ARIZONA SUPREME COURT

PLANNED PARENTHOOD ARIZONA, INC., et al., Plaintiffs/Appellants, v. KRISTIN K. 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.	No. CV-23-0005-PR Court of Appeals Division Two No. 2CA-CV-2022-0116 Pima County Superior Court No. C127867

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT PLANNED PARENTHOOD ARIZONA, INC.

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Introduction

One morning around 7:00 AM, a doctor arrives at a Phoenix hospital for her first day of work. The parking lot is full, but near the hospital entrance is a street lined with poles bearing two signs:

NO PARKING **EMERGENCY VEHICLES ONLY**  Phoenix Ordinance No. 123 (1977)	**NO PARKING** **PHYSICIANS (FROM 6:00 AM – 6:00 PM) OR EMERGENCY VEHICLES ONLY**  Phoenix Ordinance No. 456 (2022)

The doctor is confused; can she park on this street? She's not driving an emergency vehicle, but she is a physician (with a waiting room full of patients she's supposed to see that day). Surely there must be a mistake. Going right to the source, the doctor pulls up the two ordinances only to find that both are still on the books:

Ordinance No. 123 (adopted 1977)	Ordinance No. 456 (adopted 2022)
A person may not park a motorized vehicle of any kind on any public roadway located within 500 feet of a hospital unless they are operating an emergency vehicle. A person who violates this ordinance commits a class 1 misdemeanor.	A person may not park a motorized vehicle of any kind on any public roadway located within 500 feet of a hospital unless they are (1) operating an emergency vehicle or (2) a physician employed by the hospital parked there between 6:00 AM and 6:00 PM. A person who violates this ordinance commits a class 3 misdemeanor.

Confronted with an old ordinance that prohibits the doctor from parking on this street and a more recent ordinance that allows her to, what is the doctor to do? And if the doctor parks on the street and the Phoenix Police Department then cites her under Ordinance 123, should the court convict the doctor or dismiss the case?

This Court's command when laws like this appear to conflict is clear: "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. v. Craig*, 200 Ariz. 327, 333 ¶ 28 (2001). Relatedly, "[w]hen there is conflict between two statutes, the more recent, specific statute governs over the older, more general statute." *State v. Ariz. Bd. of Regents*, 253 Ariz. 6, 13 ¶ 29 (2022) (cleaned up). And due process requires that statutes "provide fair warning of criminal conduct" and "clear standards to law enforcement to avoid arbitrary or discriminatory enforcement." *State v. Burbey*, 243 Ariz. 145, 149 ¶ 15 (2017).

Applying these longstanding principles of statutory construction, the Phoenix Municipal Court should dismiss any case against the doctor to give meaning to the newer ordinance that authorized her to park where she did. That result doesn't repeal the old ordinance; had our

protagonist been the hospital's general counsel instead of a doctor, or had the doctor tried to park there after 6:00 PM, the State could rightly obtain a conviction under either ordinance. In other words, the ordinances can – as this Court requires "whenever possible" – be harmonized.

The Intervenors' Petition for Review asks the same question, implicates the same principles of law, and requires the same result. But far from the banal context of parking regulations, it does so through a remarkable request that this Court ignore the Legislature's specific allowance of physician-provided abortion through 15 weeks LMP (A.R.S. § 36-2322) ("15-Week Law") and instead allow the unfettered enforcement of a near-total abortion ban first enacted before statehood (A.R.S. § 13-3603) ("Territorial Ban"). For physicians and those seeking abortion care in Arizona, the stakes couldn't be higher. Both are entitled to rely on the plain language of the 15-Week Law to provide and access necessary healthcare services when the Legislature never signaled any intent to repeal that law if the United States Supreme Court were to overturn *Roe v. Wade*, 410 U.S. 113 (1973).

The opinion below rightly rejected Intervenors' sweeping argument that *Roe*'s demise effected the repeal of scores of statutes regulating

abortion in Arizona, including the 15-Week Law. And reading the Territorial Ban and the 15-Week Law as Intervenors suggest "would criminalize conduct under one statute that our legislature has expressly allowed under another" and "render Title 36's regulation of elective abortion all but meaningless." *Planned Parenthood Ariz., Inc. v. Brnovich* ("*PPAZ*"), 524 P.3d 262, 267 ¶ 19 (App. 2022).

Every canon of statutory construction weighs against Intervenors' extreme position. They thus essentially ask this Court to apply different standards because they oppose abortion rights. This Court should decline the invitation to create special interpretive rules that apply only to statutes regulating abortion, affirm the opinion below, and end the looming uncertainty over the state of Arizona law on abortion.

Argument

As the court of appeals held, there is obvious tension between an old statute that generally criminalizes certain conduct and a newer statute that specifically authorizes it if a person meets particular conditions. And absent clear legislative intent that an external event (such as the U.S. Supreme Court overruling longstanding precedent)

invalidates one of those statutes, the court of appeals correctly harmonized them and gave meaning to each.

According to Intervenors [at 7], however, the court of appeals' holding that physicians cannot be prosecuted under the Territorial Ban because of Title 36's comprehensive regulation of abortion "defies the laws' text, legislative intent, and separation of powers" and "unnecessarily creates a forbidden repeal" of the Territorial Ban. None of Intervenors' arguments convince. And though no one doubts Intervenors' opposition to pregnant Arizonans accessing abortion care, their policy preferences must be addressed by the political branches, not this Court.

I. The Court of Appeals Correctly Harmonized the Territorial Ban and Title 36.

A. There is obvious tension between the Territorial Ban and Title 36, including the 15-Week Law.

Intervenors' claim [at 7] that the court of appeals' decision "defies the . . . text" of the Territorial Ban and the 15-Week Law must fail. According to them, there's no possible conflict between these two statutes:

A.R.S. § 13-3603	A.R.S. § 36-2322
A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life, shall be punished by imprisonment in the state prison for not less than two years nor more than five years	A. Except 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 of the unborn human being[..] B. Except in a medical emergency, 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.

As Intervenors argue [at 6-7], the Territorial Ban, considered in isolation, applies to physicians and "criminalizes most abortions." *PPAZ*, 524 P.2d at 266–67 ¶ 15. That is, it is unlawful for any person to help "procure" a miscarriage "unless it is necessary to save" the pregnant person's life. A.R.S. § 13-3603 (emphasis added). All would agree that the Territorial Ban's "unless" clause would immunize a person falling under its terms from conviction.

In contrast, the 15-Week Law provides that "[e]xcept in a medical emergency, a physician may not perform . . . an abortion unless the

physician or the referring physician has first made a determination of the probable gestational age" of the fetus. A.R.S. § 36-2322(A) (emphasis added). It then criminalizes certain abortion-related acts only if "the probable gestational age of the unborn human being has been determined to be greater than fifteen weeks." A.R.S. § 36-2322(B). Read together, all should agree that the 15-Week Law's "unless" clause immunizes a physician who satisfies its terms from criminal conviction.

Under the plain language of these two statutes, "we are faced with a statutory scheme that, if read as [Intervenors] suggest[], would criminalize conduct under one statute that our legislature has expressly allowed under another." *PPAZ*, 524 P.3d at 267 ¶ 19. Intervenors disagree, claiming [at 7–8] there's no tension because these statutes "only *forbid* abortion," and that neither the Territorial Ban nor any statute in Title 36 "expressly allows abortion."

But that's just flat-out wrong. Most laws are phrased in the negative and implicitly "authorize" conduct not specifically proscribed. A statute need not, for example, expressly provide drivers with a right to drive below the speed limit; instead, it need only declare exceeding that limit unlawful. Similarly, a statute need not give pedestrians the

affirmative right to cross the street in a crosswalk; it need only say that it's a crime to cross a street anywhere else.

Beyond that, the 15-Week Law – like the Territorial Ban before it – specifically "prohibits abortions except those it allows," *PPAZ*, 524 P.3d at 267 n.8 (emphasis added). And Intervenors have never contested that the Territorial Ban "allows" or "authorizes" an abortion to save the life of a pregnant person.[1] The suggestion that the 15-Week Law should be read any differently finds no support.

The 15-Week Law's "may not . . . unless" structure is also a common legislative framing used to reflect the allowance of certain otherwise-proscribed behavior if certain conditions are met. This makes perfect sense; "unless" is a conjunction meaning "except on the condition that" or "without the accompanying circumstance or condition that." *Unless*, https://www.merriam-webster.com/dictionary/unless (last visited Sep.

[1] Dr. Hazelrigg conceded the point below. *See* Resp. in Opp'n to Appellants' Emergency Mot. for Stay Pending Appeal at 9, *Planned Parenthood Ariz., Inc. v. Brnovich*, No. 2 CA-CV 2022-0116 ("Because A.R.S. § 13-3603 protects women from the harms of abortion by allowing it only to save the life of the mother, this Court should allow A.R.S. § 13-3603 to remain in effect.") (emphasis added).

19, 2023).[2] The Arizona Legislature understands this well, having used it (or the inverse) in many other statutes. *See, e.g.*, A.R.S. § 12-137(B) ("A judge may not refuse to accept an assigned case unless good cause exists or a court rule or ethical consideration requires or allows for refusal."); A.R.S. § 28-3413(A) ("A person may not act as a traffic survival school unless the person applies for and obtains from the director a license in the manner and form prescribed by the director."); A.R.S. § 36-851.01(A) ("A person may not act as a procurement organization in this state unless the person is licensed by the department of health services as a procurement organization.") (all emphases added).[3]

At bottom, the newer 15-Week Law specifically authorizes conduct (a physician performing an abortion up to 15 weeks LMP) that the

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[2] *See also Utley v. Mill Man Steel, Inc.*, 357 P.3d 992, 994 ¶ 12 (Utah 2015) ("The term 'unless' is one of condition.") (citation omitted); *People v. Houck*, No. 321807, 2015 WL 4470068, at *1 (Mich. Ct. App. July 21, 2015) ("The word 'unless' shows that the Legislature intended to broadly punish all possession except when 'the chief administrator of the correctional facility' officially approved.").

[3] This list is not intended to be exhaustive; many other similar statutes are on the books. *See also, e.g.*, A.R.S. § 8-530.03(B); A.R.S. § 25-417(A); A.R.S. § 32-2617(A); A.R.S. § 33-1415; A.R.S. § 23-724(E); A.R.S. § 32-934(A); A.R.S. § 35-1101(A); A.R.S. § 36-3612(D); A.R.S. § 38-1138(A); A.R.S. § 41-1002(E), (F), (G); A.R.S. § 41-5610(D); A.R.S. § 48-940.01(C).

Territorial Ban prohibits. At least as applied to physicians who comply with the 15-Week Law, there is an apparent conflict. And the court of appeals, as it must "whenever possible," read those statutes in harmony consistent with the rule that "when statutes relate to the same subject matter" (as here with abortion), "we construe them together as though they constitute one law and attempt to reconcile them to give effect to all provisions." *Fleming v. State Dep't of Pub. Safety*, 237 Ariz. 414, 417 ¶ 12 (2015); *see also Desert Waters, Inc. v. Super. Ct.*, 91 Ariz. 163, 171 (1962) ("[If] the provisions of a special statute are inconsistent with those of a general statute on the same subject, the special statute will control.").

B. The "same elements" test does not apply here.

Recognizing that these well-established canons of statutory construction don't favor them, Intervenors next [at 8-10] invoke a line of cases applying the "same elements" test they say controls here because the Territorial Ban and 15-Week Law are both criminal statutes. Not only do Arizona courts harmonize criminal statutes, *see, e.g.*, *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, 123 ¶ 17 (2015), but the "same elements" test also does not control cases about general interpretations

of a comprehensive regulatory scheme that also happen to contain criminal components.

Instead, courts apply that test mainly in determining whether conviction under two criminal statutes would violate the Double Jeopardy Clause. Two of the cases that Intervenors cite [at 9] for this proposition discuss the "same elements" test where it is "the only permissible interpretation of the double jeopardy clause." *State v. Carter*, 249 Ariz. 312, 315-16 ¶ 9 (2020) (cleaned up); *see also Anderjeski v. City of Mesa*, 135 Ariz. 549 (1983) (applying the "same elements" test in a Double Jeopardy analysis). This, of course, is not a criminal case involving the Double Jeopardy Clause, nor could a physician who performs an abortion up to 15-weeks LMP ever be charged under both the 15-Week Law and the Territorial Ban such that Double Jeopardy would ever be a concern.

As for the remaining cases cited by Intervenors, all use some version of the "same elements" test to reject arguments by criminal defendants that they can't be punished under two criminal statutes that cover essentially the same conduct. *See State v. Culver*, 103 Ariz. 505, 507–08 (1968) ("[W]e are aware of no law which prohibits the prosecution

of a criminal offense under either of two statutes where the facts of the case are such that they fall within the prohibition of both statutes"); *State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, 184 ¶¶ 17–21 (App. 2010) (rejecting argument that a defendant couldn't be convicted under two statutes, with the more recent having harsher penalties than the older statute); *State v. Weiner*, 126 Ariz. 454, 457 (App. 1980) (finding unique elements to several charged crimes); *State v. Gagnon*, 236 Ariz. 334, 335-36 ¶¶ 7–9 (App. 2014) (finding unique elements to two charged crimes). This is also not a criminal case in which a criminal defendant contends they shouldn't be punished under different statutes that all criminalize the same underlying conduct.

Intervenors' near-exclusive reliance on the "same elements" test to support their argument that traditional harmonization principles don't apply rests on a fundamental misunderstanding, discussed above [*supra*, Section I.A], about what the 15-Week Law actually does. *Far West Water & Sewer, Inc.* highlights the point. There, the court of appeals cited A.R.S. § 13-116 as mirroring the "same elements" test. That statute provides that "[a]n act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event

may sentences be other than concurrent." *Id.* But as the court of appeals held, "[w]e are not evaluating separate statutes prohibiting the same conduct," but "a statutory scheme that, if read as [Intervenors] suggest[], would criminalize conduct under one statute that our legislature has expressly allowed under another." *PPAZ*, 524 P.2d at 267 ¶ 19 (emphasis added). In the parlance of the "separate elements" test, there is "positive repugnancy" between the Territorial Ban and the 15-Week Law. The "separate elements" test thus provides no refuge to Intervenors.

C. Legislative intent supports the court of appeals' harmonization of the Territorial Ban and Title 36.

Intervenors' argument that the court of appeals' opinion betrays legislative intent fares no better.

First, analyzing the plain language of the Territorial Ban and 15-Week Law as above is enough to resolve this case, and "[w]hen the plain text of a statute is clear and unambiguous, it controls unless an absurdity or constitutional violation would result." *Cox v. Ponce in & for Cnty. of Maricopa*, 251 Ariz. 302, 307 ¶ 18 (2021) (cleaned up). There's no reason to go any further here; the statutes are facially incompatible but reconcilable without resort to secondary interpretive tools like legislative intent. *Cf. State ex rel. Arizona Dep't of Revenue v. Tunkey*, 524 P.3d 812,

817 ¶ 26 (2023) ("[T]he words of a statute are not 'evidence' of anything. They are the law.") (Bolick, J., concurring).

Even if we go beyond the plain language of the operative statutes, legislative intent supports the court of appeals' opinion. And the Court need not piece together legislative intent by doing what it has described as "the equivalent of entering a crowded cocktail party and looking over the heads for one's friends." *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 269 (1994). Rather, when enacting the 15-Week Law, the Legislature unambiguously stated in a section of (new) session law titled "Legislative Intent" that it sought to "restrict" – not eliminate – "the practice of nontherapeutic or elect abortion "to the period up to fifteen weeks of gestation." 2022 Ariz. Sess. Laws, ch. 105, § 3(B) (S.B. 1164). And in a separate section of session law titled "Construction," the Legislature further stated its intent not to "[r]epeal, by implication or otherwise, section 13-3603, Arizona Revised Statutes, or any other applicable state law regulating or restricting abortion." *Id.* § 2(2).[4]

[4] This Court aims "[t]o give effect to [] statement[s] of intent" like these. *True v. Stewart*, 199 Ariz. 396, 399 ¶ 13 (2001) (harmonizing "two seemingly contradictory" statutory provisions "in a manner" consistent with an express statement of legislative intent).

As the court of appeals recognized, this language includes the panoply of abortion regulations spread throughout Title 36 and evidences the Legislature's intent to give all its prior enactments effect. *PPAZ*, 524 P.2d at 268 ¶¶ 22–23 ("[O]ur numerous statutes regulating abortion can be readily reconciled in conformity with our legislature's express intent that we do so"). In fact, it would contravene express legislative intent to interpret the Territorial Ban to impliedly repeal scores of statutes regulating abortion as urged by Intervenors. [*See infra*, Section I.E]

One other facet of "legislative intent" bears mention. Had the Legislature intended the Territorial Ban to supersede Title 36 if *Roe* were ever overturned, it could have enacted a "trigger" clause as it's done elsewhere. *PPAZ*, 524 P.2d at 268–69 ¶ 24. The Legislature also knows how to account for litigation when enacting statutes. *See, e.g.*, 2020 Ariz. Sess. Laws, ch. 80, § 2 (S.B. 1397) (expressly conditioning a new statute's effective date on a court declaring a federal statute unconstitutional); 1999 Ariz. Sess. Laws, ch. 266, § 6(C) (S.B. 1170) (describing certain payments to be made "unless" a court in a pending case takes certain action). Given this knowledge and history, "if the Legislature had

intended" this result, "it would have expressly done so." *Est. of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 327 ¶ 15 (2011).

Like plain language and the "same elements" test before it, legislative intent does nothing to support Intervenors' argument.

D. Nothing about the court of appeals' exercise in harmonization violates the separation of powers.

Next, and related to their flawed theory of legislative intent, Intervenors declare that the court of appeals' interpretation of the 15-Week Law violates the separation of powers. Though not a model of clarity, this argument appears to be that the court of appeals "overstepped" and rewrote the statutory scheme to reach a "preferred result" rather than fulfilling its constitutional role of interpreting the statutory scheme at issue. [Pet. at 13] Nonsense.

A party alleging to our State's highest court that an inferior court injected its policy preferences into a decision and thus violated the separation of powers enshrined in Article III of the Arizona Constitution should have some basis for such a serious accusation. Yet Intervenors have nothing other than their own dislike of the outcome. And the truth is that the court of appeals applied this Court's longstanding precedent to interpret the law, a "proper and peculiar province of the courts." *Ariz.*

Indep. Redistricting Comm'n v. Brewer, 229 Ariz. 347, 355 ¶ 34 (2012) (citing THE FEDERALIST, No. 78 (A. Hamilton)); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

To be sure, "[i]t is not the function of the courts to rewrite statutes." *Lewis v. Debord*, 238 Ariz. 28, 31 ¶ 11 (2015). But the court of appeals did no such thing here, and instead harmonized the Territorial Ban with decades of other legislative enactments, including the 15-Week Law, to give as much meaning as possible to all those enactments. Because that is the judiciary's proper role, the separation of powers remains intact.

E. The court of appeals did not repeal the Territorial Ban.

Finally, though the implied repeal of a statute is "not favored," *S. Pac. Co. v. Gila Cnty.*, 56 Ariz. 499, 502 (1941) (cleaned up), there's nothing to Intervenors' bald claim [at 7] that the opinion below somehow effected a "forbidden repeal" – whatever that means – of the Territorial Ban. A law is definitionally not "repealed" if it can still be enforced. And here, the Territorial Ban remains a part of Title 13 today; a prosecutor could still prosecute a non-physician who violates its terms. *PPAZ*, 524

P.2d at 268 ¶ 23. The court of appeals' harmonization of the Territorial Ban and Title 36 didn't repeal the former.

Intervenors' suggestion that the court of appeals repealed the Territorial Ban is no more than a "because we said so" declaration. This Court's precedent teaches that when – as here – two statutes seemingly conflict, "it is the duty of the court" to construe them so that "both will be operative." *S. Pac. Co.*, 56 Ariz. at 502. And "[i]t is only when upon no reasonable construction both can be operative that it is our duty to hold that the later act repeals the former by implication." *Id.* (emphasis added). Under the court of appeals' harmonization, both the Territorial Ban and the 15-Week Law can co-exist such that both are "operative." Specifically, "[t]he 15-week law permits physicians to perform abortions and clearly delineates the penalties for doing so in violation of that statutory scheme," and "[a]ny other person who intentionally performs an abortion is subject to prosecution under" the Territorial Ban." *PPAZ*, 524 P.2d at 268 ¶ 23. There simply was no repeal.

Conclusion

From the tone of Intervenors' Petition to the many amicus curiae briefs that do little more than decry abortion, one might believe that this

is a fact-intensive case turning on whether abortion is "good" or "bad" as a matter of policy. But that is emphatically not the issue before this Court, and policy questions like that motivating the Petition are decided on the other side of Wesley Bolin Plaza and at the ballot box, not here.

Policy aside, this is a simple case. One very old statute criminalizes conduct specifically authorized by a newer statute, in the broader context of a host of other statutes that regulate – but do not forbid – that same conduct. The court of appeals gave meaning to the entire statutory scheme at issue, and this Court should affirm. Until either the Legislature or the people through their reserved legislative power speak again on abortion, this Court's precedent requires no less.

RESPECTFULLY SUBMITTED this 20th day of September, 2023.

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