

**IN THE SUPREME COURT**

**STATE OF ARIZONA**

PLANNED PARENTHOOD  
ARIZONA, INC., et al.,

Plaintiff/Appellants,

v.

MARK BRNOVICH, Attorney  
General of the State of Arizona, et al.,

Defendant/Appellees,

And

ERIC HAZELRIGG, M.D., as  
guardian ad litem of unborn child of  
plaintiff Jane Roe and all other  
unborn infants similarly situated,

Intervenor.

Supreme Court No. CV-23-0005-  
PR

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

Pima County Superior Court No.  
C127867

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**PIMA COUNTY ATTORNEY'S SUPPLEMENTAL BRIEF**

**ON GRANT OF INTERVENORS' PETITION FOR REVIEW**

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## INTRODUCTION

Intervenors Eric Hazelrigg and the Yavapai County Attorney invite this Court to create by fiat what the Arizona Legislature could have, but did not, enact legislatively: a trigger law to resuscitate a single, 159-year-old statute that criminalizes the provision of medical services that are regulated by numerous modern statutes. The Court should reject Intervenors' position, as it would effectively repeal the more recently enacted and more specific abortion statutes in favor of a total ban dating back to Arizona's Territorial days. Alternatively, that position would create an untenable situation where physicians' conduct would be both lawful (under modern statutes) and unlawful (under the historic statute). Intervenors' reading of the law belies the statutory texts, threatens due process, undermines stated legislative intent, and seeks to improperly resolve tension between an old, broad statute and recent, specific statutes. The Court of Appeals recognized these problems and thoughtfully harmonized and gave meaning to Arizona's abortion statutes. At bottom, they declined the invitation to encroach on the Legislature's authority. This Court should affirm that result and its reasoning.

## ARGUMENT<sup>1</sup>

In 2022, the Arizona Legislature passed a law permitting physician-provided abortions up to 15-weeks' gestation or in medical emergencies. Intervenors invite this Court to strike this law, and other modern statutes enacted over the past fifty years, and judicially impose a total ban on abortion. As a consequence, physicians would only legally be permitted to provide medically necessary abortion care where it is clearly "necessary" to save a pregnant person's life. Not only is it clinically impossible to comply with such a standard, but it also fails to provide constitutionally adequate notice of the acceptable standard of care in situations where a patient's health is seriously threatened and the certainty of death is unknowable. Such a regime would invite arbitrary enforcement, violate due process, and threaten the health and lives of pregnant people in Arizona.

This is not the statutory scheme the Arizona Legislature enacted, despite having had multiple opportunities to visit the abortion question. Unlike other states, the Arizona Legislature did not enact a "trigger" law resuscitating a broad ban covering physicians and non-physicians alike. This Court should decline Intervenors' request to enact one by judicial fiat.

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<sup>1</sup> Rather than repeat them here, we incorporate the arguments made by the Pima County Attorney in her 4.28.2023 Response to Hazelrigg's Petition for Review.

**1. The Court of Appeals Properly Construed and Harmonized the Plain Text of Arizona Law: Modern Title 36 Statutes Permit Physician-Provided Abortions Up to 15 Weeks and in Medical Emergencies.**

The words “except” and “unless” function as statutory allowances to permit conduct that would otherwise be prohibited. Courts interpret civil and criminal statutes in a manner consistent with their plain and ordinary English meaning. [\*Nichols v. United States\*, 578 U.S. 104, 111 \(2016\)](#); [\*Haas v. Colosi\*, 202 Ariz. 56, 58, ¶ 6 \(App. 2002\)](#). Plainly written exceptions in criminal statutes outline the boundaries of lawful conduct. *See, e.g.*, [\*Ruan v. U.S.\*, 142 S. Ct. 2370, 2379 \(2022\)](#) (explaining that the phrase “except as authorized” separates innocent from unlawful conduct); [\*State v. Kelly\*, 210 Ariz. 460, 463, ¶ 15 \(App. 2005\)](#) (noting that “except” and “unless” function as statutory exceptions by excluding “the actor from the class of people for whom the conduct is prohibited.”).

The plain language in modern Title 36 abortion statutes include both prohibitions and exceptions from those prohibitions that separate innocent from unlawful conduct. No language in the Title 36 physician-regulating statutes reflects a legislative intent to prohibit *all* physician-provided abortions. Instead, these physician-specific statutes permit physician-provided abortion in medical emergencies and where the pregnancy is of no

greater than 15 weeks' gestation by *excepting* these physician-provided abortions from other unlawful abortions.

[Section 36-2322](#)(A) outlines the law for emergency physician-provided abortions. “*Except* 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 . . . *and* documented that gestational age in the maternal patient’s chart” (emphases added). Here, the words “except” and “unless” separate the innocent conduct of physicians who provide (and document) emergency abortions from unlawful abortions.

[Section 36-2322](#)(B) outlines the law for non-emergency physician-provided abortions: “*Except* in a medical emergency, a physician may not . . . perform an abortion if the probable gestational age . . . has been determined to be greater than fifteen weeks.” Here, the word “except” again excludes a physician acting within the context of a medical emergency. And, if you remove that independent clause, you are left with non-emergency abortions and the following language: “a physician may not . . . perform an abortion *if* the probable gestational age . . . has been determined to be greater than fifteen weeks” (emphasis added). In the context of non-emergency abortions, the word “if” separates innocent physicians who provide abortions where the pregnancy is no greater than 15 weeks' gestation from those who provide

unlawful abortions after 15 weeks absent a medical emergency. The Legislature expressed its intent, in plain English, to *except* the following *physician-provided* abortions from any general prohibition: (1) emergency abortions to preserve a woman’s life or health, and (2) non-emergency abortions where the pregnancy is no greater than 15 weeks’ gestation.

Statutes that penalize conduct for broad sets of people (non-physicians) but *except* specialists (like physicians) are commonplace. *See, e.g., State v. Kelly at 463*, 210 Ariz. at 462, ¶ 15. (“statutory exceptions . . . exclude the actor from the class of people for whom the conduct is prohibited”). These statutes reflect a legislative intent to set apart from the general public certain classes of individuals who are highly trained and specially qualified. A local ordinance may proscribe parking in front of a fire hydrant *except* if you are an EMT. Another statute may criminalize breaking and entering *unless* you are a firefighter responding to an emergency. Legislatures routinely carve out exceptions for those who are trained and qualified to prevent harm to the public, like physicians providing reproductive healthcare.

The Court of Appeals thus properly construed Arizona’s modern Title 36 abortion statutes as any other set of plainly drafted statutes containing

exceptions that separate lawful from unlawful conduct. This careful and correct reading of the legislative text should be affirmed.

**2. By Harmonizing Arizona’s Abortion Statutes, the Court of Appeals Avoided Conflicts Between [§ 13-3603](#) and Title 36 Provisions.**

The Court of Appeals appropriately avoided conflicts between the historic [§ 13-3603](#) and the modern Title 36 abortion statutes. Intervenors’ suggestion that [§ 13-3603](#) and Title 36 statutes apply equally to physicians necessarily creates a statutory conflict. [Section 13-3603](#) would criminalize conduct that Title 36 permits (physician-provided abortions where the pregnancy is no greater than 15 weeks’ gestation and physician-provided abortions in extreme medical emergencies deemed non-life-threatening). Intervenors would have this Court eviscerate newer, physician-specific statutes in favor of a broad ban that nowhere mentions physicians. This Court’s precedent compels the opposite result: in cases of conflict, “the more recent, specific statute governs over an older, more general statute.” [State v. Jones, 235 Ariz. 501, 503 ¶ 8 \(2014\)](#).

However, the Court of Appeals appropriately avoided the conflict altogether by reading [§ 13-3603](#)<sup>2</sup> as applying to non-physicians and the Title

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<sup>2</sup> “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

36 statutes as applying to physicians. See [UNUM Life Ins. Co. v. Craig, 200 Ariz. 327, 333 ¶ 28 \(2001\)](#) (“when two statutes appear to conflict, whenever possible, [this Court] adopt[s] a construction that reconciles one with the other, giving force and meaning to all statutes involved”).

This workable, constitutional result honors the legislative texts and aligns with the historical provision of abortion in Arizona. For decades, licensed physicians in Arizona have provided lawful abortions where the pregnancy is no greater than 15 weeks’ gestation<sup>3</sup> and when a medical emergency<sup>4</sup> threatens death *or* impairment of a bodily function. Intervenors’ request to allow abortion laws to stand, with no harmonization, would create irreconcilable conflicts that would effectively outlaw decades-long and safe medical practices in non-life-threatening emergencies.

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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” (emphasis added).

<sup>3</sup> Under [Roe](#) post-1973 and, post-2022, including post-[Dobbs](#), under [A.R.S. § 36-2322\(B\)](#).

<sup>4</sup> [A.R.S. § 36-2321](#) defines “medical emergency” as “a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.”

Outlawing all abortions unless the pregnant patient is at imminent risk of death would mean that Arizona’s physicians could not provide abortion care even if such care was necessary to avert serious and permanent injury. The Arizona Legislature has nowhere demonstrated an intent, directly or implicitly, to deprive physicians of their ability to treat medical emergencies that could lead to significant, life-long disabilities.<sup>5</sup> Thus physicians will find themselves analyzing—in moments of crisis where quick decision-making is often required—whether a patient has a high enough risk of death for them to lawfully intervene, and if they are willing to risk criminal prosecution by doing so. Is the patient bleeding *enough*? Have they developed sepsis, or should they be sent home until *after sepsis progresses*? These are not hypotheticals. They are situations that regularly present to OB-GYNs in peer states where similar outright bans on abortion have been interpreted to apply to physicians. For example, in Missouri, medical staff erred on the side of not providing care to a pregnant patient who was bleeding and cramping

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<sup>5</sup> These could include, for example, ectopic pregnancies (pregnancies located outside the uterus that can cause the fallopian tube to rupture, leading to major internal bleeding), preterm premature ruptures of membranes, severe sepsis requiring limb amputation, and uncontrollable uterine hemorrhages requiring hysterectomies, or efforts to prevent kidney failure (requiring lifelong dialysis) or hypoxic brain injuries.

after her water broke at 18 weeks, risking serious infection.<sup>6</sup> A similar case emerged in Texas, where the hospital sent a patient home to await signs of infection or labor.<sup>7</sup> In Oklahoma, a pregnant patient with a cancerous molar pregnancy was told by hospital staff that they could not provide care until she was actively crashing in front of them or had blood pressure so high that a heart attack would result.<sup>8</sup> A two-hospital-wide study of delayed care in such life or death situations in Dallas County, Texas showed that more than half of pregnant patients experienced significant medical problems including infections and hemorrhaging where timely abortion care wasn't provided.<sup>9</sup>

Pregnant patients in emergency conditions simply receive worse, delayed, or no care at all, at grave risk to their health, when physicians have to analyze not only a patient's symptoms but whether a prosecutor would agree with them that the symptoms were sufficiently severe to signal

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<sup>6</sup> Harris Meyer, [\*Hospital Investigated for Allegedly Denying an Emergency Abortion After Patient's Water Broke\*](#), KFF Health News, Nov. 1, 2022.

<sup>7</sup> J. David Goodman and Azeen Ghorayshi, [\*Women Face Risks as Doctors Struggle with Medical Exceptions on Abortion\*](#), N.Y. TIMES, July 20, 2022.

<sup>8</sup> Selena Simmons-Duffin, In Oklahoma, [\*A Woman Was Told to Wait Until She's "Crashing" for Abortion Care\*](#), NPR News, Apr. 25, 2023.

<sup>9</sup> J. David Goodman and Azeen Ghorayshi, [\*Women Face Risks as Doctors Struggle with Medical Exceptions on Abortion\*](#), N.Y. TIMES, July 20, 2022.

imminent death. But, in many emergency situations, it is medically impossible to say that death was the guaranteed outcome.

Guesstimating risk of death and intervening only when death is imminent, and under the threat of criminal liability, is not how physicians are trained to assess or provide care. Intervenors' reading of Arizona's statutes would require physicians to estimate the likelihood of the patient's death, weigh that likelihood against their own liberty interests (jail) and property interests (loss of medical license), and then decide whether to provide the necessary care or risk criminal liability and loss of livelihood if another physician (or a prosecutor) would have guessed slightly different odds. The practical result will be denial of care, *even in* life-or-death situations. That is because where the probability of death is incalculable, and where the threat of criminal prosecution looms, physicians can be expected to exercise extreme caution—not because that is what the patient's needs or the standard of care require, but because that is what avoiding criminal liability requires. Such a result is not even what [§ 13-3603](#), which foresees provision of care in life-threatening situations, intends. Applying it to physicians threatens the provision of necessary and critical care in Arizona.

### **3. Due Process Requires Clarity About Prohibited Conduct.**

Due process requires clarity about what conduct is proscribed. [\*Skilling v. U.S.\*, 561 U.S. 358, 402 \(2010\)](#). A criminal statute must define the criminal offense with sufficient specificity that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement. *Id.* A statute authorizes an impermissible degree of enforcement discretion where it fails to provide fair notice of prohibited conduct and set reasonably clear guidelines (and limit discretion) for law enforcement officials and triers of fact. [\*City of Chicago v. Morales\*, 527 U.S. 41 \(1999\)](#).

Arizona's territorial abortion law, [§ 13-3603](#), if made applicable to physicians, would violate due process because it does not provide physicians clarity on how they should conform their conduct to the law in life- and health-threatening situations. Nor could it. Physicians are not in the business of calculating precise odds, least of all when it comes to something so complex and nuanced as pregnancy. The statute, if applicable to physicians, simply does not provide constitutionally adequate specificity and notice of what conduct is prohibited in life- and health-threatening circumstances.

Furthermore, enforcement will be based on some prosecuting attorney's lay understanding of medicine and invite arbitrary enforcement. The Pima County Attorney has frequently explained in this litigation that applying all of Arizona's abortion statutes to physicians (including the territorial law), without harmonization, *will* result in arbitrary enforcement. Arizona's physicians, prosecutors, and pregnant patients are entitled to a "sufficiently definite" set of criminal laws, [State v. Schmidt, 220 Ariz. 563, ¶ 5 \(2009\)](#), so they know exactly what conduct is prohibited and prosecutable. Broadly applying [§ 13-3603](#) to physicians with only an unclear exception where abortion is "necessary" life-saving treatment would not provide that clarity.

**4. The Legislature Intended to and In Fact Passed a 15-Week Ban with a Medical Emergency Exception; that Intent Should Not be Thwarted Judicially.**

The Arizona Legislature intended to and in fact passed a 15-week abortion ban in 2022. *See* Title 36 Statutes. *That same year*, the Legislature considered but failed to pass a ban criminalizing all medication abortion,<sup>10</sup> and it considered but failed to pass privately enforced prohibitions on abortions after six weeks gestation.)<sup>11</sup> The Legislature underlined its intent

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<sup>10</sup> [H.B. 2811, 55<sup>th</sup> Leg., 2<sup>nd</sup> Reg. Sess. \(Ariz. 2022\)](#).

<sup>11</sup> [H.B. 2483, 55<sup>th</sup> Leg., 2<sup>nd</sup> Reg. Sess. \(Ariz. 2022\)](#).

to impose a 15-week ban alongside the bill text: “This legislature intends through this act and any rules and policies adopted thereunder, to restrict the practice of non-therapeutic or elective abortion to the period up to fifteen weeks of gestation.” [S.B. 1164](#), 55th Leg., 2nd Reg. Sess. (Ariz. 2022). Then-Governor Ducey understood the Legislature to intend a 15-week ban when he signed the law in March 2022 stating, “the law of the land today in Arizona is the 15-weeks’ law . . . and that will remain [the] law” regardless of whether [Roe v. Wade, 410 U.S. 113, 150 \(1973\)](#) was overturned.<sup>12</sup>

That activity was indeed pre-[Dobbs v. Jackson Women’s Health Organization, 142 S. Ct. 2228 \(2022\)](#). But the Legislature has also had opportunities, post-[Dobbs](#), to further restrict abortion through duly enacted legislation, but declined to do so. Notably, in 2023, the legislative session ran concurrently with the filings in this headline-grabbing case, and legislators were or should have been aware of the December 2022 Court of Appeals decision permitting physician-provided abortions where the pregnancy is no greater than 15 weeks’ gestation, or emergency abortions after 15 weeks’

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<sup>12</sup> Howard Fisher, “Arizona Gov. Ducey: Abortion Illegal After 15 Weeks”, Apr. 24, 2022, [KAWC.org,https://www.kawc.org/news/2022-04-24/arizona-govducey-abortion-illegal-after-15-weeks](https://www.kawc.org/news/2022-04-24/arizona-govducey-abortion-illegal-after-15-weeks). The 15-week law was later codified in Title 36 at [A.R.S. § 36-2322](#).

gestation. Still, the Legislature did not pass new abortion legislation in 2023 that further restricted physician-provided abortions.

And, importantly, the Arizona Legislature has never passed—as peer states have—an abortion statute with a “trigger” provision for reviving a prior statutory ban in all cases if there were a change in the U.S. Supreme Court’s position on abortion. As early as 2005, South Dakota enacted such a “trigger.” See [S.D. § 22-17-5](#) (2005). South Dakota’s statute spelled out that “[t]his Act is effective on the date that the states are recognized by the United States Supreme Court to have the authority to prohibit abortions at all stages of pregnancy.” South Dakota’s law, now in effect, subjects physicians to criminal prosecution, with an exception only where “there is appropriate and reasonable medical judgment that performance of an abortion is necessary to preserve the life of the pregnant female.” *Id.* A dozen other states passed similar statutes expressing their intent to revert abortion law to more restrictive forms if there was a change in federal law and did so as late as 2022 when Arizona was passing its latest abortion restrictions. See, e.g., [Ark. Acts 180 \(S.B. 149\)](#) (2019);” [Id. Stat. § 18-622 \(SB 1385\)](#) (2020); Ky. Rev. Stat. 311.772 (2019); [La. Stat. Ann. § 40:1061](#) (2018); [MS. Code Ann. § 41-41-45](#) (2015); [Mo. Rev. Stat. § 188.017](#) (2019); [N.D. Cent. Code § 12.1-31-12](#) (2019); [Ok. S.B. 612](#) (2021); [Tex. Health & Safety Code §§ 170A.001-7](#) (2021);

[Tenn. Code Ann. § 39-15-213 \(2019\); Utah Code Ann. § 76-7a-201 \(2020\); Wyo. Stat. Ann. § 35-6-102 \(2022\).](#)

Arizona chose not to follow these readily available statutory examples going back seventeen years. This reflects the Legislature’s intent to avoid passing a “trigger” law and rather allow all existing statutes to stand and be harmonized.

Not having achieved their policy objective—a statute that supersedes recently enacted physician permissions and exceptions— Intervenors now invite this Court to repeal five decades of legislative action to achieve their preferred result. This Court should resist that invitation. Intervenors’ appropriate remedy is in the legislature and not the courts.

## CONCLUSION

The Court of Appeals properly construed and harmonized Arizona's abortion laws. For the reasons above and those in our brief submitted in response to Intervenor's Petition for Review, the Court of Appeals' decision should be affirmed.

RESPECTFULLY SUBMITTED September 20, 2023.

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