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

PLAINTIFF-APPELLANT PLANNED PARENTHOOD ARIZONA, INC.'S RESPONSE TO INTERVENOR-APPELLEE ERIC HAZELRIGG, M.D.'S PETITION FOR REVIEW

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I. INTRODUCTION

This Court should deny Eric Hazelrigg, M.D.'s Petition for Review because it fails to raise any issue worthy of this Court's attention. The court of appeals issued a narrow decision that properly applied this Court's precedent to interpret and reconcile Arizona's abortion statutes. Those statutes include the territorial-era near-total abortion ban and dozens of other more recent laws regulating – but not eliminating – the provision of abortion under Title 36, such as the law passed just last year allowing for abortions up to 15 weeks (the "15-week Law"). The unanimous opinion below does nothing more than apply long-standing principles of statutory construction requiring courts to give as much effect as possible to all these duly enacted statutes while providing reasonable notice of what the law forbids.

Dr. Hazelrigg says this Court should accept review because the court of appeals committed "critical error" by harmonizing Arizona's abortion statutes, which he claims can coexist without being reconciled by the court. But that argument turns on both a fundamental misreading of Title 36 (including the 15-week Law) and a disregard of this Court's well-established precedent on statutory construction and harmonization.

It also ignores the post-*Dobbs* confusion shared by government officials, healthcare providers, and the healthcare-seeking public as to which of Arizona's abortion laws controlled. After *Dobbs*, multiple prosecutors acknowledged that the laws were unclear, while former Governor Ducey, who signed the 15-week Law, maintained that the 15-week Law was "the law of the land" in Arizona. The court of appeals' decision ably – and correctly – resolved the untenable chaos.

Contrary to Dr. Hazelrigg's sensational claims, the opinion below neither crippled Arizona's criminal code nor denied the will of the people. Rather, the decision gives effect to as many laws as possible consistent with the Legislature's express intent. Because the court of appeals rightly harmonized these statutes, and because Dr. Hazelrigg provides no other reason justifying this Court's review,[1] this Court should deny his Petition. If Dr. Hazelrigg believes it is good policy to subject licensed physicians to criminal prosecution for performing any abortion, even those performed before 15 weeks, he may seek to achieve such policy through the legislative process and not by judicial fiat.

[1] The issue presented in Dr. Hazelrigg's Petition is controlled by existing precedent, does not involve conflicting lower court decisions, and does not otherwise merit this Court's review. *See* Ariz. R. Civ. App. P. 23(d)(3).

II. ISSUE PRESENTED FOR REVIEW

Should this Court accept review of the opinion below when it merely applied long-standing principles of statutory construction to interpret A.R.S. § 13-3603 and certain statutes regulating abortion in Title 36 to give effect and meaning to all the relevant statutes and provide reasonable notice as to what the law prohibits?

III. BACKGROUND

A. Territorial Era Abortion Ban

In 1864, the First Arizona Territorial Legislature enacted the "Howell Code" as a basis for the territory's law, which included a ban on providing abortions that is substantially similar to A.R.S. § 13-3603. ROA 22 at 8. A.R.S. § 13-3603 effectively bans the provision of abortion, except when necessary to save a pregnant person's life. It has no exceptions for rape, incest, or threats to the patient's health. A.R.S. § 13-3603 controlled from its passage until enjoined by a 1973 order of the court of appeals.

B. *Planned Parenthood Center of Tucson v. Nelson*

In 1971, a predecessor-in-interest to Planned Parenthood Arizona, Inc. ("PPAZ") and several individual physicians challenged A.R.S. §§ 13-3603, -3604, and -3605 under the Arizona and United States

Constitutions. After a bench trial, the court entered a declaratory judgment that the laws violated federal and state law and permanently enjoined their enforcement. *See* Appendix to Intervenor-Appellee Eric Hazelrigg, M.D.'s Petition for Review ("App.") at 33–35. The court of appeals reversed. *Id.* at 19–20. Ten days later, the U.S. Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), after which the court of appeals reversed its original holding and declared that "the statutes in question are unconstitutional as to all." *Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. App. 142, 152 (1973).

C. Subsequent Regulation of Abortion

In the following five decades, the Arizona Legislature enacted a detailed, comprehensive statutory regime that recognizes and regulates abortion as a lawful medical procedure that can be provided by licensed physicians. *See* PPAZ Opening Brief, Oct. 25, 2022 ("PPAZ OB") at 5–7 nn. 4, 5 (listing abortion regulations in Title 36).

In the summer of 2021, the state of Mississippi asked the U.S. Supreme Court not only to uphold its ban on abortion at 15 weeks of pregnancy, but also to overrule *Roe*. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The Supreme Court heard arguments in

December 2021, with questioning focused largely on *Roe*. Yet in early 2022, the Arizona Legislature passed additional legislation regulating abortion, but did not enact a "trigger law" like other states,[2] which would ban abortion upon *Roe* being overturned. Instead, the Legislature enacted S.B. 1164, which permits abortions only where a physician makes a determination of the probable gestational age of the pregnancy using standard medical practices/techniques and documents it in the patient's chart, and only if the gestational age is determined not greater than fifteen weeks LMP.[3] The law provides a medical emergency exception and requires a report to be filed with the Department of Health Services if the gestational age determination is greater than 15 weeks. A.R.S. § 36-2322; S.B. 1164, 55th Leg., 2nd Reg. Sess. (Ariz. 2022) (the "15-week Law"). Then-Governor Ducey announced after signing S.B. 1164 into law in April 2022 that "the law of the land today in Arizona is

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[2] Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans – Here's What Happens When Roe Is Overturned*, Guttmacher Institute (June 6, 2022), https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned.

[3] Pregnancy is commonly measured from the first day of a pregnant person's last menstrual period or LMP. A full-term pregnancy is approximately 40 weeks LMP.

the 15-weeks' law . . . and that will remain the law" even if the Supreme Court overrules *Roe*.[4] Of course, in June 2022, that came to pass and *Roe* was overruled. *Dobbs*, 142 S. Ct. at 2284. Soon after, then-Attorney General Brnovich released a statement saying "[t]he Arizona Legislature passed an identical law to the one upheld in *Dobbs*, which will take effect in approximately 90 days." ROA 21 at 6 n. 7.

D. The Trial Court's Ruling and Aftermath

Nearly three weeks after *Dobbs*, AG Brnovich reversed course and moved to vacate the 1973 injunction against § 13-3603. App. at 1–16. He also moved to substitute Dr. Hazelrigg in place of Cliffton E. Bloom, who entered the case in 1971 as "intervenor and Guardian Ad Litem of unborn infants" but died in 2014. PPAZ opposed both motions.

The trial court granted the substitution, App. at 72–73, and the motion to lift the 1973 injunction in its entirety as to § 13-3603, *id.* at 74–75. The trial court rejected PPAZ's argument that it had a duty to harmonize § 13-3603 with the dozens of laws allowing for and regulating abortion enacted by the Legislature after 1973. *Id.*

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[4] Howard Fischer, *Arizona Gov. Ducey: Abortion Illegal After 15 Weeks*, KAWC (Apr. 24, 2022), https://www.kawc.org/news/2022-04-24/arizona-gov-ducey-abortion-illegal-after-15-weeks.

Following the trial court's decision, with A.R.S. §§ 13-3603, 36-2322 and many other laws in Title 36 that allow for abortion all in effect (*e.g.*, A.R.S. § 36-2160 ("An abortion-inducing drug may be provided only by a qualified physician")), uncertainty ensued. Abortion providers stopped providing abortions that are permissible under the clear language of the 15-week Law, and Arizonans were denied medically necessary and life-saving care. PPAZ OB at 10–12. Statements from government officials fueled the confusion, ROA 21 at 6–7, and county prosecutors including Rachel Mitchell (Maricopa) and Laura Conover (Pima) stated they did not know which law controlled, PPAZ OB at 12–14. Then-Governor Ducey maintained that the recently enacted 15-week Law, which took effect on September 24, would be "the law of the land, despite [the trial court's] ruling."[5]

E. PPAZ's Successful Appeal

The court of appeals stayed the trial court's order in October 2022, after which PPAZ and other providers resumed providing abortions

[5] Mary Kekatos & Libby Cathey, *Arizona Judge Upholds Century-old Abortion Ban*, ABC News (Sept. 23, 2022), https://abcnews.go.com/US/arizona-judge-upholds-century-abortion-ban/story?id=90375448.

through 15 weeks LMP.[6] On December 30, 2022, the court of appeals affirmed in part and reversed in part.

The court of appeals concluded it was proper to consider the changed "legal landscape" following the 1973 injunction, App. at 81–82 ¶ 9, and employed long-standing principles of statutory construction to interpret and reconcile § 13-3603 and Title 36, *id.* at 82–84 ¶¶ 11–16. The court found that Title 36 was "inten[ded] to restrict – but not to eliminate" abortions provided by physicians, *id.* at 83–84 ¶¶ 15–16, and therefore § 13-3603 cannot be read to impose criminal liability for physicians providing abortions authorized under Title 36, *id.* at 84 ¶ 16. As the court emphasized, § 13-3603 and Title 36 are not "separate statutes prohibiting the same conduct," but rather are part of the same "statutory scheme" that, if read as AG Brnovich and Dr. Hazelrigg suggested, "would criminalize conduct under one statute that our legislature has expressly allowed under another" and would "render Title

[6] Around the same time, the State – represented by AG Brnovich – agreed in separate litigation raising similar issues that the State will not enforce § 13-3603 "in any manner against any person" until a final mandate issues in this case. Order Granting Stipulation and Joint Motion for Stay, *Isaacson v. Arizona*, No. CV-2022-013091 (Ariz. Sup. Ct. Oct. 25, 2022), https://cv-2022-013091-stay-order.tiiny.site/.

36's regulation of elective abortion all but meaningless." *Id.* at 84–85 ¶ 19. The court was therefore required to reconcile the laws and held that "[l]icensed physicians who perform abortions in compliance with Title 36 are not subject to prosecution under § 13-3603." *Id.* at 85–87 ¶¶ 20, 24, 26. Dr. Hazelrigg petitioned this Court for review.

IV. REASONS THE PETITION SHOULD BE DENIED

Dr. Hazelrigg argues that this Court must "correct the critical error" made by the court of appeals, specifically its "forbidden repeal" of § 13-3603. Pet. at 11, 14. But there was no "critical error" in the court of appeals decision, which properly applied settled Arizona law. Rather, it is Dr. Hazelrigg who asks this Court to effectively repeal dozens of Arizona statutes, including the more recently enacted 15-week Law, and give effect only to one: § 13-3603. Dr. Hazelrigg's Petition simply rehashes arguments rejected by the court of appeals. In considering these issues, the court of appeals properly applied settled Arizona law to

construe and reconcile Arizona's abortion laws. There is thus no "critical error" for this Court to correct.

A. The court of appeals merely held that all Arizona statutes must be given effect.

Dr. Hazelrigg's contention that the court of appeals engaged in a "forbidden repeal" of § 13-3603, Pet. at 11, is simply wrong. The court of appeals dutifully applied well-settled principles of statutory construction to issue a narrow ruling that gives effect and meaning to all of Arizona's laws governing abortion.

In line with this Court's precedent, the court of appeals considered the plain language of the relevant laws, the entire statutory scheme as a whole, and the express legislative intent. App. at 82–87, ¶¶ 11, 15, 16, 19, 23, 24. The court found that the plain language of § 13-3603 "encompass[es] abortions performed by licensed physicians," whereas Title 36, including specifically the 15-week Law, was "inten[ded] to restrict – but not to eliminate" abortions provided by physicians. *Id.* at 83–84 ¶¶ 15–16. Thus, "[r]eading § 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," *id.* at 84 ¶ 16, and "render Title 36's regulation of elective abortion all but meaningless," *id.* at 84–85 ¶ 19.

The court of appeals recognized that such a result would be improper because it would ignore legislative intent and because statutes are not construed in isolation. *Id.* at 83 ¶ 15. The court of appeals gave Title 36 and § 13-3603 their only logical interpretation and "adopt[ed] a reading that gives vitality to all the relevant statutes." *Id.* at 85 ¶ 19; *see UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 333 ¶ 28 (2001) ("[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.").

No matter what Dr. Hazelrigg says [*e.g.* Pet. at 7], the court did not "repeal" § 13-3603. *See* App. at 86 ¶ 22 (recognizing that "the doctrine of implied repeal [is] disfavored"). Rather, the court of appeals determined no repeal was required because the apparent conflict between § 13-3603 and Title 36 could be reconciled. *Id.* at 83 ¶ 13. The court of appeals thus did not "overstep[]," Pet. at 13: it harmonized and gave as much effect as possible to all the Legislature's enactments relating to abortion including § 13-3603, which, as the court held, still allows for prosecution of any

person besides a licensed physician who performs an abortion. *See* App. at 86 ¶ 23; *id.* at 88–89 ¶ 31 (Eckerstrom, J., specially concurring) ("It is the only construction that comports with the legislature's direction that each of the statutes regulating abortion continue to have force and effect.").

B. The court of appeals did not manufacture a conflict against legislative intent.

Next, Dr. Hazelrigg leans heavily on his claim that the court of appeals "manufactured [a] conflict against legislative intent," Pet. at 13, because Title 36 and § 13-3603 "only *forbid* abortion," *id.* at 7. *See also id.* at 8 ("multiple restrictions do not make a contradiction, much less allow a doubly-condemned act"). But the court of appeals' harmonization aligns perfectly with legislative intent because, as the court explained, the more recent § 36-2322 (the 15-week Law), specifically subsections (A) and (B), "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)." App. at 85 ¶ 19 n. 8 (emphasis added). Dr. Hazelrigg does not explain how the court of appeals decision could "manufacture[]"

anything when it tracks the statute's plain language.[7] *See* § 36-2322(A) ("[e]xcept in a medical emergency, a physician ***may not*** perform, induce or attempt to perform or induce an abortion ***unless*** the physician or the referring physician has first made a determination of the probable gestational age . . . and documented that gestational age") (emphasis added); (B) (prohibiting an abortion "if the probable gestational age . . . has been determined to be greater than fifteen weeks").[8]

Dr. Hazelrigg further claims the court of appeals "relied on an ambiguous line in SB 1164's *history* to upend Section 13-3603." Pet. at 11 (emphasis in original). Not so. It was not the "history" of S.B. 1164 that the court pointed to as *further* evidence of the Legislature's intent. The court instead looked at the text in S.B. 1164 itself titled "Legislative intent," in which the Legislature *un*ambiguously stated it sought to

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[7] Not only does Dr. Hazelrigg misread the 15-week Law as only forbidding abortion, he conflates the exception in § 13-3603 to "save [a patient's] life" with the broader (and later enacted) exception in Title 36 for "medical emergencies." Pet. at 10. He then proposes that physicians endeavoring to "save [a patient's] life" in compliance with § 13-3603 would be required to wait 24-hours to administer care in compliance with § 36-2153, *id.* – a decidedly absurd result. *See* PPAZ OB at 38–41.

[8] *See* PPAZ Reply Brief, Nov. 17, 2022 at 19–23 (explaining how the terms "may not" and "unless" demonstrate legislative intent to permit physicians to perform an abortion under certain circumstances).

"restrict" (not eliminate) abortions "to the period up to fifteen weeks of gestation." App. at 83–84 ¶ 15. Dr. Hazelrigg also points to the Legislature's statement that the 15-week Law does not "[r]epeal . . . section 13-3603," Pet. at 13, but the Legislature's *full* statement was that it does not "[r]epeal, by implication or otherwise, section 13-3603, Arizona Revised Statutes, *or any other applicable state law regulating or restricting abortion*." *See* S.B. 1164 section 2(2) (emphasis added). As the court of appeals recognized, such language is plainly inclusive of Title 36 and further evidences the Legislature's intent to preserve the ability to have all its abortion laws given effect. *See* App. at 86–88 ¶¶ 22, 23, 28.

The notion that the *only* plausible reading of Title 36, and of the 15-week Law specifically, is that it strictly forbids abortion, Pet. at 7–8, cannot be squared with the reality of numerous public officials of both major political parties either publicly disagreeing or, at the very least, recognizing the need for harmonization of those statutes with § 13-3603. Former Governor Ducey, who signed the 15-week Law, repeatedly maintained that the 15-week Law controlled over § 13-3603. *See supra* Section III.D. The Maricopa County Attorney, on the other hand, stated prosecutors did not know which abortion law controlled. *Id.* Even former

AG Brnovich acknowledged the lack of clarity and went so far as to call on Governor Ducey to file a brief in this case to clarify that § 13-3603 superseded the 15-week Law or call a special session for the Legislature to resolve the issue.[9] Thus, far from manufacturing a conflict, the court of appeals' harmonization provides a coherent statutory scheme that can be understood by all.

Finally, Dr. Hazelrigg argues the "identical elements" test shows that § 13-3603 and the 15-week Law do not conflict. Pet. at 7–10. But as the court of appeals stated, that test is irrelevant because these statutes do not "prohibit[] the same conduct." App. at 84–85 ¶ 19.[10] Instead, if read as Dr. Hazelrigg urges, Arizona law "would criminalize conduct under one statute that our legislature has expressly allowed under another." *Id.* The identical elements test does not apply here.

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[9] Letter from Brunn (Beau) Roysden, Solicitor Gen., Ariz. Att'y Gen.'s Office, to Anni Foster, Gen. Counsel, Ariz. Gov.'s Office (Sept. 28, 2022), https://www.azag.gov/sites/default/files/2022-09/Ltr%20to%20A%20Foster%20re%20SB1164%20FINAL.pdf.

[10] Even if the "identical elements test" applied, it is a presumption that can be rebutted by "clear indication of contrary legislative intent." *State v. Carter*, 249 Ariz. 312, 317 ¶ 20 (2020) (citation omitted). The court of appeals correctly analyzed legislative intent to reject Dr. Hazelrigg's analysis.

C. The court of appeals did not err in concluding that harmonization was necessary to avoid arbitrary enforcement of the laws.

"[S]tatutes must be sufficiently clear and concrete that they provide 'person[s] of ordinary intelligence a reasonable opportunity to know what is prohibited' and contain explicit standards of application so as to prevent arbitrary and discriminatory enforcement." *Martin v. Reinstein*, 195 Ariz. 293, 317 ¶ 79 (App. 1999) (citation omitted). Applying these principles, the court of appeals correctly held that the relief sought by Dr. Hazelrigg and AG Brnovich – to let all of Arizona's abortion laws stand without harmonization and allow for prosecutors to exercise discretion – would cause uncertainty for licensed physicians who provide abortions and "would not merely invite arbitrary enforcement, [but] would practically demand it." App. at 85–86 ¶ 20. Indeed, such an interpretation would be, as the concurring judge below noted, "extraordinary." *Id.* at 89 ¶ 33 (J. Eckerstrom, specially concurring). That is because it would mean the Legislature intended – but never said – that "the lawfulness of elective abortion [should] vary depending on the county-by-county discretion of local law enforcement officials, county attorneys, and the state-wide discretion of the attorney general." *Id.*

Finally, Dr. Hazelrigg's dramatic warnings about the alleged consequences of the court of appeals' decision are unwarranted and darkly ironic. *See* Pet. at 2 ("many Arizona criminal laws would crumble"); *id.* at 15 (the court of appeals' reasoning will "cripple Arizona's criminal code and give the judiciary a blank check to overrule legislative policy direction"). But the sky is hardly falling. As explained above, the court of appeals applied well-settled principles of statutory construction to give effect and meaning to as many statutes as possible. And it is Dr. Hazelrigg who seeks an undemocratic outcome: he wants this Court to overturn the court of appeals' well-reasoned decision to "crumble" dozens of laws enacted over the past five decades, including a law enacted *last year*, and give precedence to one that was enacted *over one hundred years ago*. Nothing justifies this extraordinary request.

V. CONCLUSION

For all these reasons, the Court should deny Dr. Hazelrigg's Petition for Review.

RESPECTFULLY SUBMITTED this 1st day of May, 2023.

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