

Arizona Law on Abortion

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Background

- A.R.S. 13-3603 prohibits abortion except to save the life of the mother. The law has been in the Arizona statutes since statehood. This is the law referred to as Arizona's pre-*Roe* law on abortion. The term miscarriage means abortion in this context.

A person who provides, supplies, or administers to a pregnant woman, or procures such woman to take any medicine, drug 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.

- The U.S. Supreme Court issued *Roe v. Wade* on January 22, 1973, declaring abortion was legal in all fifty states.
- An Arizona court issued an injunction in March 1973 prohibiting enforcement of Arizona's law on abortion because of the *Roe v. Wade* decision.
- In 1977, the Arizona Legislature repassed the pre-*Roe* law, expressing its intent to keep the law on abortion in Arizona statutes despite the *Roe* decision. The pre-*Roe* law may accurately be called the 1977 abortion law.
- On June 24, 2022, the U.S. Supreme Court overturned *Roe v. Wade*, ruling that the U.S. Constitution did not include a right to an abortion. Rather, abortion laws are to be determined by representatives of the people, meaning the legislative branch.
- Arizona Attorney General Mark Brnovich filed a procedural motion in Pima County Superior Court to have the 1973 injunction prohibiting enforcement of Arizona's pre-*Roe* law lifted now that *Roe* had been overturned. Alliance Defending Freedom represents the interests of unborn children in this case.
- On September 23, 2022, Pima County Superior Court Judge Kellie Johnson issued a 7-page ruling in which she ordered the 1973 injunction of the law to be lifted.
- The abortion industry appealed Judge Johnson's ruling. On October 7, a three-judge panel on the Arizona Court of Appeals, Division Two blocked enforcement of the pre-*Roe*. The Court has scheduled oral arguments for November 30 at 2:00 p.m. in Tucson.
- Arizona's pre-*Roe* law is not enforceable pending the final outcome of this litigation.

Responses to Key Arguments

- No Arizona law punishes a woman for having an abortion. In 2021, the Arizona Legislature repealed A.R.S. 13-3604, the law that criminalized a woman for getting an abortion or trying to get an abortion. Hence, Arizona law only punishes the abortionist.
- A.R.S. 13-3603 does not prevent any woman from getting treatment for a miscarriage or ectopic pregnancy. Neither does any other Arizona law prevent this treatment. Miscarriages and ectopic pregnancies do not happen with the intent to procure an abortion.
- Democrat candidate for Attorney General, Kris Mayes, repeatedly states that Arizona Constitution Article 2 Section 8, grants abortion rights. Not true.
 - The clause states, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”
 - No state or federal court has ever interpreted the language to include a right to an abortion.
 - The clause is a search and seizure type prohibition.
- SB 1164 (2022) to limit abortions after 15-weeks gestational age does not override A.R.S. 13-3603. Gov. Ducey and media representatives have made that claim. It is not an accurate reading of Arizona laws. The new law:
 - Prohibits abortion after 15-weeks gestational age of the unborn child. The provision mirrored the Mississippi law that was pending before the U.S. Supreme Court in *Dobbs* at the time the 15-week limitation was passed and signed into law.
 - Specifically states that the new law:
 - Did not create or recognize a right to abortion
 - Did not repeal A.R.S. 13-3603.
 - The clear intent of the legislature was that the 15-week limit only would go into effect if the U.S. Supreme Court did not overturn *Roe* in the *Dobbs* decision.
- **Until the courts resolve the litigation over the pre-*Roe* law, the 15-week limit is in effect and enforceable.**

Status of Abortion Litigation - *Three lawsuits currently pending*

- **Arizona Court of Appeals, Division Two**

- Lawsuit mentioned above.
- Court has set oral arguments for 2:00 p.m. on November 30, with decision to follow.
- The losing side is all but certain to appeal this case to the Arizona Supreme Court. Final outcome not anticipated for several months.

- **Maricopa County Superior Court**

- On Monday, October 3, the ACLU Arizona filed a new lawsuit challenging Arizona's abortion law. The lawsuit makes claims similar to those made before the Arizona Court of Appeals but rejected by Pima County Judge Johnson.
- The lawsuit was filed on behalf of abortionist Paul Isaacson and the Arizona Medical Association. The lawsuit alleges that:
 - Arizona courts have a "duty to harmonize" Arizona's pro-life laws.
 - They claim all of Arizona's laws should "co-exist" as opposed to leaving in effect the pre-*Roe* law banning most abortions.
 - They claim Arizona's legislature intended to allow doctors to perform abortions within the framework of laws like parental consent, informed consent, etc.
- Response – legislative intent is clear. Arizona law does not state anywhere that a doctor may perform an abortion. The law clearly states that non-doctors are not allowed to perform or provide abortions. That prohibits nurse practitioners and physician assistants from providing abortions, but it does not grant doctors or anyone else the legal authority to perform abortions.
- Lawmakers passed restrictions on abortion to the extent that laws were permissible pursuant to decisions made by the U.S. Supreme Court and other courts. It is a false claim that lawmakers intended these laws to co-exist with pre-*Roe* law.
- Lawmakers repeatedly and specifically declined to repeal A.R.S. 13-3603. Through the years, amendments or bills filed to do so were not approved. When the legislature repealed the law punishing women, they clearly did not take the step to repeal A.R.S. 13-3603.
- On October 25, Maricopa County Superior Court Judge Joseph Mikitish issued an order granting a joint motion to stay this litigation until the final outcome in the Pima County litigation.

- **U.S. District Court**

- The abortion industry has continued to pursue a lawsuit in federal court challenging Arizona's 2021 law that granted rights to the unborn child and prohibited abortions due to genetic abnormalities.

Summary

- Arizona's pre-*Roe* law prohibiting abortion except to save the life of the mother is not enforceable only due to state court order and pending litigation. Now before the Arizona Court of Appeals, Division Two, this case is on an expedited review basis with appeal to the Arizona Supreme Court likely. Final resolution of this case will occur sometime in the next few months.
- Arizona's law prohibiting abortion after 15-weeks is in effect today as well as other laws regulating abortion.