**IN THE SUPREME COURT**
**STATE OF ARIZONA**

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| PLANNED PARENTHOOD ARIZONA, INC., et al.,<br><br>Plaintiff/Appellants,<br><br>v.<br><br>KRISTIN MAYES, Attorney General of the State of Arizona, et al.,<br><br>Defendant/Appellees,<br><br>And<br><br>ERIC HAZELRIGG, M.D., as guardian ad litem of all Arizona unborn infants,<br><br>Intervenor/Appellee. | Supreme Court No. CV-23-0005-PR<br><br>Court of Appeals, Division 2<br>No. 2CA-CV-2022-0116<br><br>Pima County Superior Court No. C127867 |

# APPELLANT PIMA COUNTY ATTORNEY'S RESPONSE TO APPELLEE HAZELRIGG'S PETITION FOR REVIEW


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## INTRODUCTION

In their Petition, two individuals with no cognizable interest in the underlying lawsuit[1] seek this Court's assistance to impose their preferred view of Arizona abortion law. Petitioners are unhappy with the result of the Court of Appeals' careful textual analysis and application of established statutory canons of construction. They ask this Court to sidestep such well-settled principles in favor of a nakedly outcome-based interpretive approach that ignores the Legislature's clearly expressed and unambiguous intent to regulate, not eliminate, abortions in Arizona. The Pima County Attorney urges this Court to reject this approach and the Petition.

## ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err in applying established statutory canons of construction to harmonize A.R.S. § 13-3603 with Arizona's Title 36 abortion statutes?

## STATEMENT OF FACTS

Over the past 50 years, the Arizona Legislature developed a comprehensive statutory framework to regulate abortions provided by licensed physicians. Last

[1] Dr. Eric Hazelrigg is a private individual with no direct interest in this case. And as argued in our response to his motion to intervene, the Yavapai County Attorney has failed to either identify a statutory basis or articulate a cognizable interest that would support his intervention.

spring, the Legislature passed a law permitting abortions by licensed physicians in the first 15 weeks of pregnancy, consistent with other Title 36 abortion statutes. At the same time, other state legislatures prepared to implement total abortion bans by adopting statutory "trigger" language designed to take effect in anticipation of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). The Legislature could have passed such "trigger" language indicating legislative intent to implement a total abortion ban in Arizona. It chose not to. When Governor Ducey signed the law in March 2022, he stated, "the law of the land today in Arizona is the 15-weeks' law . . . and that will remain [the] law" regardless of whether *Roe v. Wade*, 410 U.S. 113, 150 (1973) is overturned.[2] Likewise the Legislature made its intentions clear, "[t]his legislature intends through this act and any rules and policies adopted thereunder, to restrict the practice of nontherapeutic or elective abortion to the period up to fifteen weeks of gestation." S.B. 1164, 55th Leg., 2nd Reg. Sess. (Ariz. 2022).

Arizona's Title 36 abortion statutes, including the 15-week law, were developed alongside an older abortion law that remained on the books: a Territorial-era law that imposed a near-total abortion ban (§ 13-3603, previously codified as §

[2] Howard Fisher, "Arizona Gov. Ducey: Abortion Illegal After 15 Weeks", Apr. 24, 2022, KAWC.org, https://www.kawc.org/news/2022-04-24/arizona-gov-ducey-abortion-illegal-after-15-weeks. The 15-week law was later codified in Title 36 at A.R.S. § 36-2322.

13-211). The Territorial law was challenged in this case and enjoined by this Court after the U.S. Supreme Court's decision in *Roe v. Wade*.

Almost 50 years later, this lawsuit returned to the courts after the Supreme Court decision in *Dobbs* overruled *Roe* and sent questions of abortion regulation back to the states. The former Attorney General moved to set aside the injunction on the Territorial law, §13-3603, forcing the courts below to confront the interplay between the broad Territorial near-total abortion ban and the numerous, subsequently enacted Title 36 statutes regulating abortion.

The Superior Court lifted the injunction without attempting to address the interaction between statutes. [Hon. Kellie Johnson's Under Advisement Ruling: Attorney General's Motion to Substitute Dr. Eric Hazelrigg as Intervenor and Guardian Ad Litem and Attorney General's Motion for Relief from Judgment, dated September 22, 2022, ROA 64]. Planned Parenthood and the Pima County Attorney appealed, and the Court of Appeals reversed, holding that the full body of Arizona abortion restrictions must be read together, and that the Legislature clearly expressed its intent to regulate, not eliminate, abortions. The Court of Appeals recognized that Title 36's abortion restrictions applied to licensed physicians, and held that a licensed physician who performs an abortion complying with Title 36 is not subject to prosecution under § 13-3603.

The Attorney General declined to petition this Court for review. However, Dr. Eric Hazelrigg, who was substituted below for the late Clifton Bloom as the putative "guardian ad litem of all Arizona unborn infants," filed a petition for review. The Yavapai County Attorney seeks to intervene in the litigation and join in the Petition. The Pima County Attorney opposes review for the reasons set forth below.

## ARGUMENT

This Court should not grant the Petition for Review because the Court of Appeals properly applied well-established canons of statutory interpretation to give meaning to all the statutes at play. The Court of Appeals properly harmonized the apparent conflicts related to the same subject matter in a manner that aligns with the Legislature's intent to regulate rather than eliminate abortions.

### I. The Court of Appeals applied well-established statutory-interpretation principles that courts must give meaning to all statutes, including by harmonizing statutes that appear to conflict when those statutes relate to the same subject matter.

A.R.S. § 13-3603 and modern statutes codified in Title 36 relate to the same subject matter: state regulation of abortion. The Court of Appeals, following this Court's command, read these statutes together as a system of related statutes and properly gave effect to all provisions. *See Larson v. Farley*, 106 Ariz. 119, 122 (1970)("[W]hen two statutes appear to conflict, whenever possible, we adopt a

construction that reconciles one with the other, giving force and meaning to all statutes involved," citing *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, ¶ 28 (2001)).

"In so far as the provisions of a special statute are inconsistent with those of a general statute on the same subject, the special statute will control. The general statute remains applicable, however, to all matters not dealt with in the specific statute." *Desert Waters, Inc. v. Superior Ct. In & For Pima Cnty.*, 91 Ariz. 163, 171 (1962). The Court of Appeals properly harmonized the statutes by reading Title 36 with its multiple physician-specific requirements as specifically applying to licensed physicians performing abortions (permissible until 15 weeks gestation) and § 13-3603 as applying generally to non-physician abortions (never permissible). *Planned Parenthood Arizona, Inc. v. Brnovich*, 524 P.3d 262, 266 (App. 2022).

By harmonizing the statutes in this manner, the Court of Appeals avoided both the apparent conflicts at issue and potential inconsistencies in the law's application, which could lead physicians to provide lawful abortions under Title 36 but still be guilty of a felony under § 13-3603 for the same abortions performed in the same manner.

Petitioner reads § 13-3603 in isolation, contends that it is unambiguous, and finds a conflict necessitating erasure of a more recently enacted statutory regime. § 13-3603 may be unambiguous in a vacuum, but a "very basic rule of statutory

construction" is that statutes relating to the same subject matter must read together "as a whole system" and harmonized if possible. *See* *Larson*, 106 Ariz. at 122 (citing frequent affirmation of the rule). Conflicting provisions must be reconciled "to give effect to all"[3] because "[s]tatutory interpretation requires us to determine the meaning of the words the legislature chose to use" based on their meaning at the time of formulation and according to the broader statutory context.[4] The Court of Appeals would have erred had it ignored Title 36 and read § 13-3603 in isolation as suggested by Petitioner.

## II. The Court of Appeals did not err in harmonizing Title 36 and § 13-3603 to give effect to the unambiguous legislative intent to regulate but not eliminate abortions.

Petitioner's challenge to the Court of Appeals' decision is based on a flawed argument, *viz.*, that the 15-week law (SB 1164) evinces a legislative intent not merely to protect the Territorial ban from repeal, but rather to transform the Territorial ban into a "trigger" law that would render the 15-week ban moot. This argument flips established statutory interpretation principles on their head. It

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[3] *Fleming v. State Dept. of Public Safety*, 237 Ariz. 414, 417 (2015). *See also* *UNUM Life Ins. Co. of Am*, 200 Ariz. at 333 (explaining that courts should adopt a construction that gives force and meaning to all statutory provisions); and *Premier Physicians Group, PLLC v. Navarro*, 240 Ariz. 193, 195 (2016) (stating that courts should "avoid interpretations that result in contradictory provisions" even "when two statutes appear to conflict.").

[4] *S. Ariz. Home Builders Ass'n v. Town of Marana*, 522 P.3d 671, 676 ¶ 31 (Ariz. 2023); *Matthews v. Indus. Comm'n*, 520 P.3d 168, 174 ¶ 29 (Ariz. 2022)

proposes that courts should pick and choose which legislative enactments should have effect, and it would render meaningless the Title 36 regime.[5] It further seeks to impose the older, more general statute at the expense of the more specific, recently-enacted statutes.[6] By harmonizing the statutes and interpreting Title 36 to apply to physicians and § 13-3603 to apply to everyone else, the Court of Appeals ensured no law was rendered meaningless and honored both express statutory language and legislative intent.

Petitioner seeks to obfuscate the effect of applying § 13-3603 to physicians by comparing the resulting regime to instances where two criminal laws address the same conduct [Intervenor/Appellee's Petition for Review at 7-8]. The Court of Appeals determined that Petitioner's comparisons between the current matter and overlapping criminal laws prohibiting the same conduct were unpersuasive because they ignored "the unambiguous legislative intent to regulate but not eliminate elective abortions." *Planned Parenthood Arizona, Inc. v. Brnovich*, at 267 . The Legislature made its intent clear, '"to restrict the practice of nontherapeutic or elective abortion to the period up to fifteen weeks of gestation.' 2022 Ariz. Sess. Laws, ch. 105, § 3(B)." *Planned Parenthood Arizona, Inc. v. Brnovich*, at 266 .

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[5] *See Mejak v. Granville*, 212 Ariz. 555, 557 (2006) ("[Courts] must interpret [a] statute so that no provision is rendered meaningless, insignificant, or void.").

[6] *Planned Parenthood Arizona, Inc. v. Brnovich*, at 268 , (citing *UNUM Life Ins. Co. of Am.*, 200 Ariz. at 327)]

Petitioner posits that § 13-3603 can exist unmodified alongside the 15-week law, which makes it a crime for a licensed physician who complies with the express legislative intent of "restricting nontherapeutic" abortions "to the period up to fifteen weeks gestation." This position, had it been adopted by the Court of Appeals, would have functionally repealed the 15-week law. The Court of Appeals therefore did not err in finding that imposing criminal liability on physicians for providing restricted abortions (those prior to 15 weeks) "would ***eliminate the elective abortions the legislature merely intended to regulate*** under Title 36." *Planned Parenthood Arizona, Inc. v. Brnovich*, at 267.[7] Petitioner's argument that the Court of Appeals should have left intact a 50-year-old total ban in a manner that would have operated to repeal the one-year-old 15-week law was and is untenable.

The Legislature could have followed the lead of other states that sought to ban nearly all abortions in anticipation of a future where the U.S. Supreme Court would overrule *Roe v. Wade*. Over the last few years, many states passed laws with "trigger" language that made it clear that an all-out ban on abortion would apply in

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[7] Here, a law that has been unenforced for 50 years covers conduct that has been permitted and highly regulated for 50 years. Because "the law must be sufficiently definite to avoid arbitrary enforcement," *State v. Schmidt*, 220 Ariz. 563, ¶ 5 (2009), Petitioner's interpretation would be unconstitutional as it has *already* created confusion among physicians, legislators, attorneys, the Governor's office, and other Arizonans about prohibited conduct in violation of the right to due process.

those states in the event *Roe v. Wade* was overruled.[8] Arizona could have, but did not, pass a similar law. Instead, it passed the 15-week law further restricting, but not banning, abortions performed by licensed physicians. And despite mirroring Mississippi's 15-week law in other respects, Arizona's 15-week law does not include a clause like Mississippi's that states "[a]n abortion that complies with this [2018] section, but that violates any other state law, is unlawful." *See Planned Parenthood Arizona, Inc. v. Brnovich*, at 268-269; Miss. Code Ann. § 41-41-191(8) (2018). This absence led the Court of Appeals to correctly conclude that the Legislature did not intend to subject licensed physicians to criminal prosecution under § 13-3603.

Even after *Dobbs* the Legislature considered and, through its deliberative process, chose not to ban nearly all abortions—even those by physicians. For example, in 2022, the Legislature considered but failed to pass a ban criminalizing all medication abortion. H.B. 2811, 55th Leg., 2nd Reg. Sess. (Ariz. 2022). The Legislature also considered and failed to pass privately enforced prohibitions on

[8] Idaho's 2020 trigger ban, for example, spelled out that "the issuance of the judgment in any decision of the United States Supreme Court that restores to the states their authority to prohibit abortion" would trigger an all-out felony ban on abortion that would apply to physicians. S.B. 1385 (Id. 2020). Idaho's "trigger" law subjects physicians to criminal prosecution, with only limited affirmative defenses available to physicians who deem the abortion necessary to prevent the death of the pregnant woman or where they are presented with verifiable claims of rape or incest. S.B. 1385 (Id. 2020).

abortions after six weeks gestation. S.B. 1339, 55th Leg., 2nd Reg. Sess. (Ariz. 2022); H.B. 2483, 55th Leg., 2nd Reg. Sess. (Ariz. 2022). Instead, the Legislature retained the 15-week law, choosing to further regulate—but not ban—physician-provided abortions.

Petitioner's arguments would effectively impose a total ban that would have been made possible by "trigger" language that the Arizona Legislature clearly could have, but expressly did not, include in the 15-week law. The Petition is a transparent end-run around the Legislature's intent to regulate but not eliminate abortions. The Court of Appeals' careful application of settled canons of statutory construction does not warrant further review, and the Petition should be denied.

## CONCLUSION

For the reasons stated herein, the Court should deny the Petition for Review.

RESPECTFULLY SUBMITTED April 28, 2023.

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