SUPREME COURT OF ARIZONA

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.	Arizona Supreme Court No. CV-23-0005-PR Court of Appeals Division Two No. 2 CA-CV 22-0116 Pima County Superior Court No. C127867

THE ATTORNEY GENERAL'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Petitioners ask this Court to judicially prohibit nearly all abortions in the State of Arizona. To get there, they need this Court to disregard dozens of laws, precedent, and context, all of which compel the conclusion that the Legislature never did what Petitioners urge. Without acknowledging they are doing so, Petitioners urge this Court to take a hammer to basic principles of statutory construction and find that an older, general statute renders superfluous many newer, specific statutes on the same subject. The Court should reject this argument and affirm.

ARGUMENT

The central question in this case is whether the old ban on abortion, A.R.S. § 13-3603, conflicts with the modern statutes regulating abortion. Petitioners do not appear to dispute that, if there is a conflict, the newer and more specific laws must prevail over the old ban.

The 15-week law, A.R.S. § 36-2322, permits abortions up to 15 weeks and in medical emergencies and therefore conflicts with the old ban. *See* Argument § I(A). A doctor who performs an abortion authorized by this recent statute cannot be prosecuted under the old ban. *See* Argument § I(B). Many other modern abortion statutes likewise contemplate that abortions

are permitted other than when necessary to save the mother's life; they too conflict with the old ban. *See* Argument § II. Sending all of these modern laws to the waste bin without repealing them would have required the Legislature to pass a trigger law, which it did not do. *See* Argument § III. Harmonization is the only solution. *See* Argument § IV.

I. The 15-week law permits abortions that the old ban forbids and the permissions in the newer and more specific statute must prevail.

A. The 15-week law permits abortions up to 15 weeks of gestational age and in medical emergencies.

The 15-week law allows doctors to perform abortions if they determine that the gestational age is 15 weeks or less or in medical emergencies. Specifically, the statute provides:

> A. *Except* in a medical emergency, a physician may not perform . . . an abortion *unless* the physician . . . has first made a determination of the probable gestational age . . . .
>
> B. *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.

A.R.S. § 36-2322(A), (B) (emphasis added). A "medical emergency" includes not only abortions that are necessary "to avert … death" (like under § 13-3603), but also those where delaying the abortion would "create serious risk

of substantial and irreversible impairment of a major bodily function." *Id.* § 36-2151(9).

The key words are "except" and "unless." They are functionally identical. A leading dictionary defines "unless" as "except on the condition that" and "except" as "on any other condition than that : unless." *See* Merriam-Webster, merriam-webster.com/dictionary/unless and merriam-webster.com/dictionary/except. These statutory exceptions affirmatively "exempt certain persons or conduct from the statute's operation." *Exception*, Black's Law Dictionary (11th ed. 2019); *see also* 82 C.J.S. Statutes § 487.

Here, the "Except in a medical emergency" clauses in Sections (A) and (B) are exceptions that modify all the text that follows in those sections. Thus, in a medical emergency, the prohibition on abortions is entirely and absolutely exempted. A doctor may perform an abortion if a medical emergency exists. A.R.S. § 36-2322(A), (B).

Now to "unless." Subject to the medical emergency exception, Section (A) prohibits abortions "unless" the doctor has determined the probable gestational age. Thus, reading (A) alone, a doctor may perform an abortion if the doctor first determines the gestational age. A.R.S. § 36-2322(A).

Section (B) then narrows this latter permission, prohibiting abortions after 15 weeks.[1]

The U.S. Supreme Court has interpreted a statutory abortion exception similarly. In *United States v. Vuitch*, the law at issue prohibited abortions "unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." 402 U.S. 62, 67–68 (1971) (citation omitted). In rejecting a vagueness challenge to an indictment, the Court observed that the "statute does not outlaw all abortions, but only those which" did not satisfy the "unless" exception, which "expressly authorized physicians to perform such abortions as are necessary to preserve the mother's life or health." *Id.* at 70.

Our statute books are filled with similar constructions in a variety of contexts. For example, "[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. § 28-3413(A) (emphasis added). This means that a person *may* act as a traffic survival school *if* they

[1] Whether reading the "if" exception in § 36-2322(B) in isolation, or in combination with the "unless" exception in (A), the only reasonable reading and logical consequence is that abortions are permitted up until 15 weeks.

fulfill the unless clause, i.e., if they obtain a license from the director. Similarly, "[a] rental agreement … may not permit the receipt of rent, unless the landlord has agreed to comply with § 33-1434, subsection A, [landlord's obligation to maintain fit premises]." A.R.S. § 33-1415. This means that a rental agreement *may* permit the receipt of rent *if* the landlord complies with the obligations in § 33-1434(A).[2]

These interpretive principles simply confirm what is plain from a commonsense reading of these sorts of phrases. If a parent says, "You may not play video games unless you load the dishwasher," any child would understand that she *may* play video games once she loads the dishwasher. If the child finished the chore and began playing, she would be rightly surprised if her parent scolded her and told her that she hadn't been given permission to play video games at all.

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[2] The Legislature has repeatedly used similar language and structures to draw lines in the abortion context. Long before *Roe*, the Legislature used an "unless" clause to demarcate a set of legal abortions (§ 13-3603). After *Roe*, it codified the viability line and used an "unless" plus a list of five necessary conditions to satisfy before performing post-viability abortions (§ 36-2301.01). And the "except"/"unless" structure in the 15-week law—chosen again by the Legislature on the near-certain eve of *Roe*'s curtailment or end—was molded after the same structure in a prior 20-week law (§ 36-2159). Petitioners are late to the party in challenging this statutory text.

B. A person cannot be prosecuted for conduct that the newer, more detailed statute expressly permits.

It is undisputed, black-letter law that disparate statutes must be read as one law. And when statutes conflict, the newer, specific statutes prevail over older, general statutes. Those principles dictate that conduct permitted by the 15-week law cannot be prosecuted under the old ban.

The point is easily illustrated by continuing with our dishwasher and video game example. Imagine that, last month, the parent had told the child, "No video games for the rest of the year!" Then, today, he tells her, "You may not play video games unless you load the dishwasher." The child would naturally understand that, if she loads the dishwasher, she may play video games, notwithstanding the older, generic video game ban.

Or imagine that an early traffic law states: "It is unlawful for any driver to exceed the posted speed limit." The Legislature later passes another law: "A driver may not exceed the posted speed limit, unless necessary to maintain the flow of traffic." A driver who drives 40 MPH in a 35 MPH zone to maintain the flow of traffic, consistent with the express permission in the new statute, could not be prosecuted under the old statute. Similarly, a doctor who performs an abortion that the 15-week law expressly permits

cannot be prosecuted under the old ban. *Cf. State v. Eidahl*, 495 N.W.2d 91, 91–94 (S.D. 1993) (finding a conflict between a city ordinance that prohibited "turn[ing] without using a signal in *all* instances" and a statute that "allow[ed] turning without use of a signal under certain circumstances").

C. Petitioners ignore the text and apply the wrong test.

Petitioners' answer is simply to ignore the text that defeats their interpretation. Petitioners want the 15-week law to be a flat prohibition, rather than a statute that defines both prohibited and permitted conduct, so they disregard essentially all of the critical language, never explaining what the "except" or "unless" clauses mean or do. *E.g.*, Pet. at 10.

As another work-around, Petitioners assert (at 9) that there's no conflict requiring harmonization unless § 13-3603 and another statute "share identical elements." But Petitioners are using the wrong test.

Petitioners first cite two inapposite double jeopardy cases. When analyzing whether a defendant has been unconstitutionally punished twice for the same conduct, it makes sense to compare elements to "determine whether two distinct offenses charged under different statutes constitute the same offense." *State v. Carter*, 249 Ariz. 312, 315–16 ¶ 9 (2020). But comparing elements does not illuminate what the statutes say and mean.

Petitioners then cite three distinguishable positive repugnancy cases, which helpfully illuminate the very different conflict here. In each of those three cases, there was no dispute that the defendant's conduct had violated multiple statutes. Rather, the defendants argued that they could not be prosecuted under a general statute because the Legislature had enacted a more specific law, and thus the specific statute preempted the general as the sole basis for criminal liability. *See State v. Gagnon*, 236 Ariz. 334, 335–36 ¶¶ 4, 6 (App. 2014); *State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, 181–82, 184 ¶¶ 7, 12, 17, 20 (App. 2010); *State v. Weiner*, 126 Ariz. 454, 455 (App. 1980).

By contrast, ours is not a case of asserted conflict because of *overlapping* prohibitions, where the prosecutor has a choice between multiple statutes that could all apply. The conflict here is due to *opposing* prohibitions and permissions, where one statute indicates conduct is criminal, but a later statute explicitly carves out the same conduct as legal.

For example, there's no conflict between two provisions that forbid someone (A) "who is under the influence of intoxicating liquor to drive," or (B) "to drive … while there is 0.10 per cent or more by weight of alcohol in the person's blood." *Anderjeski v. City Ct. of City of Mesa*, 135 Ariz. 549, 550 (1983) (citation omitted). But, if the second statute were later amended by

adding the phrase "unless necessary to transport another person in a medical emergency," then there would be a conflict. And a person who drove intoxicated would be free from prosecution under both statutes if their driving was necessary to save another's life in a medical emergency.

The "except," "unless," and "if" clauses in § 36-2322 have the same effect. Comparing elements in this situation misses the whole point—of course the elements will be different when one statute authorizes something a preexisting statute forbids. That analysis will only ever spit out the answer Petitioners want. No wonder they insist on it.

II. Titles 13 and 36 exacerbate the conflict with the old ban and further illustrate the absurdity of Petitioners' position.

Even a passing look through the rest of Titles 13 and 36 proves that Petitioners ignore not only the 15-week law, but the entire statutory scheme. More than a dozen other statutes confirm that abortions are authorized up to 15 weeks, and thereafter in a "medical emergency."[3]

Fifteen Weeks. Many statutes only make sense if abortions are authorized up to a specified period of gestational age. For instance, facilities

[3] *See, e.g.*, A.R.S. §§ 13-3603.02, 36-449.03, 36-2152, 36-2153, 36-2156, 36-2157, 36-2158, 36-2159, 36-2161, 36-2163, 36-2162.01, 36-2301, 36-2301.01, 36-2322.

that perform abortions must report "[t]he reason for the abortion, including at least one of" several listed options. A.R.S. § 36-2161(A)(12). Possible reasons include that the abortion: "is elective," "due to maternal health considerations" which are not limited to averting death, or that the pregnancy is "the result of a sexual assault." *Id.* But none of the reasons listed in § 36-2161(A)(12)(a)-(j) state that the abortion was necessary to save the woman's life, the only exception found in § 13-3603. So, according to Petitioners, the statute fails to list the only legal reason to perform an abortion, while also absurdly and misleadingly suggesting a number of legal reasons that are all, in fact, illegal.

Relatedly, the state must prepare an annual report based on information collected from providers, which "shall include a breakdown by month of the reasons for abortions pursuant to § 36-2161." *Id.* § 36-2163(B). But there is nothing to break down if abortions are legal for only one reason.

In addition, if abortions are lawful only in life-threatening situations, Petitioners cannot explain the statutory requirements for ultrasounds (§ 36-2156), gestational age determinations (§ 36-2322(A); § 36-449.03(D)(5)), detailed notices and information that a patient must receive "orally and in person" at least twenty-four hours before the abortion (§ 36-2153(A)(1)(a)-

(g), (A)(2)(a)-(h); § 36-2158(A)(1)(a)-(c), (A)(2)(a)-(d)), or the detailed judicial bypass procedures for minors seeking authorization to obtain an abortion without parental consent (§ 36-2152(A)-(H)). These provisions don't apply in a medical emergency, meaning they would *never* apply under Petitioners' theory of the case. *See* Pet. at 10 (agreeing that "medical emergencies" include situations when an abortion is necessary to save the mother's life). According to Petitioners then, these statutes just explain in detail how to perform abortions that are illegal in any event.

It is black-letter law that courts must read every word in a statute to have meaning. Petitioners take a wrecking ball to this rule. Not only would they read these statutes to *contain* surplusage; they would read entire statutes to *be* surplusage.

Medical Emergency. Although Petitioners collapse them, the old ban's narrow "necessary to save her life" exception and the 15-week law's broader "medical emergency" exception plainly are not coextensive. Right off the bat then, Petitioners' position would mean that statutes like § 36-2322(C) require the reporting of abortions that the old ban plainly criminalizes. *See* AG's Resp. to Amici at 10 n.3.

That cannot be. The Legislature has repeatedly authorized abortions, and exempted compliance with certain requirements, in medical emergencies. *E.g.*, *supra* at 9-11; A.R.S. §§ 36-2159(A)-(B), 36-2322(A)-(B), 36-2301.01(B); *see also id.* § 36-2161(A)(16) (anticipating that doctors might develop a "judgment that a medical emergency exist[s]" which "excuse[s] the physician from compliance with [certain] requirements"). Petitioners' interpretation would render all these statutes superfluous.

That construction makes no sense given how clear the Legislature has been that the "medical emergency" exception encompasses more than just the abortions that § 13-3603 exempts. For instance, doctors must report *both* the number of abortions where certain information "was not provided because … an abortion [was necessary] to avert the woman's death ***and*** the number of abortions [where the] information was not provided because a medical emergency compelled … an abortion to avert substantial and irreversible impairment of a major bodily function." A.R.S. § 36-2162.01(A)(4) (emphasis added); *see also id.* §§ 36-2152(H)(2), 36-2153(C) (distinguishing between the two prongs of a defined medical emergency).

Other Redundancy and Absurdity. Petitioners' construction breeds still other redundancies and absurdities. For example, "Except in a medical

emergency," one cannot perform an abortion "knowing that the abortion is sought based on the sex or race" or "a genetic abnormality of" the fetus. A.R.S. § 13-3603.02(A)(1)-(2) (the "reason ban"). But under Petitioners' reading, this whole statute has no application because if an abortion is sought for a prohibited reason, it is not sought to save the mother's life. The statute's "medical emergency" exception would be double-surplusage because it is an exception that encompasses the only abortions Petitioners believe are legal, and in service of a now-meaningless statute.

That superfluousness cannot be avoided by saying that the Legislature simply created new offenses for illegal abortions it saw as particularly heinous. That might follow if the penalty was more severe than § 13-3603, but it's not. The most severe punishment possible under § 13-3603.02 (2 years, *see* § 13-702(D)) is only as long as the mandatory minimum sentence under § 13-3603, which, Petitioners say, would prohibit those abortions anyway.

Notice requirements created by related statutes are similarly rendered absurd. If a woman seeks an abortion when the fetus has been "diagnosed with a nonlethal fetal condition," she must receive certain information, including that "§ 13-3603.02 prohibits abortion because of … [a non-lethal]

genetic abnormality." A.R.S. § 36-2158(A)(2)(d); *see also id.* § 13-3603.02(G)(2)(b), § 36-2301(C) (reiterating § 36-2158(A)'s requirements). This requirement does not apply in a medical emergency. *Id.* § 36-2158(A). Under Petitioners' construction, the only legal abortions would be a subset of medical emergencies, so this requirement would never apply. Petitioners would leave the statute books littered with meaningless laws.[4]

To return to our dishwasher and video games scenario, imagine that after the parent forbade the child from playing for the rest of the year, the parent created a chore chart for the child. Since then, the child has been filling out the chart, and for months, the parent has allowed her to play video games once the chart is complete. The other statutes in Titles 13 and 36 are not so different. But under Petitioners' theory, the child not only misunderstood her parent's instruction from earlier today, "You may not play video games unless you load the dishwasher." She also completely

[4] Petitioners' position also muddles § 36-2157's requirement that a person not perform an abortion until they complete an affidavit that the abortion is not sought for a prohibited reason. *Id.* § 36-2157(A)(1). This statute makes sense if abortions are legal up to a period of 15 weeks unless obtained for a prohibited reason. But if the old ban reigns supreme, abortions are prohibited generally, and not because one is performed for a prohibited reason, so the affidavit requirement is meaningless.

misunderstood the point of the chore chart as further informing how and when she could play video games. The parent can insist the chart is not meaningless, but if the child can't play video games at all, what purpose is the chart serving anymore?

Inconsistent Positions. Because Petitioners' construction is completely unaligned with the statutory text, it's riddled with still other questions they cannot answer. For instance, Title 36 prohibits non-doctors from performing surgical abortions and providing medication abortion. A.R.S. §§ 36-2155(A), 36-2160(A). Nonetheless, would Petitioners say that any "person" can perform an abortion that is "necessary to save the woman's life"? *See id.* § 13-3603.

If Petitioners say yes (meaning the old ban's exception is unaffected by later limitations), then they illustrate how their construction is tantamount to arguing that the old ban renders subsequently enacted, more specific statutes a dead letter—a bizarrely inverted sort of implied repeal. And if they say no (Title 36 does limit the exception in the old ban), then they illustrate their willingness to selectively harmonize the old ban with later laws, so long as it produces a desirable outcome.

III. Petitioners' construction obtains only if the Legislature passed a trigger law for the old ban, which it plainly chose not to do.

In light of the above, there is only one way that the old ban could reign supreme. The Legislature must have passed a law—whether a "trigger" provision before *Dobbs*, or legislation since—that makes the old ban the superseding statute. The Legislature has not done so. *See* AG's Resp. to Amici at 11-15. Rather, the Legislature passed the *opposite* of a trigger law, stating unequivocally that it was repealing *nothing*. S.B. 1164 § 2(2), 55th Leg. 2nd Reg. Sess. (Ariz. 2022). Nothing—neither the old ban nor the modern abortion statutes that conflict with it.

That text (and lack of contrary text anywhere else) is unambiguous, so there's no need to go any further. In any event, the context surrounding the passage of S.B. 1164 confirms that the Legislature deliberately decided against the result that Petitioners now advocate.

Before S.B. 1164. The Legislature knew how to draft a trigger law. Arizona Legislature Bill Drafting Manual § 4.4 at 30-32 (2021-2022) (explaining conditional enactments and repeals). Indeed, the Legislature *had* drafted a trigger law before, and in the abortion context, no less. *See* 1999 Ariz. Sess. Laws, ch. 311, §§ 12, 13 ("Conditional repeal" and "Conditional

enactment" dependent on whether "there is a final court ruling that the definition of 'abortion clinic' … is unconstitutional").

The Legislature also had plenty of examples of trigger laws from multiple states (AG's Resp. to Amici at 11; Resp. to Pet. at 10), including a provision in the very law that S.B. 1164 was modeled after, which would have functionally served as a trigger law here. *See* Miss. Code. Ann. § 41-41-191(8) ("An abortion that complies with this section, but violates any other state law, is unlawful."). All the Legislature had to do was *leave that provision in* what it otherwise adopted essentially verbatim. It didn't—it took that provision out.

That omission "is strong evidence that [the] Legislature did not intend [the] omitted matter [to] be effective." *State Bd. of Barber Examiners v. Walker*, 67 Ariz. 156, 164 (1948) (citation omitted); *see also* AG's Resp. to Amici at 12-13 (citing cases); *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 529 ¶ 36 (2021) ("The legislature could have included a [particular] provision … as other states have done. But it did not. And it is not our role to add one." (citations omitted)).

If that omission weren't enough, in 2022, the Legislature considered, but did not pass, two abortion laws that would have been *more* restrictive

than the 15-week law (at least in part), but *less* restrictive than the old ban: a prohibition on all medication abortion (H.B. 2811), and a privately enforceable ban after 6 weeks (S.B. 1339). The Legislature went only so far, and no further.

After S.B. 1164. As its subsequent conduct shows, the Legislature knew it hadn't enacted a trigger law and deliberately chose not to. Almost immediately after S.B. 1164 passed, Governor Ducey stated publicly that he did not read Arizona law to mean that the old ban would supersede the 15-week law if *Roe* were overturned.[5] The Legislature did not take any action to the contrary. That was not because of some widespread agreement that the old ban already reigned supreme. Rather, the Legislature simply didn't have the votes to ban abortion. Indeed, at the end of the 2022 session, after *Dobbs* was issued, two House members tried to introduce a bill that would have completely banned abortion in Arizona. Speaker of the House Toma

[5] *E.g.*, 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.

then exclaimed to one of the sponsors: "You're going to waste everyone's time … in a political stunt. Count to 31, Jake!"[6]

IV. Harmonization is the only solution.

Arizona "courts are continually called upon … to try to make consistent that which is inconsistent; to harmonize that which is full of discord." *Territory ex rel. Hawkins v. Wingfield*, 2 Ariz. 305, 308 (1887). Harmonization is not only possible, it's the only option. No trigger law resolves the conflict as Petitioners wish.

But there's also something deeper going on here, to which harmonization is the only response. Whatever one thinks about the underlying issue, there's no question that the outcome Petitioners advocate would be a dramatic policy shift with enormous implications. There is a world of difference between a near-total ban on abortion and legal abortion up through 15 weeks; between the law allowing a woman to get care when

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[6] Ray Stern, *2 Republicans argue over last-minute push for abortion ban at Arizona Legislature*, Arizona Republic (July 3, 2022) https://www.azcentral.com/story/news/politics/legislature/2022/07/03/republicans-argue-arizona-capitol-over-last-minute-abortion-ban-attempt/7783424001/.

her health and major bodily functions are in jeopardy, and the law prohibiting care until her condition so deteriorates that death is imminent.

In the wake of *Dobbs*, these are distinctions of paramount importance to citizens and legislators around the country. If the Legislature had expressly considered the massively consequential move from the modern abortion regulations to a near-total ban, there would have been a robust civic debate and a democratic feedback mechanism (voting). Petitioners' arguments in this case seek to circumvent that democratic process.

In contrast to Petitioners' radical request, harmonization respects the separation of powers, preserves more law than not, and adheres to the presumption—on which the People rely—that the Legislature can and will "express its meaning in as clear a manner as possible," *Mendelsohn v. Super. Ct. in & for Maricopa Cnty.*, 76 Ariz. 163, 169 (1953), especially on matters of profound consequence. This Court should refuse Petitioners' plea to hold that the old ban supersedes newer laws and instead leave "that authority [with] the people and their elected representatives." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

CONCLUSION

The Court should affirm.

RESPECTFULLY SUBMITTED this 20th day of September, 2023.

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