 2022, the Arizona Legislature began to consider legislation similar to Mississippi’s law restricting the performance of abortions on fetuses with a gestational age over fifteen weeks. The legislation passed and was signed into law by Governor Ducey on March 30, 2022. See 2022 Ariz. Sess. Laws, ch. 105, §§ 1-5, codified as A.R.S. §§ 36-2321 to 36-2326 (prohibiting a physician from performing an abortion after fifteen weeks gestational age but adopting “construction” provisions declaring intent not to repeal A.R.S. §13-3603 and not to legalize unlawful abortion) (“the 2022 Law”). The text of the two “construction” provisions of the 2022 law is as follows:

Sec. 2. Construction. 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.
2. Repeal, by implication or otherwise, section 13-3603, Arizona Revised Statutes, or any other applicable state law regulating or restricting abortion.

On June 24, 2022, SCOTUS issued its decision in *Dobbs*, overturning *Roe v. Wade*. *Dobbs v. Jackson Women’s Health Organization*, ___ U.S. ___, ___, 142 S. Ct. 2228, 2279 (2022) (holding there is no constitutional right to an abortion). On June 29, 2022, Arizona Attorney General Mark Brnovich (“Brnovich”) sought relief under Rules 60(b)(5) and (6), Ariz. R. Civ. P. from the 1973 stay of effectiveness of A.R.S. § 13-3603. Planned Parenthood opposed the motion, arguing that Brnovich should be enjoined from taking any action to enforce the provisions of A.R.S. § 13-3603 with respect to abortions provided by licensed physicians in compliance with the 2022 law.

On September 23, 2022, the trial court judge in Pima County now assigned to case C127867 granted Brnovich’s Rule 60 motion, concluding that the legal basis for the 1973 stay had been vacated when SCOTUS overturned *Roe v. Wade*. Accordingly, the trial court ordered that the 1973 stay would no longer have any prospective application to A.R.S. § 13-3603. In its analysis, the trial court declined Planned Parenthood’s request to “harmonize” § 13-3603 and the 2022 law. The trial court agreed with Brnovich that, pursuant to Rule 60(b)(5), it was not permitted to consider anything other than whether the constitutional principles forming the basis for the injunction were still valid.

On September 24, 2022, the 2022 law went into effect. On September 26, 2022, Planned Parenthood and the Pima County Attorney’s office appealed the trial court ruling to the Arizona Court of Appeals. On October 4, 2022, Planned Parenthood filed a motion to stay the trial court’s order pending the appeal. On October 7, 2022, the Court of Appeals issued an order granting the stay, stating that the trial court erred by limiting its analysis to the constitutional viability of A.R.S. § 13-3603 and refusing to consider the provisions of the 2022 law, which the Court of Appeals termed a relevant statute.

On December 30, 2022, the Court of Appeals issued an opinion reversing the trial court decision and holding that § 13-3603 must be harmonized with more recent statutes regulating the practice of abortion codified in Title 36, including the 2022 law. The Court of Appeals concluded, therefore, that a licensed physician who performs an elective abortion in conformity with the 2022 law was not subject to prosecution under § 13-3603.

On January 2, 2023, Kris Mayes assumed office as Arizona Attorney General, thereby succeeding Brnovich as a party but with an opposing viewpoint to Brnovich’s.

On March 1, 2023, Dr. Hazelrigg petitioned for review of the Court of Appeals’ Opinion. On March 2, 2023, Yavapai County Attorney Dennis McGrane filed a “Motion to Intervene and Join Petition for Review of Intervenor [Hazelrigg].”

Planned Parenthood, Attorney General Mayes and Pima County Attorney Laura Conover filed responses in opposition to Dr. Hazelrigg’s Petition for Review.

On August 22, 2023, the Arizona Supreme Court granted Dr. Hazelrigg’s Petition for Review as well as Yavapai County Attorney McGrane’s Motion to Intervene and Join Dr. Hazelrigg’s Petition for Review. The case was set for supplemental briefing and oral argument.

ISSUE:

A.R.S. § 13-3603 forbids any “person” from performing an abortion at any time “unless it is necessary to save” the mother’s life. Did the Arizona Legislature repeal or otherwise limit this statute by later enacting *Roe*-era laws like SB 1164 that forbid certain physician-performed abortions while expressly (1) refusing to repeal § 13-3603; (2) creating no right to an abortion; and (3) making no unlawful abortion legal?

This Summary was prepared by the Arizona Supreme Court Staff Attorneys’ Office solely for educational purposes. It should not be considered official commentary by the Court or any member thereof or part of any brief, memorandum, or other pleading filed in this case.