

ARIZONA SUPREME COURT

PLANNED PARENTHOOD ARIZONA,
INC., et al.,

Plaintiffs/Appellants,

v.

KRISTIN MAYES, Attorney General of
the State of Arizona, et al.,

Defendants/Appellees,

and

ERIC HAZELRIGG, M.D., as guardian
ad litem of all Arizona unborn infants,

Intervenor/Appellee.

Supreme Court
No. CV-23-0005-PR

Court of Appeals
Division Two
No. 2 CA-CV 2022-0116

Pima County Superior Court
No. C127867

INTERVENOR/APPELLEE'S PETITION FOR REVIEW

Mark A. Lippelmann (No. 036553)

Kevin H. Theriot (No. 030446)

Jacob P. Warner (No. 033894)

ALLIANCE DEFENDING FREEDOM

15100 N. 90th Street

Telephone: (480) 444-0020

Facsimile: (480) 444-0028

mlippelmann@adflegal.org

ktheriot@adflegal.org

jwarner@adflegal.org

John J. Bursch*

ALLIANCE DEFENDING FREEDOM

440 First Street, NW, Suite 600

Washington, DC 20001

Telephone: (202) 393-8690

jbursch@adflegal.org

Denise M. Harle**

ALLIANCE DEFENDING FREEDOM

1000 Hurricane Shoals Rd.

Suite D-1100

Lawrenceville, GA 30043

Telephone: (770) 339-0774

dharle@adflegal.org

*Attorneys for Eric Hazelrigg, M.D., intervenor and guardian ad litem of
all Arizona unborn infants*

*Application for *pro hac vice* admission pending

**Application for *pro hac vice* admission forthcoming

TABLE OF CONTENTS

INTRODUCTION	1
ISSUE PRESENTED FOR REVIEW	2
BACKGROUND	3
REASON PETITION SHOULD BE GRANTED	6
I. The court below incorrectly held that A.R.S. § 13-3603 no longer applies to physicians.	6
A. A.R.S. § 13-3603 unambiguously applies to physicians.	6
B. Title 36 does not conflict with A.R.S. § 13-3603.	7
1. Like many laws, Title 36 and A.R.S. § 13-3603 restrict some of the same conduct.	7
2. Title 36 and A.R.S. § 13-3603 do not conflict as none of their provisions share identical elements.	9
C. The court below misinterpreted the plain meaning of Title 36 and A.R.S. § 13-3603.	11
1. The Legislature did not intend to repeal or limit A.R.S. § 13-3603 by enacting Title 36.	11
2. Title 36 and A.R.S. § 13-3603 satisfy due process.	13
II. This Court should correct the critical error below.	14
CONCLUSION	15
RULE 21(a) STATEMENT	16
Addendum	

TABLE OF AUTHORITIES

Cases

<i>Anderjeski v. City Court of Mesa,</i> 135 Ariz. 549 (1983)	9, 15
<i>Arnold v. Arizona Department of Health Services,</i> 160 Ariz. 593 (1989)	16
<i>Cave Creek Unified School District v. Ducey,</i> 233 Ariz. 1 (2013)	12
<i>Dobbs v. Jackson Women’s Health Organization,</i> 142 S. Ct. 2228 (2022)	1, 3, 4
<i>Glazer v. State,</i> 244 Ariz. 612 (2018)	6
<i>Hightower v. State,</i> 62 Ariz. 351 (1945)	3, 7
<i>In re McLauchlan,</i> 252 Ariz. 324 (2022)	11
<i>Kinsey v. State,</i> 49 Ariz. 201 (1937)	3
<i>Lewis v. Debord,</i> 238 Ariz. 28 (2015)	13
<i>Mead, Samuel & Company, Inc. v. Dyar,</i> 127 Ariz. 565 (App. 1980)	13
<i>Nelson v. Planned Parenthood Center of Tucson, Inc.,</i> 19 Ariz. 142 (App. 1973)	3, 4
<i>Pima County by City of Tucson v. Maya Construction Company,</i> 158 Ariz. 151 (1988)	13

<i>Planned Parenthood v. Casey</i> , 505 U.S. 833 (1992)	4
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	4
<i>State v. Boozer</i> , 80 Ariz. 8 (1955)	3, 7
<i>State v. Carter</i> , 249 Ariz. 312 (2020)	9
<i>State v. Culver</i> , 103 Ariz. 505 (1968)	8
<i>State v. Far West Water & Sewer Inc.</i> , 224 Ariz. 173 (App. 2010).....	9
<i>State v. Gagnon</i> , 236 Ariz. 334 (App. 2014).....	9, 14
<i>State v. Johnson</i> , 143 Ariz. 318 (App. 1984).....	14
<i>State v. Jones</i> , 235 Ariz. 501 (2014)	8
<i>State v. Keever</i> , 10 Ariz. 354 (App. 1969).....	3
<i>State v. Leal</i> , 248 Ariz. 1 (App. 2019).....	7
<i>State v. Lopez</i> , 174 Ariz. 131 (1992)	14
<i>State v. Mussiah</i> , 141 Ariz. 212 (App. 1984).....	14

<i>State v. Schmidt</i> , 220 Ariz. 563 (2009)	14
<i>State v. Wahlrab</i> , 19 Ariz. 552 (App. 1973).....	3
<i>State v. Weiner</i> , 126 Ariz. 454 (App. 1980).....	9
<i>Yellen v. Confederated Tribes of Chehalis Reservation</i> , 141 S. Ct. 2434 (2021)	13

Statutes

A.R.S. § 13-105	7
A.R.S. § 13-116	8
A.R.S. § 13-211	1, 3
A.R.S. § 13-3603	passim
A.R.S. § 36-2321–2326.....	4
A.R.S. § 36-2153	8, 10
A.R.S. § 36-2155	8, 10
A.R.S. § 36-2160	8, 10
A.R.S. § 36-2161	8, 10
A.R.S. § 36-2322	8, 10
A.R.S. § 36-449.02	8, 10

Other Authorities

1977 Ariz. Sess. Laws ch. 142, § 99 (1st Reg. Sess.).....	4
2009 Ariz. Sess. Laws ch. 172 (1st Reg. Sess.)	12

2010 Ariz. Sess. Laws ch. 111 (2nd Reg. Sess.)	12
2011 Ariz. Leg. Serv. chs. 9, 10	12
2012 Ariz. Leg. Serv. ch. 250.....	12
2021 Ariz. Sess. Laws ch. 286, § 3 (1st Reg. Sess.).....	4
2022 Ariz. Sess. Laws ch. 105, § 2 (2d Reg. Sess.).....	4, 12, 13
2022 Ariz. Sess. Laws ch. 105, § 3	11, 12

INTRODUCTION

Arizona has protected unborn human life longer than it has been a State. Since 1901, starting with A.R.S. § 13-211, the Legislature has always restricted abortion except to save a mother's life. *Roe v. Wade* never changed that. Yes, *Roe* temporarily kept officials from fully enforcing § 13-211. But even then, the Legislature reenacted § 13-211 as § 13-3603 and passed more protections—careful to say these changes created *no* abortion right, made *no* unlawful abortion legal, and did *not* repeal § 13-3603. Not one of those laws allowed abortion. Only *Roe* did that.

Then federal law changed. Last year, the U.S. Supreme Court held that States could once again fully protect unborn life. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022). That revived § 13-3603, but a decades-old injunction kept it buried. So the Arizona Attorney General moved to set aside the judgment against § 13-3603—joined by Petitioner, Substitute Guardian ad Litem Eric Hazelrigg, M.D., and opposed by Planned Parenthood and the Pima County Attorney. The trial court granted that motion, fully lifting the old injunction.

The appeals court reversed, rewriting § 13-3603 and thwarting legislative intent. In that court's view, while § 13-3603 plainly regulated physicians, by enacting SB 1164 to *restrict* physician-performed abortions at 15-weeks' gestation, the Legislature somehow *allowed* physician-performed abortions before then—“*regardless of § 13-3603.*” But the

statutes say no such thing. Nor did the Legislature. And multiple restrictions do not make a conflict, much less *authorize* a doubly-condemned act. Otherwise many Arizona criminal laws would crumble.

In effect, the appeals court solved a manufactured conflict against legislative intent by partially repealing § 13-3603. And it justified this error by saying due process required it. But Arizona law is clear: no one may perform an abortion except to save the mother's life. And nothing suggests that prosecutors will make arbitrary enforcement decisions.

This Court should correct the error below. Its logic threatens many Arizona laws and undermines this Court's precedents. Worse, it overrides the will of Arizonans, who have elected Legislature after Legislature to fully protect life.

This Court should reverse the judgment below, enforce the Arizona Legislature's plain intent, and lift the injunction against § 13-3603.

ISSUE PRESENTED FOR REVIEW

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?

BACKGROUND

For over 120 years, Arizona has vigorously protected unborn human life—prohibiting abortion except to save the mother’s life. This pro-life legacy began when Arizona was just a territory. In 1901, the Territorial Legislature passed A.R.S. § 13-211, which prohibited any “person” from providing “any medicine, drugs or substance” or using “any instrument or other means ... with intent ... to procure [a] miscarriage” unless “necessary to save [the mother’s] life.”¹ This law was consistently enforced until 1973. *E.g.*, *State v. Wahlrab*, 19 Ariz. 552 (App. 1973); *State v. Keever*, 10 Ariz. 354 (App. 1969); *State v. Boozer*, 80 Ariz. 8 (1955); *Hightower v. State*, 62 Ariz. 351 (1945); *Kinsey v. State*, 49 Ariz. 201 (1937).

In 1971, Planned Parenthood of Tucson, Inc. challenged § 13-211, suing both the Arizona Attorney General and the Pima County Attorney and arguing the law was unconstitutional. App.24–31. The trial court allowed a Guardian ad Litem to intervene on behalf of unborn Arizona children. App.18–19. After a trial, the suit was dismissed, and Planned Parenthood appealed. On remand, the trial court entered a declaratory judgment and injunction for Planned Parenthood, declaring § 13-211 unconstitutional. *Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. 142, 143 (App. 1973). State officials appealed, and the court reversed, upholding § 13-211—but only for a few weeks. *Id.* at 142-50.

¹ Miscarriage means abortion. *Abortion*, Black’s Law Dictionary (11th ed. 2019); *accord Dobbs*, 142 S. Ct. 2228, App.

The U.S. Supreme Court issued its decision in *Roe v. Wade*, 410 U.S. 113 (1973) three weeks later, holding that states could no longer fully restrict abortion. Bound by this new rule, the appeals court vacated its prior decision *solely because of Roe. Nelson*, 19 Ariz. at 152. Then the trial court entered judgment, enjoining officials from enforcing § 13-211 to the extent it conflicted with *Roe*. App.18–22.

The Legislature was unmoved. In fact, it doubled down—reenacting former § 13-211 as § 13-3603 a few years later. *See* 1977 Ariz. Sess. Laws ch. 142, § 99 (1st Reg. Sess.). After passing a series of other restrictions, in 2021, the Legislature repealed § 13-3604 but did not repeal neighboring § 13-3603—showing its intent to keep § 13-3603 and to protect mothers from prosecution. 2021 Ariz. Sess. Laws ch. 286, § 3 (1st Reg. Sess.). Then, in 2022, when the Legislature enacted SB 1164 forbidding abortion at 15-weeks’ gestation, it expressly made clear that this law “does not ... [r]epeal” § 13-3603. 2022 Ariz. Sess. Laws ch. 105, § 2 (2d Reg. Sess.).²

Then came *Dobbs*—which held “that the Constitution does not confer a right to abortion.” 142 S. Ct. at 2279. This decision overruled *Roe* and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and returned to the states “the authority to regulate abortion”—including the power to fully protect unborn life “at all stages.” 142 S. Ct. at 2279, 2284.

² SB 1164 was codified at §§ 36-2321–2326. The court below often used “Title 36” when referencing § 36-2322 and related statutes.

So, former Attorney General Mark Brnovich, joined by Petitioner, Substitute Guardian ad Litem Eric Hazelrigg, moved to set aside the injunction on § 13-211 (now § 13-3603), because federal law changed. App.1, 55, 69. All parties agreed that the full injunction was no longer proper, but Planned Parenthood of Arizona (successor to Planned Parenthood Center of Tucson) and the Pima County Attorney argued that a partial injunction should remain as to physicians because Title 36 forbids physician-performed abortions at 15-weeks’ gestation. App.38.

Last fall, the trial court entered an order granting the Rule 60(b) motion and fully lifting the injunction against § 13-3603. App.69–75. Planned Parenthood and the Pima County Attorney appealed. The appeals court reversed, holding that by prohibiting physician-performed abortions at 15-weeks’ gestation, the Legislature *allowed* physician-performed “abortions under certain circumstances”—including those illegal under § 13-3603. *Planned Parenthood Arizona, Inc. v. Brnovich*, No. 2 CA-CV 2022-0116, 2022 WL 18015858, at *1 (Ariz. Ct. App. Dec. 30, 2022) (“App.”) (App.79).

Substitute Guardian ad Litem Dr. Eric Hazelrigg, M.D. timely petitions this Court for review.

REASON PETITION SHOULD BE GRANTED

The Court should grant this petition to clarify that A.R.S. § 13-3603 forbids all people, including physicians, from performing abortions except to save a mother's life, and that Title 36 did not repeal or otherwise limit § 13-3603. This is a critically important issue for all Arizonans, including thousands of unborn children whose lives hang in the balance.

I. The court of appeals incorrectly held that A.R.S. § 13-3603 no longer applies to physicians.

As Arizona courts have long held, A.R.S. § 13-3603 unambiguously applies to physicians. And because the Legislature may enact multiple laws that forbid the same conduct, especially when curbing criminal activity, Title 36 does not conflict with § 13-3603. Indeed, both laws prohibit abortion, and Title 36 requires nothing that § 13-3603 forbids. This satisfies due process. No judicial rewrite is needed, but the court of appeals penned one anyway—against plain text and legislative intent.

A. A.R.S. § 13-3603 unambiguously applies to physicians.

This Court interprets statutes “to give effect to the Legislature’s intent.” *Glazer v. State*, 244 Ariz. 612, 614 ¶9 (2018) (citation omitted). “The best indicator of that intent is [a] statute’s plain language.” *Id.* “[W]hen that language is unambiguous,” the Court “appl[ies] it without resorting to secondary ... interpretation principles.” *Id.* Here, as even the court of

appeals held, A.R.S. § 13-3603’s “plain language” restricts “abortions performed by licensed physicians.” App.83.

A.R.S. § 13-3603 applies to a “person”—defined broadly as “a human being.” A.R.S. § 13-105(30); *accord State v. Leal*, 248 Ariz. 1, 4 ¶11 (App. 2019). Physicians are human beings. So § 13-3603 applies to them. Indeed, physicians were prosecuted for violating the prior version of § 13-3603 before it was enjoined. *E.g. Boozer*, 80 Ariz. 8 (medical practitioner); *Hightower*, 62 Ariz. 351 (licensed physician). No one disputes that § 13-3603 regulates physicians.

B. Title 36 does not conflict with A.R.S. § 13-3603.

Yet the appeals court concluded that A.R.S. § 13-3603 now unambiguously *exempts* physicians. App.79. The court said that because Title 36 forbids physician-performed abortions after 15-weeks’ gestation, it must “permit[]” such abortions before then. *Id.* Accordingly, physicians who comply with Title 36 may no longer face “prosecution under § 13-3603.” App.83. That ruling defies the laws’ text, legislative intent, and separation of powers, and it unnecessarily creates a forbidden repeal.

1. Like many laws, Title 36 and A.R.S. § 13-3603 restrict some of the same conduct.

Title 36 and A.R.S. § 13-3603 prohibit some of the same conduct. These laws do not conflict because they only *forbid* abortion, and contrary to the ruling below, Title 36 nowhere “expressly allow[s]” abortion.

App.85 ¶19; *see* A.R.S. § 13-3603 (forbidding abortion except to save mother’s life); § 36-2155 (forbidding nonphysician-performed surgical abortions); § 36-2322 (forbidding physician-performed abortions after 15-weeks’ gestation); § 36-2153 (forbidding nonconsensual abortions); § 36-2160 (forbidding nonphysicians from providing abortion-inducing drugs); § 36-2161 (requiring reports); § 36-449.02 (imposing licensing and operating rules). *Roe* alone did that.

Indeed, multiple restrictions do not make a contradiction, much less *allow* a doubly-condemned act. As both the Legislature and this Court affirm, conduct “punishable in different ways by different ... laws may be punished under both,” A.R.S. § 13-116; *see State v. Jones*, 235 Ariz. 501, 504 ¶13 (2014). Take *State v. Culver*, where this Court upheld both A.R.S. § 13-311 and § 13-316 despite their partial overlap. The latter forbids writing a check with “no account” at the bank drawn upon, while the former more broadly forbids “bogus check[s].” 103 Ariz. 505, 507 (1968). This Court rejected that § 13-316—a newer, narrower law covering the same conduct—repealed or otherwise limited § 13-311. Instead, the Court upheld both laws because they had no “positive repugnancy.” *Id.* at 508. New laws may “cover some or even all” the conduct prohibited by an old one yet not limit its application. *Id.* at 507.

Here, the Legislature has criminalized some of the same conduct through multiple laws. That’s not unusual or unconstitutional.

2. Title 36 and A.R.S. § 13-3603 do not conflict as none of their provisions share identical elements.

To have positive repugnancy, two or more provisions of Title 36 and A.R.S. § 13-3603 must share identical elements, as Arizona courts, including the one below, have recognized. *See State v. Carter*, 249 Ariz. 312, 318 ¶19 (2020); *Anderjeski v. City Ct. of Mesa*, 135 Ariz. 549 (1983); *State v. Weiner*, 126 Ariz. 454, 456 (App. 1980) (“[C]onflict arises only where the elements of proof ... under each statute are exactly the same.”); *State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, 184 ¶20 (App. 2010); *State v. Gagnon*, 236 Ariz. 334, 336 ¶7 (App. 2014); App.84 ¶18.

Title 36 and § 13-3603 do not conflict because none of their provisions share identical elements. Section 13-3603 applies to a “person,” does not require the State to prove gestational age, requires the “intent to procure” an abortion, and carries a penalty of two- to five-year confinement. Section 36-2301.01(A) applies to “physicians,” requires the State to prove viability, requires “knowing” intent, and if violated, results in a class-five felony. Section 36-2159 applies to “a person,” requires the State to prove 20-weeks’ gestation, requires “knowing” intent, and if violated, results in a class-one misdemeanor. And § 36-2322 applies to “a physician,” requires “intentional or knowing” intent, requires the State to prove 15-weeks’ gestation, and if violated, results in a class-six felony. Each of these laws is unique. None have identical elements.

Figure 1

Abortion Law Distinctions				
<i>Element</i>	<i>§ 13-3603</i>	<i>§ 36-2301.01</i>	<i>§ 36-2159</i>	<i>§ 36-2322</i>
Applies to “person”	X		X	
Applies to “physician”		X		X
Intent to procure abortion	X			
Knowing intent		X	X	
Intentional/knowing intent				X
Viable unborn child		X		
20-weeks gestational age			X	
15-weeks gestational age				X
<i>Punishment</i>	<i>§ 13-3603</i>	<i>§ 36-2301.01</i>	<i>§ 36-2159</i>	<i>§ 36-2322</i>
Class 1 Misdemeanor			X	
Class 6 felony				X
Class 5 felony		X		
2-5 years in prison	X			

In practice, this means that performing an elective abortion violates A.R.S. § 13-3603. A separate violation occurs if the person is a physician and performs a prohibited abortion after 15-weeks’ gestation. A.R.S. § 36-2322(A). And a separate violation occurs if the person is not a physician yet performs a surgical abortion, A.R.S. § 36-2155, or provides abortion drugs, in any situation, A.R.S. § 36-2160. For rare terminations that sadly occur to save a mother’s life—which are medical emergencies—the facility must follow relevant licensing, operating, consent, waiting, and reporting rules, some of which apply only if the emergency allows. A.R.S. §§ 36-2322(c); 36-2161; 36-449.02; 36-2153.

Because no provisions of Title 36 and A.R.S. § 13-3603 share identical elements, there is no conflict to be resolved.

C. The court below misinterpreted the plain meaning of Title 36 and A.R.S. § 13-3603.

The appeals court agreed there is no conflict between Title 36 and A.R.S. § 13-3603 yet held that Title 36 unambiguously *exempts* physicians from § 13-3603. In so doing, the court wrongly assumed that Title 36 “expressly allow[s]” certain physician-performed abortions, misread legislative intent, and identified a non-existent due-process concern.

1. The Legislature did not intend to repeal or limit A.R.S. § 13-3603 by enacting Title 36.

The plain text of Title 36 and A.R.S. § 13-3603 does not expressly allow abortion; it forbids abortion. Section I.A-B *supra*. The appeals court cited no statutory text to the contrary.

Instead, the court relied on an ambiguous line in SB 1164’s *history* to upend Section 13-3603: The Legislature intends “to restrict the practice of nontherapeutic or elective abortion to the period up to fifteen weeks of gestation.” App.83–84 ¶15 (quoting 2022 Ariz. Sess. Laws ch. 105, § 3(B)). To the court below, this line suggests the Legislature passed SB 1164 “to restrict—but not to eliminate—elective abortions” forbidden by § 13-3603. App.84 ¶16. But that view defies statutory text and context while manufacturing a forbidden repeal.

First, the court below rewrote § 13-3603 based on one line in SB 1164’s legislative history. But such history is no “substitute for clear legislative language.” *In re McLauchlan*, 252 Ariz. 324, 326 ¶15 (2022). And

the court overlooked *other* legislative history saying unambiguously that SB 1164 “does not ... [c]reate ... a right to abortion,” nor does it “make lawful an abortion that is currently unlawful.” 2022 Ariz. Sess. Laws ch. 105, § 2(1).³ On the lower court’s logic, the latter disclaimer contemplates federal law, but the former does not. App.85 n.8. But the far better read is that, by amending Title 36, the Legislature created no *state* right to abortion, nor did it legalize abortions then-illegal under *state* law. The Legislature plainly did not intend to repeal or otherwise limit § 13-3603.

Second, the appeals court disregarded the constitutional context. *Roe* and *Casey* long shackled state legislatures, preventing them from fully protecting unborn children. Even so, the Arizona Legislature consistently showed its intent to protect unborn life as much as possible. Section I.B.2 *supra*. This Court presumes the Legislature acts “with full knowledge of relevant constitutional provisions.” *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5 ¶11 (2013). And here, the Legislature amended Title 36 expressly acknowledging that *Roe* and *Casey* controlled. *E.g.*, 2022 Ariz. Sess. Laws, ch. 105, § 3(A)(3). The Legislature did not intend to allow *any* abortions; it intended to regulate *Roe*-era abortions while § 13-3603 remained enjoined. That context matters.

³ The Legislature has repeatedly issued such disclaimers. *E.g.* 2012 Ariz. Leg. Serv. ch. 250; 2011 Ariz. Leg. Serv. chs. 9, 10; 2010 Ariz. Sess. Laws ch. 111 (2nd Reg. Sess.); 2009 Ariz. Sess. Laws ch. 172 (1st Reg. Sess.).

Third, the court below read Title 36 to partially repeal A.R.S. § 13-3603—allowing physicians to perform abortions “*regardless of § 13-3603*.” App.83 ¶13 (emphasis added). This read does not harmonize the laws; it solves a manufactured conflict against legislative intent. That’s doubly wrong. Implied repeals—including *partial* ones—are “not favored.” *Mead, Samuel & Co., Inc. v. Dyar*, 127 Ariz. 565, 568 (App. 1980); *accord Pima Cnty. by City of Tucson v. Maya Constr. Co.*, 158 Ariz. 151, 155 (1988). And here, the Legislature declared that Title 36 “does not ... [r]epeal, by implication or otherwise, [§] 13-3603.” 2022 Ariz. Sess. Laws, ch. 105, § 2(2). It even clarified that Title 36 does not legalize then-illegal abortions. *Id.* § 2(1).

While courts may criticize this policy, *e.g.* App.84–85 ¶19 (criticizing notice requirement), they may not change enacted law to fit “more closely with” their “preferred result.” *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2460 n.3 (2021) (Gorsuch, J., dissenting) (cleaned up). “It is not the function of the courts to rewrite statutes.” *Lewis v. Debord*, 238 Ariz. 28, 31-32 ¶11 (2015) (citation omitted). The court below overstepped.

2. Title 36 and A.R.S. § 13-3603 satisfy due process.

The court also suggested that full enforcement of Title 36 and A.R.S. § 13-3603 would violate due process—creating “uncertainty for ... physicians” and allowing “arbitrary enforcement.” App.85 ¶20. But while

“the law must be sufficiently definite to avoid arbitrary enforcement,” *State v. Schmidt*, 220 Ariz. 563, 565 ¶5 (2009), the statutes are clear: no one may perform an abortion except to save the mother’s life, Section I.A-B *supra*. And physicians have no right to limit the menu of charges they may face.

The court below never explained why a plain read of Title 36 and § 13-3603 would “practically demand” arbitrary enforcement. App.85–86 ¶20. But prosecutors have “discretion” to decide which statute to apply when two or more are available. *State v. Lopez*, 174 Ariz. 131, 143 (1992); accord *State v. Johnson*, 143 Ariz. 318, 321 (App. 1984). Of course, they may not discriminate against a class of people, *Gagnon*, 236 Ariz. at 336 ¶10, but there is no evidence of that here. So ordinary rules apply.

Physicians “may be prosecuted under either” Title 36 or § 13-3603 if their conduct “fall[s] within the prohibitions of both.” *State v. Mussiah*, 141 Ariz. 212, 214 (App. 1984). That satisfies due process.

II. This Court should correct the critical error below.

This is a critical case. The prior Attorney General moved to set aside a decades-old judgment after the U.S. Supreme Court reversed two landmark cases, sending protection of the unborn back to the states. The trial court rightly set aside the judgment while exercising judicial restraint. But the appeals court rewrote an unambiguous law. Section 13-3603 now stands partially repealed, and this error is binding.

The error also raises broader concerns. Say *Anderjeski* were on appeal now. Would former § 28-692(B) (now § 28-1381), which forbids driving with 0.10% blood-alcohol content, be read to repeal or limit § 28-1381(A), which forbids driving “under the influence of intoxicating liquor”? Under the lower court’s logic, it should—because § 28-1381 “allows” people to drive with less than 0.10% blood-alcohol content. But that’s incorrect. *Anderjeski*, 135 Ariz. at 550-51. This logic would cripple Arizona’s criminal code and give the judiciary a blank check to overrule legislative policy direction.

Arizonans deserve to have their laws fully enforced. They made their voice heard at the ballot box—electing Legislature after Legislature to protect life as much as possible. And lawmakers delivered. Then the appeals court rewrote § 13-3603, doing with a pen what abortion proponents could not do with a vote. That’s not how a republic works. Only this Court can fix it.

CONCLUSION

The Court should grant this petition for review.

RULE 21(a) STATEMENT

Substitute Intervenor Eric Hazelrigg, M.D. requests attorneys' fees and costs under Arizona's private attorney general doctrine, for if he succeeds in this petition, the result will benefit many people, come from his private enforcement, and resolve an important societal issue. *See Arnold v. Ariz. Dep't of Health Servs.*, 160 Ariz. 593, 609 (1989).

Respectfully submitted this 1st day of March, 2023.

By: /s/ Jacob P. Warner

Mark A. Lippelmann (No. 036553)
Kevin H. Theriot (No. 030446)
Jacob P. Warner (No. 033894)
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
mlippelmann@adflegal.org
ktheriot@adflegal.org
jwarner@adflegal.org

Denise M. Harle**
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road
Suite D-1100
Lawrenceville, GA 30043
Telephone: (770) 339-0774
dharle@adflegal.org

John J. Bursch*
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
Telephone: (616) 450-4235
jbursch@adflegal.org

*Attorneys for Eric Hazelrigg, M.D., intervenor and guardian ad litem of
all Arizona unborn infants*

*Application for *pro hac vice* admission pending

**Application for *pro hac vice* admission forthcoming

ADDENDUM

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

PLANNED PARENTHOOD ARIZONA, INC., SUCCESSOR-IN-INTEREST TO
PLANNED PARENTHOOD CENTER OF TUCSON, INC.;
LAURA CONOVER, PIMA COUNTY ATTORNEY,
Appellants,

v.

MARK BRNOVICH, ATTORNEY GENERAL OF THE STATE OF ARIZONA,
Appellee,

and

ERIC HAZELRIGG, M.D., AS GUARDIAN AD LITEM OF UNBORN CHILD OF
PLAINTIFF JANE ROE AND ALL OTHER UNBORN INFANTS SIMILARLY SITUATED,
Intervenor.

No. 2 CA-CV 2022-0116
Filed December 30, 2022

Appeal from the Superior Court in Pima County
No. C127867
The Honorable Kellie L. Johnson, Judge

AFFIRMED IN PART; REVERSED IN PART

COUNSEL

Coppersmith Brockelman PLC, Phoenix
By D. Andrew Gaona

and

Planned Parenthood Federation of America
By Sarah Mac Dougall, Pro Hac Vice, New York, New York and Diana O.
Salgado, Pro Hac Vice, Washington, D.C.
Counsel for Appellant Planned Parenthood Arizona, Inc.

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

Laura Conover, Pima County Attorney
By Samuel E. Brown, Chief Civil Deputy County Attorney and
Jonathan Pinkney, Deputy County Attorney, Tucson
Counsel for Appellant Laura Conover, Pima County Attorney

Mark Brnovich, Arizona Attorney General
By Michael S. Catlett, Linley Wilson, and Katlyn J. Divis, Assistant
Attorneys General, Phoenix
Counsel for Appellee

Alliance Defending Freedom, Scottsdale
By Mark A. Lippelmann and Kevin H. Theriot
Counsel for Intervenor

John J. Jakubczyk, Phoenix
Counsel for Amicus Curiae Charlotte Lozier Institute

OPINION

Chief Judge Vásquez authored the opinion of the Court, in which Judge Swann¹ concurred and Presiding Judge Eckerstrom specially concurred.

V Á S Q U E Z, Chief Judge:

¶1 Dating back to its territorial days, Arizona has had a near-total statutory ban on abortion. But for almost five decades, enforcement of the ban was enjoined, and it was declared unconstitutional as to all persons. This changed on June 24, 2022, when, in *Dobbs v. Jackson Women's Health Organization*, ___ U.S. ___, ___, 142 S. Ct. 2228, 2279 (2022), the United States Supreme Court held there is no constitutional right to abortion. Arizona Attorney General Mark Brnovich then filed a motion for relief from judgment in the trial court, asking it to set aside the permanent injunction prohibiting criminal prosecution under A.R.S. § 13-3603. The court granted

¹The Hon. Peter B. Swann, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

the motion, and Planned Parenthood of Arizona, Inc. (PPAZ) and the Pima County Attorney's Office (PCAO) have challenged the court's order, arguing § 13-3603 should be harmonized with more recent statutes regulating the practice of abortion, codified in Title 36.

¶2 The question at the core of this appeal is whether a licensed physician who performs an elective abortion in conformity with more recent statutes in Title 36 is nevertheless subject to prosecution under § 13-3603. Because Title 36 permits physicians to perform elective abortions under certain circumstances, the answer is no.

Factual and Procedural Background

¶3 In 1971, the Planned Parenthood Center of Tucson and several physicians challenged the constitutionality of Arizona abortion statutes, including A.R.S. § 13-211, now renumbered as § 13-3603.² The Arizona Attorney General and Pima County Attorney were named as defendants. The trial court granted declaratory relief in favor of the plaintiffs and permanently enjoined the defendants from enforcing the statutes. After the Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), we affirmed the injunction but modified it to reflect that "the statutes in question are unconstitutional as to all." *Nelson v. Planned Parenthood of Tucson, Inc.*, 19 Ariz. App. 142, 152 (1973).

¶4 Since 1973, the Arizona legislature has enacted numerous laws regulating abortion. Most recently, it enacted A.R.S. §§ 36-2321 to 36-2326 (the 15-week law), which places requirements on abortion services by licensed physicians up to fifteen weeks, generally prohibits the abortion of any fetus with a gestational age of fifteen weeks or more, and creates reporting procedures for medically necessary abortions performed by licensed physicians after fifteen weeks. 2022 Ariz. Sess. Laws, ch. 105, §§ 1-5. Currently, Arizona statutes relating to abortion are found in Title 36, *see, e.g.*, A.R.S. §§ 36-2151 to 36-2164, 36-2301 to 36-2326, and A.R.S. §§ 13-3603 to 13-3605.³ Title 36 includes both criminal and civil sanctions

²1977 Ariz. Sess. Laws, ch. 142, § 99.

³Section 13-3603.01 provides for civil and criminal liability for performing partial-birth abortions, while § 13-3603.02 provides penalties for providing abortion for certain prohibited reasons such as sex or race selection. Section 13-3605 creates criminal liability for, among other things, advertising for abortion. These statutes are not at issue in this appeal.

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

for violations of the regulatory scheme, while § 13-3603 broadly prohibits and criminalizes abortion, except to save the life of the pregnant woman.

¶5 In June 2022, the Supreme Court overruled *Roe* in *Dobbs*. Brnovich then sought relief under Rule 60(b)(5) and (6), Ariz. R. Civ. P., from the injunction, asking the trial court to set it aside “as applied to A.R.S. § 13-3603.”⁴ PPAZ, a successor-in-interest to Planned Parenthood of Tucson, opposed the motion. The PCAO joined in PPAZ’s arguments. They acknowledged that, in light of *Dobbs*, the injunction had to be modified because it was based on *Roe*. But they argued the court should “harmonize” all statutes “as they exist today . . . to make clear that § 13-3603 can be enforceable in some respects” but Brnovich and the PCAO should be enjoined “from taking any action or threatening to enforce the provisions of A.R.S. § 13-3603 with respect to abortions provided by licensed physicians” under the regulatory scheme in Title 36.

¶6 The trial court granted the Rule 60 motion, concluding the “legal basis for the judgment entered in 1973 has now been overruled,” and vacated the order granting injunctive relief. The court declined PPAZ and the PCAO’s request to address the interaction between § 13-3603 and Arizona statutes enacted since the injunction, describing that undertaking as “procedurally improper.” The 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. This appeal followed.

Discussion

The Trial Court’s Limited Review Under Rule 60

¶7 We must first determine whether the trial court erred, as PPAZ and the PCAO assert, by refusing to consider whether the injunction should be modified in light of current law. Brnovich argues that the court properly exercised its discretion in refusing to evaluate other changes in the law beyond *Dobbs*. We conclude the court erred in limiting its review.

¶8 We generally review for an abuse of discretion a trial court’s ruling on a motion for relief from judgment under Rule 60. *Rogone v.*

⁴Dr. Eric Hazelrigg was substituted as an intervenor and argued in support of Brnovich’s motion. As to the issues we reach in this appeal, Hazelrigg’s arguments largely parallel Brnovich’s. We therefore do not separately address them.

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

Correia, 236 Ariz. 43, ¶ 12 (App. 2014). However, we review de novo the interpretation of court rules, including the scope of a trial court’s authority under Rule 60. See *Duff v. Lee*, 250 Ariz. 135, ¶ 11 (2020). Rule 60(b)(5) permits a court to relieve a party from a final judgment if “it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.” Rule 60(b)(5) has “been used liberally in reopening otherwise final court orders where there has been a change in the law affecting substantial rights of a litigant.” *Edsall v. Superior Court*, 143 Ariz. 240, 243 (1984).

¶9 As noted above, the trial court concluded it lacked authority to evaluate the state of the law beyond whether *Roe* was still in force. But the inquiry is not solely whether some specific case, constitutional provision, or statute supporting the original injunction is no longer valid. Instead, the issue is whether the “legal landscape has changed,” *Agostini v. Felton*, 521 U.S. 203, 216 (1997),⁵ and that determination cannot be made by artificially narrowing the inquiry to only part of the current legal landscape. “A court may recognize subsequent changes in either *statutory* or *decisional* law.” *Id.* at 215 (emphasis added). Consequently, the court abused its discretion by erroneously concluding it must limit its analysis here.⁶

⁵ Arizona’s Rule 60 is similar to the federal rule, and, thus, interpretation of the rule by federal courts is persuasive. See *Harper v. Canyon Land Dev., LLC*, 219 Ariz. 535, ¶ 6 (App. 2008).

⁶Nothing in the cases cited by Brnovich precludes a trial court’s consideration of how the law has changed in evaluating whether Rule 60 relief is warranted. See *Horne v. Flores*, 557 U.S. 433, 448, 453 (2009) (noting particular value of Rule 60(b)(5) in evaluating “changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights” regarding longstanding injunctive relief and criticizing intermediate appellate court for “confining the scope of its analysis to that of the original order”); *California v. EPA*, 978 F.3d 708, 715-16 (9th Cir. 2020) (declining to revisit *factual* equities when law has changed). Brnovich additionally cites several cases for the proposition that a party cannot “re-litigate legal or factual claims underlying the original judgment.” That is not what PPAZ and the PCAO have requested—they request only that any modification to the injunction reflect the whole of current Arizona law. Finally, Brnovich asserts that PPAZ is somehow bound by its argument in the pre-injunction litigation that § 13-3603 applies to all persons. But, because the regulatory scheme found in Title 36 did not exist at the time, PPAZ could not have raised this argument previously.

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

See Phx. City Prosecutor v. Lowery, 245 Ariz. 424, ¶ 6 (2018) (error of law constitutes abuse of discretion). We now turn to the question the court refused to consider.

Licensed Physicians Who Perform Abortions Under Title 36

¶10 PPAZ argues that, by lifting the injunction entirely, the trial court's ruling causes "contradicting laws to take effect" and we should "harmonize[]" the statutes to conclude the abortion regulations in Title 36 govern. The PCAO similarly contends § 13-3603 cannot stand "unmodified" without conflicting with provisions in Title 36. They ask that we remand the case to the trial court to enter a "modified judgment" "making clear" that § 13-3603 does not apply to licensed physicians who perform abortions under Title 36. As they acknowledge, this is a question of law. As explained below, our resolution of this issue clarifies the statutes can be reconciled such that physicians are permitted to perform abortions in compliance with Title 36 and not be prosecuted under § 13-3603. We need not therefore remand to the trial court for any action, including a modified injunction. *See Bills v. Ariz. State Bd. of Educ.*, 169 Ariz. 366, 370 (App. 1991).

¶11 "The primary aim of statutory construction is to find and give effect to legislative intent." *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, ¶ 11 (2001). We begin with the plain language of the statutes and must give effect to all provisions. *See Stambaugh v. Killian*, 242 Ariz. 508, ¶ 7 (2017). When statutes relate to the same subject matter, we read them together and consider not only "the literal meaning of the wording" but also "the whole system of related statutes." *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970). We do so "even where the statutes were enacted at different times, and contain no reference one to the other, and it is immaterial that they are found in different chapters of the revised statutes." *Id.* And "when 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." *UNUM Life Ins. Co. of Am.*, 200 Ariz. 327, ¶ 28.

¶12 PPAZ and the PCAO argue that § 13-3603 and the regulatory scheme in Title 36 can be harmonized by allowing licensed physicians to provide abortions under Title 36 and applying § 13-3603 to non-physicians. The PCAO argues in the alternative that "this court should find § 13-3603 to be implicitly repealed in scope so that the entire statutory scheme is given consistent operation."

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

¶13 We agree that the statutes can be reconciled. But for reasons discussed below, we disagree that there is some conflict between § 13-3603 and Title 36 that must result in the repeal of either, implicit or otherwise. See *UNUM Life Ins. Co. of Am.*, 200 Ariz. 327, ¶ 28. The statutes, read together, make clear that physicians are permitted to perform abortions as regulated by Title 36 regardless of § 13-3603. Thus, physicians who perform abortions in compliance with Title 36 are not subject to prosecution under § 13-3603.

¶14 Arizona’s most recent abortion regulation is the 15-week law, which directs that a physician “may not intentionally or knowingly perform, induce or attempt to perform or induce an abortion if the probable gestational age of the unborn human being has been determined to be greater than fifteen weeks” absent “a medical emergency.” § 36-2322(B). Violating that section is a class six felony. § 36-2324(A). Other abortion regulations found in Title 36 restrict abortion of a viable fetus, § 36-2301.01, and restrict the provision of abortion without complying with specific notice and consent requirements, including parental consent in the case of abortions provided to juveniles, §§ 36-2152, 36-2153, 36-2156, 36-2158. There are also numerous reporting requirements. §§ 36-2161 to 36-2164, 36-2322 to 36-2323.

¶15 In contrast, § 13-3603 states in full:

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.⁷

Construed in isolation, § 13-3603 criminalizes most abortions, and its plain language would encompass abortions performed by licensed physicians. But we do not construe statutes in isolation. See *Farley*, 106 Ariz. at 122. In

⁷ A procured “miscarriage” historically had the same common language definition as an “abortion” — that is, any artificial termination of a pregnancy. See *Abortion, Miscarriage*, Black’s Law Dictionary (11th ed. 2019).

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

enacting the 15-week law, 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).

¶16 The 15-week law and other statutes in Title 36 regulate the provision of abortion by licensed physicians, encompassing not only the provision of abortion but ancillary matters. Violations of these various provisions carry not only criminal penalties but other penalties including licensing sanctions and civil liability. *See, e.g.*, §§ 36-2152(I), (J), 36-2158(C), (D), 36-2163(G), (H), 36-2303, 36-2324(A), 36-2325(A). In sum, the legislature has created a complex regulatory scheme to achieve its intent to restrict—but not to eliminate—elective abortions. Reading § 13-3603 to impose criminal liability for physicians providing those restricted abortions would eliminate the elective abortions the legislature merely intended to regulate under Title 36.

¶17 Brnovich agrees the statutes do not conflict but argues physicians may nonetheless be prosecuted under § 13-3603 because it applies to “[a] person,” a term that “undeniably includes licensed physicians.” *See* A.R.S. § 13-105(30) (a “[p]erson” is “a human being”). We reject Brnovich’s reading for three reasons. First, it ignores the unambiguous legislative intent to regulate but not eliminate elective abortions, as we have explained. Second, it creates an irreconcilable conflict between § 13-3603 and Title 36 because it would criminalize conduct permitted by Title 36. Third, it violates due process by promoting arbitrary enforcement. We address the second and third reasons in turn.

¶18 Regarding the second reason, adopting Brnovich’s proposed reading would require us to disregard legislative intent and result in an irreconcilable conflict between § 13-3603 and Title 36. A conflict exists when statutes cannot be read “to give each effect and meaning.” *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, ¶ 24 (2013). Brnovich correctly observes that, when comparing overlapping criminal statutes, we find a conflict only when the elements required to establish guilt under the specific statute are identical to the elements required to establish guilt under the general statute. *State v. Gagnon*, 236 Ariz. 334, ¶ 7 (App. 2014); *see, e.g., State v. Far W. Water & Sewer, Inc.*, 224 Ariz. 173, ¶ 21 (App. 2010); *State v. Sommer*, 155 Ariz. 145, 147 (App. 1987); *State v. Weiner*, 126 Ariz. 454, 456 (App. 1980); *State v. O’Brien*, 123 Ariz. 578, 584 (App. 1979).

¶19 But that analysis is not apt here. We are not evaluating separate statutes prohibiting the same conduct. Instead, we are faced with a statutory scheme that, if read as Brnovich suggests, would criminalize

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

conduct under one statute that our legislature has expressly allowed under another.⁸ As Brnovich acknowledged at oral argument before this court, under his view it would be impossible for a physician to perform an elective abortion in compliance with Title 36 without potentially facing criminal prosecution under § 13-3603. And Brnovich’s reading would effectively render Title 36’s regulation of elective abortion all but meaningless because there would be no legal elective abortions. For example, the statutory provisions requiring the reporting of elective abortions, including abortions for rape and incest, *see* § 36-2161(A)(12)(a), (d), (e), would serve no useful purpose. Nor would there be any continuing relevance to provisions like § 36-2153(A)(2)(b), which requires that the patient seeking an abortion be informed that the “father of the unborn child is liable to assist in the support of the child” except in cases of rape or incest. Instead, we must adopt a reading that gives vitality to all the relevant statutes. *See UNUM Life Ins. Co. of Am.*, 200 Ariz. 327, ¶ 28.

¶20 This leads us to the third reason Brnovich’s interpretation is unsound. If we adopted it, the resulting uncertainty for licensed physicians who provide abortion services would violate due process, which requires that “the law must be sufficiently definite to avoid arbitrary enforcement.” *State v. Schmidt*, 220 Ariz. 563, ¶ 5 (2009). “The touchstone of due process is protection of the individual against arbitrary action of government.” *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Brnovich’s interpretation would not merely invite arbitrary enforcement, it would practically demand it. When interpreting statutes, we assume our legislature has enacted them to avoid

⁸We reject Brnovich’s claim that the 15-week law cannot be read to preclude the prosecution of physicians under § 13-3603 because the 15-week law does not “allow” abortions. This argument is grounded in Brnovich’s refusal to consider the entire statutory scheme as a whole, but we are required to consider all relevant statutes. *See Farley*, 106 Ariz. at 122. The 15-week law prohibits abortions except those it allows—that is, it permits a licensed physician to perform abortions in emergency situations and elective abortions if the physician has determined the fetus’s gestational age is fifteen weeks or less and otherwise has complied with Title 36. § 36-2322(A), (B). We also reject Brnovich’s related contention that our reading somehow runs afoul of the legislature’s statement that the 15-week law does not create a right to abortion or “make lawful an abortion that is currently unlawful.” 2022 Ariz. Sess. Laws, ch. 105, § 2(1). At the time the legislature enacted the 15-week law, § 13-3603 was unenforceable. Elective abortions were, at that time, permitted in compliance with Title 36, as they are now.

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

such unconstitutional results. *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 272 (1994) (court construes statutes to avoid rendering them unconstitutional).

¶21 According to Brnovich, the conflict his interpretation creates is resolved because prosecutors have discretion whether and how to charge those who violate criminal statutes. But under this interpretation, physicians performing elective abortions would not know if their conduct would be criminally prosecuted under § 13-3603 or if they could avoid criminal liability by complying with Title 36. Even if a specific county attorney and attorney general had publicly promised they would not charge physicians under § 13-3603, a physician would still be at risk considering the statute of limitations for felonies in Arizona exceeds the term of elected county attorneys and the attorney general. *See* Ariz. Const. art. V, § 1, art. XII, § 3; A.R.S. § 13-107(B).

¶22 Brnovich further suggests that we are essentially imposing a partial implied repeal of § 13-3603 by concluding the legislature intended to permit physicians to perform elective abortions under the 15-week law. Under the doctrine of implied repeal, where it appears by reason of repugnancy, or inconsistency, that two conflicting statutes cannot operate contemporaneously, the “more recent, specific statute governs over [an] older, more general statute.” *UNUM Life Ins. Co. of Am.*, 200 Ariz. 327, ¶ 29 (alteration in *UNUM*) (quoting *Lemons v. Superior Court*, 141 Ariz. 502, 505 (1984)). Not only is the doctrine of implied repeal disfavored, *id.* ¶ 28, our legislature has specifically instructed us to construe the 15-week law in a manner that does not “[r]epeal, by implication or otherwise, section 13-3603, Arizona Revised Statutes, or any other applicable state law regulating or restricting abortion,” 2022 Ariz. Sess. Laws, ch. 105, § 2(2).

¶23 But as we have already explained, we are not imposing an implied repeal here. The doctrine of implied repeal requires as a predicate that any apparent conflict between the statutes cannot be reconciled to give “force and meaning to all statutes involved.” *UNUM Life Ins. Co. of Am.*, 200 Ariz. 327, ¶ 28. Here, our numerous statutes regulating abortion can be readily reconciled in conformity with our legislature’s express intent that we do so. The 15-week law permits physicians to perform abortions and clearly delineates the penalties for doing so in violation of that statutory scheme. This is consistent with the exception originally created by the legislature in § 13-3603 for abortions performed by licensed physicians to save the life of the mother. Any other person who intentionally performs an abortion is subject to prosecution under § 13-3603. We thus need not imply the legislature’s intent—it stated it directly.

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

¶24 Finally, our legislature conspicuously avoided statutory language stating that § 13-3603 should govern irrespective of other law should *Roe* be overturned. For example, in enacting its own 15-week law, the Mississippi legislature included clauses stating that: “An abortion that complies with this section, but violates any other state law, is unlawful. An abortion that complies with another state law, but violates this section is unlawful.” Miss. Code Ann. § 41-41-191(8) (2018). Arizona’s 15-week law contains no such clause despite otherwise mirroring Mississippi’s law, almost word for word, in all other respects. And our legislature has enacted comparable “trigger” clauses in other statutes. *See, e.g.*, 1999 Ariz. Sess. Laws, ch. 311, §§ 12, 13 (calling for varying definition of “abortion clinic” depending on constitutionality of definition). The legislature’s decision to forgo a similar provision here further reflects its intent that licensed physicians not face criminal prosecution under § 13-3603 for providing certain elective abortions.

Attorney Fees and Costs

¶25 PPAZ requests an award of attorney fees and costs under A.R.S. §§ 12-341, 12-342, 12-348, “and the private attorney general doctrine” but provides no further explanation supporting its entitlement to attorney fees. Accordingly, in our discretion, we deny PPAZ’s request for attorney fees, but, as the prevailing party, PPAZ is entitled to its costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* § 12-341.

Disposition

¶26 Licensed physicians who perform abortions in compliance with Title 36 are not subject to prosecution under § 13-3603. We affirm in part and reverse in part the trial court’s order as modified by this opinion.

E C K E R S T R O M, Presiding Judge, specially concurring:

¶27 In lifting the injunction and giving effect to § 13-3603, a law originally enacted over a century ago, we must necessarily address how that statute integrates with Arizona’s subsequently enacted statutes regulating abortion. In doing so, we strictly follow our legislature’s direction on how its more contemporary laws should interact with § 13-3603. To the extent detailed legislative instruction is not provided, we apply settled canons of construction for integrating new statutes with old.

¶28 Here, the legislature has expressly directed that we read our subsequent statutes regulating abortion in harmony with § 13-3603. Its most recent bill, the “15-week law,” specifically instructs that neither

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

Arizona’s original law, nor its host of more modern regulations of abortion, is “[r]epeal[ed], by implication or otherwise.” 2022 Ariz. Sess. Laws, ch. 105, § 2. This conforms with our threshold canon, well understood by our legislature, for how we presumptively integrate newer statutes into an existing statutory framework: we read new statutes in harmony with old ones. *Fleming v. State Dep’t of Pub. Safety*, 237 Ariz. 414, ¶ 12 (2015) (courts must construe separate statutory provisions relating to same subject matter “together as though they constitute one law”); *UNUM Life Ins. Co. of Am.*, 200 Ariz. 327, ¶ 28; see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) (“[L]aws dealing with the same subject . . . should if possible be interpreted harmoniously.”).

¶29 At the same time, we recognize that our legislature fully intends its new statutes to alter the pre-existing legal landscape; otherwise, it would not have bothered to pass them. Therefore, when conducting the harmonization process, we understand new laws, to the extent possible, as amending, amplifying, or calibrating pre-existing statutes without supplanting them. See, e.g., *State v. Cassius*, 110 Ariz. 485, 487 (1974) (when later statute expresses more specific intent than more general existing statutes, new statute is “taken as an exception to the general intent, and both will stand”); *O’Brien*, 123 Ariz. at 583 (legislatures presumed to enact statutes compatible with existing legislation: “where the [later] specific statute is narrower, the [older] general one is not repealed”).

¶30 In this case, harmonizing all of our state’s abortion statutes is not a difficult task. As the majority’s analysis demonstrates, our contemporary laws relating to abortion can be read, side by side, with our original one, without depriving any of continuing legislative logic or vitality.

¶31 Arizona’s original statute outlawing most abortions, § 13-3603, itself contains an exception permitting abortions when necessary to save the life of the mother. Arizona’s more specific subsequent laws, including the most recent 15-week law, may be read in harmony with that provision, by understanding them as merely adding further exceptions to the general prohibition on abortion. See *Cassius*, 110 Ariz. at 487 (subsequent legislation may carve out exceptions to earlier, more general statute without supplanting it). Under this construction, our contemporary statutes permit physicians to perform elective abortions up to fifteen weeks but only in conformity with a host of exacting regulations. Our original law continues to outlaw abortions under all circumstances not permitted by that subsequent legislation. This construction results in a coherent and easily applied statutory scheme. It is the only construction that comports with the

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

legislature's direction that each of the statutes regulating abortion continue to have force and effect.

¶32 Brnovich objects that this construction markedly changes the ultimate application of § 13-3603 from its original effect in 1912. But we must presume legislatures know, and fully intend, that all new laws will, as a practical matter, change the pre-existing statutory landscape in some respect—even when the new legislation, as here, expressly directs us that pre-existing laws have not been repealed. As the above-cited authority implicitly instructs, we assume non-repeal language in current legislation merely directs us to consider that legislation as amending or calibrating, rather than replacing, the non-repealed statute. It would be nonsensical to do what Brnovich urges: to nullify, as a practical matter, the very legislation that contains the non-repeal clause in favor of the older, non-repealed statute. *See id.* (“The presumption is that the legislature did not intend to do a futile thing by including in a statute a provision which is nonoperative or invalid.”).

¶33 The majority explains why Brnovich's own suggestion for how we should harmonize the old and new statutes—by empowering prosecutorial discretion—would necessarily create unconstitutional conflict between the statutes in application. But, perhaps more importantly, Brnovich's remedy goes unmentioned in any statutory text provided by the legislature. Had our legislature intended the lawfulness of elective abortion to vary depending on the county-by-county discretion of local law enforcement officials, county attorneys, and the state-wide discretion of the attorney general, it would have specified such a complicated and extraordinary approach in direct, unambiguous language. Instead, in the 15-week law, our legislature sets forth a detailed regulatory structure outlawing elective abortions after fifteen weeks of gestational age. It articulates requirements for ascertaining and reporting the gestational age of a fetus and medical circumstances under which abortions may be performed after fifteen weeks. § 36-2322. It sets forth specific penalties for a person violating its provisions. §§ 36-2324(A), 36-2325. Far from providing law enforcement agencies broad discretion on prosecuting elective abortions, our most recent statute gives detailed instruction to those officials on when physicians may, and may not, be criminally prosecuted or civilly sanctioned for performing an abortion. §§ 36-2322, 36-2324(A), 36-2326, 36-2325.

¶34 In sum, I join fully with the majority's reasoning because it best complies with our legislature's express instructions that we give all existing abortion regulations vitality: that we impliedly repeal no

PLANNED PARENTHOOD OF ARIZ. v. BRNOVICH
Opinion of the Court

provision, old or new. It also executes our legislature's expectation that, to the extent its express instructions do not settle all disputes in construction, we will conduct the obligatory harmonization process in conformity with our settled canons for doing so. By this process, we show our strictest fidelity to legislative intent.