IN THE ARIZONA SUPREME COURT

PLANNED PARENTHOOD ARIZONA, INC.; LAURA CONOVER, Pima County Attorney, Appellants, v. KRISTIN K. MAYES, Arizona Attorney General; Appellee, and ERIC HAZELRIGG; DENNIS McGRANE, Yavapai County Attorney, Intervenors.	No. CV-23-0005-PR Court of Appeals No. 2 CA-CV 2022-0116 Pima County Superior Court No. C127867

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE (AACJ) IN SUPPORT OF APPELLANTS

FILED WITH CONSENT OF ALL PARTIES

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INTRODUCTION

This case involves the most volatile political issue of the last fifty years – the right of a woman to obtain an abortion and the power of government to curtail that right. Over the last half-century, the two sides of this political issue have skirmished consistently in all branches of government; however, much of the political posturing at the state level was largely irrelevant because of a federal constitutional right to abortion protected in *Roe v. Wade,* 410 Ariz. 113 (1973). Arizona is no different in this regard; the political branches enacted several statutes and regulations with the full knowledge that they could never be realized so long as *Roe* remained the law of the land. Once the U.S. Supreme Court overruled *Roe* in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 228 (2022), however, those formerly irrelevant statutes gained force of law—and state courts were pressed into action to resolve the competing interests and competing language among the various state laws.

This Court should affirm *Planned Parenthood Arizona, Inc. v. Brnovich*, 254 Ariz. 401 (App. 2022) (hereinafter "*Opinion*"), since the court of appeals correctly applied the canons of statutory construction. More importantly, however, this case lays bare the naked intent of (at least) one county prosecutor to abuse prosecutorial discretion with a view toward effecting a personal political agenda. One of the purposes of Arizona criminal law is "[t]o give fair warning of the nature of the conduct proscribed," A.R.S. § 13-101(2), yet the legal interpretation offered by

Intervenors Hazelrigg and McGrane does the opposite. This case provides an excellent vehicle for this Court to comment on the limits of prosecutorial discretion. To the extent that the Intervenors want to see their vision become law, the appropriate forum is the ballot box, not the courts.

INTEREST OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Amicus offers this brief because challenging an unconstitutional application of criminal laws is at the core of AACJ's mission. This case is a classic example of interested persons asking the courts to interpret the laws consistently with a political belief rather than focus on the language of the laws that the legislature enacted and the governor signed. Pushing the boundaries of the law not only creates problems of vagueness but also reflects an abuse of prosecutorial discretion. Only with a narrow

reading of the criminal law can courts protect the right to fair notice of what the law prohibits, and this case presents an excellent vehicle for imposing such limitations.

ARGUMENTS

I. Giving effect to the "15-week ban" is not only supported by all canons of statutory interpretation, but it is necessary to avoid vagueness problems, which risk unconstitutionally violating due process.

"Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Because the criminal law restricts liberty of action, it must be sufficiently precise so that it is abundantly clear what conduct is permitted and what is prohibited. Courts rely on several canons of statutory construction to resolve questions of interpretation.

This Court's "objective in interpreting statutes is to give effect to the legislature's intent." *State ex rel. Polk v. Campbell*, 239 Ariz. 405, 406 ¶ 5 (2016). When a statute's meaning is clear and unambiguous, courts "apply the plain meaning and our inquiry ends." *State v. Burbey*, 243 Ariz. 145, 147 ¶ 7 (2017). Each word, phrase, and clause in a statute is to be given meaning so that "no clause, sentence or word is rendered superfluous, void, contradictory or insignificant." *Bilke v. State*, 206 Ariz. 462, 464 ¶ 11 (2003) (quoting *Guzman v. Guzman*, 175 Ariz. 183, 187 (App. 1993)).

Statutes relating to the same subject or having the same general purpose, namely, statutes that are *in pari materia*, "should be read in connection with, or should be construed with other related statutes, as though they constituted one law" to avoid rendering any word, clause or sentence superfluous. *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970). Courts will "adopt a construction that reconciles them whenever possible, giving force and meaning to each." *State v. (Shawnte) Jones*, 235 Ariz. 501, 502 ¶ 6 (2014) (citing *UNUM Life Ins. Co. v. Craig*, 200 Ariz. 327, 333 ¶ 28 (2001). But when "conflicting statutes cannot operate contemporaneously, the more recent, specific statute governs over an older, more general statute." *Id.* at 503 ¶ 8 (quoting *UNUM Life Ins. Co.*, 200 Ariz. at 333 ¶ 29). The specific statute effectively creates "an exception or qualification" to the general statute. *State v. Weiner*, 126 Ariz. 454, 456 (App. 1980). And when "more than one interpretation [of a statute] is plausible, we ordinarily interpret the statute in such a way as to achieve the general legislative goals that can be adduced from the body of legislation in question." *Dietz v. Gen. Elec. Co.*, 169 Ariz. 505, 510 (1991).

When courts contemplate the intent of the legislature, courts should be mindful of separation of powers, lest the courts become a floating legislature. *State v. Wagstaff*, 164 Ariz. 485, 487 (1990) (citing Ariz. Const. art. 3; Federalist No. 47). "Courts are not at liberty to impose their views of the way things ought to be simply because that's what must have been intended, otherwise no statute, contract or

recorded word, no matter how explicit, could be saved from judicial tinkering." *Kilpatrick v. Superior Court*, 105 Ariz. 413, 422 (1970).

Criminal statutes that fail to give notice that an act has been made criminal before it is done are unconstitutional deprivations of due process. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *United States v. Cohen Grocery Co*., 255 U.S. 81 (1921); U.S. Const. amends. V, XIV; Ariz. Const. art. 2, § 4. It is the "public policy of this state and the general purpose" of the Criminal Code "[t]o give fair warning of the nature of the conduct proscribed and the sentences authorized upon conviction." A.R.S. § 13-101(2).

To satisfy due process, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357. "[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). This Court has therefore held:

> That the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its

> meaning and differ as to its application violates the first essential of due process of law.

State v. McNair, 141 Ariz. 475, 483 (1984) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also State v. Getz*, 189 Ariz. 561, 565 (1997). A statute "is unconstitutionally vague if it fails to give persons of ordinary intelligence reasonable opportunity to know what is prohibited and fails to provide explicit standards for those who apply it." *State v. Tocco*, 156 Ariz. 116, 118 (1988) (citations omitted). Courts have a duty to construe statutes in a way that "not only gives effect to the legislature's intent, but also in a way that maintains its constitutionality." *State v. Thompson*, 204 Ariz. 471, 478 ¶ 27 (2003).

It is for this reason that "[w]hen a statute is 'susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant.'" *State v. Tarango*, 185 Ariz. 208, 210 (1996) (quoting *State v. Pena*, 140 Ariz. 545, 549-50 (App. 1983)). "[T]his 'time-honored interpretive guideline' serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)).

Due process is not a "non-existent" concern, as the Intervenors claim. Pet. at 11. On the contrary, the Intervenors' argument turns all of these rules on their head. According to the Intervenors, because there is some overlap between the "territorial

ban" (all abortions are outlawed except for medical necessity) and the "15-week ban" (elective abortions are outlawed beyond 15 weeks of gestation except for medical necessity), it follows that the narrower ban is subsumed in the greater ban. This argument, at its core, rejects the most fundamental principle of law in a free society: everything which is not forbidden is allowed. The Intervenors ignore this principle by arguing that no law "'expressly allow[s]'" abortion. Pet. at 7 (quoting *Opinion* ¶ 19). Even if the laws were ambiguous, giving effect to this argument "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon*, 494 U.S. at 178 (Scalia, J., concurring).

The absurdity of the Intervenors' argument is plain when considering the effect it requires. Not only would the entire legislative scheme around the 15-week ban be rendered superfluous and meaningless, but the same would be true for large swaths of the criminal code. Three examples of note: criminal homicide, justification defenses, and medical marijuana.

First, criminal homicide is prohibited by four separate statutes defining first-degree murder, second-degree murder, manslaughter, and negligent homicide. For the most part, these are distinguished by the culpable mental state of the killer. A person who kills intentionally without premeditation may be charged with second-degree murder or manslaughter, depending on whether the crime was committed in

a heat of passion upon sudden provocation by the victim. *State v. Lua*, 237 Ariz. 301, 303 ¶ 7 (2015). "[A] jury literally following the *LeBlanc* instruction would never reach the issue of adequate provocation in order to find a defendant guilty of manslaughter under § 13-1103(A)(2) rather than second-degree murder," which would render that subsection of the manslaughter statute superfluous.[1] *State v. Eddington*, 226 Ariz. 72, 81-82 ¶ 31 (App. 2010), *aff'd*, 228 Ariz. 361 (2011). This Court thus approved the post-*Eddington* pattern instruction that requires the jury to consider the circumstance that differentiates the two crimes. *Lua*, 237 Ariz. at 306-07 ¶ 20 (citing RAJI (Criminal) Statutory 11.04 (3d ed.)).

Second, consider justification defenses. "In effect, once sufficient self-defense evidence is admitted, the absence of self-defense becomes an additional element the state must prove to convict." *State v. Carson*, 243 Ariz. 463, 466 ¶ 11 (2018). "A person commits assault by: [i]ntentionally, knowingly or recklessly causing any physical injury to another person." A.R.S. § 13-1203(A)(1). Under § 13-403(5), however, "[t]he use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal" when "[a] duly licensed physician or a registered nurse or a person acting under his direction" provides

[1] The *LeBlanc* instruction would inform a jury that it may "deliberate on a lesser offense if it either (1) finds the defendant not guilty on the greater charge, or (2) after reasonable efforts cannot agree whether to acquit or convict on that charge." *State v. LeBlanc*, 186 Ariz. 437, 438 (1996).

medical care with consent or in emergency situations. Justification defenses create an exception to a general application of criminal law much as the 15-week ban does to the territorial ban. But under the Intervenors' logic, justification defenses should be read out of existence—a fact that would undoubtedly shock peace officers who use physical force to arrest wrongdoers every day.

Third, prior to passage of the Arizona Medical Marijuana Act (AMMA) in 2010, A.R.S. 13-3405(A)(1) read: "A person shall not knowingly … possess or use marijuana." After AMMA, there was no change to this language in 13-3405(A), even though it was understood that "AMMA broadly immunizes qualified patients" from various prosecution for marijuana offenses. *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, 122 ¶¶ 7-8 (2015). After the 2020 passage of Proposition 207, section 13-3405 clearly states: "Except as provided in sections 36-2852 and 36-2853…" For the preceding decade, when that language was missing, the Intervenors' statutory construction would allow full disregard of AMMA and prosecution of patients.[2]

Even if the conflicting statutes created ambiguity and there was any merit to the Intervenors' arguments, this Court's recent opinion in *Burbey* requires rejecting those arguments and upholding the 15-week ban. In that case, the issue was whether

[2] This is not hypothetical in the case of Intervenor McGrane, whose office attempted to convince this Court that AMMA should not be applied by Arizona courts and continued to prosecute and imprison law-abiding patients. *State ex rel. Polk v. Hancock*, 237 Ariz. 125 (2015); *State v. (Rodney) Jones*, 246 Ariz. 452 (2019).

the sex-offender-registration statutes required a person, who upon becoming homeless, was required to register as homeless within 72 hours or 90 days. First, this Court noted that the requirement to give meaning to every word would be violated by applying the 72-hour rule to a person who becomes homeless because they do not acquire a new residence. *Id*. at 147 ¶ 10. Second, reading the relevant statutes *in pari materia*, it would make little sense to have a 90-day rule for homeless persons if the "residence" was nothing more than a "temporary location." *Id*. at 148 ¶ 13. Finally, this Court "consider[ed] the constitutional ramifications of the State's view" and recognized that the statute "on its face does not provide clear notice whether a person who moves from a registered residence to homelessness must both provide notification of the move and a new 'residence' and register as a transient, or only the latter." *Id*. at 149 ¶¶ 15-16. This Court avoided striking down the statute in its entirety by giving it a constitutional reading that would only require application of the 90-day rule. *Id*. ¶ 17 (citing *Thompson*, 204 Ariz. at 478 ¶ 27).

II. The Intervenors' arguments reflect an abuse of prosecutorial discretion.

Then-Attorney General Mark Brnovich argued below that prosecutors should be able to exercise discretion in the case of interpreting the abortion laws. The court of appeals criticized Brnovich's argument because the statute of limitations for felony offenses is seven years, whereas county attorneys and the attorney general

serve four-year terms. *Opinion* ¶ 21.[3] Judge Eckerstrom's concurrence notes that the county-by-county prosecutorial discretion is not stated explicitly in the law. *Id.* ¶ 33 (Eckerstrom, J., concurring).

If the legislature had included such language, however, it would violate due process because it would create a patchwork of differing enforcements and punishments depending on the caprice of any particular elected official. The danger of such a patchwork approach became abundantly clear in this case when 12 of Arizona's 15 County Attorneys signed a letter asking Governor Katie Hobbs to rescind her executive order that reserved all power to prosecute abortions for the Attorney General.[4] The implication of this letter, of course, is that despite the haziness of the legal landscape, its signatories intended to prosecute abortions as they saw fit—exercising unfettered prosecutorial discretion.

Also demonstrative of the patchwork problem are the radically different stated

[3] Arguably, the State would be estopped from bringing any prosecution where an elected prosecutor announced a refusal to bring charges during the course of that official's term. *See Commonwealth v. Cosby*, 252 A.3d 1092, 1147 (Pa. 2021) ("When an unconditional charging decision is made publicly and with the intent to induce action and reliance by the defendant, and when the defendant does so to his detriment (and in some instances upon the advice of counsel), denying the defendant the benefit of that decision is an affront to fundamental fairness, particularly when it results in a criminal prosecution that was foregone for more than a decade. No mere changing of the guard strips that circumstance of its inequity.").

[4] Letter from Rachel Mitchell, Maricopa County Attorney, to Katie Hobbs, Arizona Governor (July 3, 2023).

approaches to abortion criminalization on a county-by-county basis. For example, Pima County Attorney Laura Conover, who did not sign the letter, has publicly stated through Twitter, "we will do everything in our power to ensure that no person seeking or assisting in an abortion will spend a night in jail."[5] Conversely, Yavapai County Attorney (and Intervenor) Dennis McGrane intends to "fully enforce § 13-3603 as it was written," meaning, he intends to enforce the territorial ban. Motion to Intervene at 2. Maricopa County Attorney Rachel Mitchell has claimed her office will not prosecute women for having abortions, but she made no mention of providers or physicians.[6] Coconino County Attorney Bill Ring admits that "both laws contradict each other in a contradiction that can't be solved by a prosecutor."[7] La Paz County Attorney Tony Rogers abstained, expressing confusion about the state of the law, but merely shrugged, "there are no abortion services here."[8]

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[5] @Conover17L, Twitter (May 3, 2022, 4:41 PM), https://twitter.com/Conover17L/status/1521636060056326146.

[6] *Statement from Maricopa County Rachel Mitchell on Pima County Ruling regarding abortion*, Facebook (Sept. 27, 2022), https://www.facebook.com/watch/?v=488507969840324.

[7] Haley Smilow, *Letter of the law(s): Prosecutors confused by conflicting abortion laws*, Cronkite News (Sept. 30, 2022), https://cronkitenews.azpbs.org/2022/09/30/letter-of-the-laws-prosecutors-confused-by-conflicting-abortion-laws/.

[8] John Gutekunst, *Twelve of 15 Arizona county attorneys call on Gov. Hobbs to rescind executive order on abortion*, Parker Pioneer.net (Jul. 11, 2023), https://www.parkerpioneer.net/news/article_8d4ee3a0-2053-11ee-bfd8-a37109fb9d46.html.

Further confusing the issue are the statements of former governor Doug Ducey. His spokesperson said that the 15-week ban, which Ducey was "proud to sign," was the "law of the land," despite the trial court's ruling.[9] In response, Mark Brnovich complained that the Governor "had not taken a clear position on the current state of the law in Arizona," and requested that Governor Ducey clarify.[10]

The advocates of prosecutorial discretion seek to create a landscape in which a physician may legally perform an abortion in Tucson at the gestational age of 10 weeks, but the same physician performing the same procedure in Prescott should be arrested, charged, and sentenced to 2-5 years in the Department of Corrections pursuant to A.R.S. § 13-3603.[11] That same doctor may then travel to Phoenix and have no way of knowing whether she may lawfully terminate a patient's pregnancy before the fetus has reached a gestational age of 15 weeks. Worse, if the county attorney and attorney general do not see eye-to-eye, one prosecutor may bring charges while another would not, based on the same act. The Intervenors complain

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[9] 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.

[10] 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.

[11] It is also unclear whether doctors performing illegal abortions are punished under section 13-3603 or section 36-2324(A). The latter makes the offense a class 6 felony, punishable under section 13-702(D) by 0.33 to 2.0 years.

that the court of appeals did not clarify how the conflict between the territorial ban and the 15-week ban would "'practically demand' arbitrary enforcement." Pet. at 14. But one need only look to the current patchwork: Arizona, a state full of prosecutors ready to apply different criminal statutes to the same conduct, is ripe for arbitrary enforcement.

While the decision of "whether and with what crime to charge a suspect is within the sound discretion of the prosecutor," a "case of prosecutorial abuse is certainly possible." *State v. LaGrand*, 153 Ariz. 21, 30 (1987). Over 100 years ago, this Court has held that when the law bestows discretion, "it means a sound discretion. It does not mean a wild whimsical discretion … because he may have the humor to bestow a favor upon one person as a mark of friendship, and withhold it from another as a mark of displeasure." *In re Welisch*, 18 Ariz. 517, 521-22 (1917). Likewise, while prosecutors may make charging decisions in their sound discretion, such discretion still must be bounded by the law and "does not warrant ignoring" the statutes' plain language. *State v. Holle*, 240 Ariz. 300, 309 ¶ 44 (2016). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

The Intervenors propose an interpretation of the abortion statutes that creates vagueness problems. Reasonably intelligent persons would not recognize abortions

within 15 weeks as prohibited. The class of such persons includes not only elected county attorneys and the Attorney General, but also three judges of the court of appeals. *See State v. Weakland*, 246 Ariz. 67, 71-72 ¶¶ 15-16 (2019) (erroneous judicial interpretations demonstrated officer reasonableness for application of good-faith exception). The Intervenors' arguments fail constitutional muster.

III. This Court should establish sound limits on prosecutorial discretion.

The problem of prosecutorial discretion comes to this Court by means of a hot-button political issue, but it has been lurking in the shadows of criminal law for a long time. Over the last decade, the United States Supreme Court decided a string of cases limiting a statute's scope where the broad language of the statute leaves too much room for overcharging and thus abuse of prosecutorial discretion. These cases should guide this Court's jurisprudence.

In *Bond v. United States*, 572 U.S. 844, 865 (2014), a woman poured household chemicals on her husband's lover's car, causing skin irritation. Prosecutors charged Bond with violating the Chemical Weapons Convention Implementation Act. The Court unanimously reversed Bond's conviction because charging Bond in this manner amounted to abuse of prosecutorial discretion. The following year, in *Yates v. United States*, 574 U.S. 528 (2015), the Court addressed another case of prosecutorial overreach where a commercial fisherman accused of catching and disposing of three undersized fish in the Gulf of Mexico was charged

with violating the "anti-shredding provision" of the Sarbanes-Oxley Act. *Id.* at 534-35.[12] The Court determined that a fish is not a "tangible object" within the statutory meaning, largely based on concern that the broad language of criminal statutes leaves too much room for abuse of prosecutorial discretion. *Id.* at 536, 541 (rejecting the "Government's unrestrained reading" because "Congress' conception of § 1519's coverage was considerably more limited than the Government's.").

In *Maslenjak v. United States*, 582 U.S. 335 (2017), the Court again limited the reach of a criminal statute to protect against prosecutorial overcharging. In 1998, Maslenjak, an ethnic Serb from Bosnia, was granted refugee status. Many years later, Maslenjak—now a citizen—was convicted of making false statements about her husband's military service because the government successfully argued to the trial court that a person could be convicted even if the statements were immaterial to the immigration official's decision. *Id*. at 338-40. The Court strictly construed the statutory phrase "knowingly procure . . . contrary to law" to mean only misrepresentations material to the naturalization determination, in large part because of the Court's concerns regarding prosecutorial overreach. *Id*. at 341-42. Indeed, the

[12] Although he dissented in the case, Justice Scalia was disturbed enough by the charging decision to wonder aloud during oral argument, "who do you have out there that . . . exercises prosecutorial discretion? Is this the same guy that . . . brought the prosecution in Bond last term? . . . . What kind of a mad prosecutor would try to send this guy up for 20 years or risk sending him up for 20 years?" Transcript of Oral Argument at 27-28.

Court explained that "by so wholly unmooring the revocation of citizenship from its award, the Government opens the door to a world of disquieting consequences—which…would give prosecutors nearly limitless leverage—and afford newly naturalized Americans precious little security." *Id.* at 346.

In several recent cases, the Court has unanimously rejected the government's overbroad readings of various federal criminal statutes. *McDonnell v. United States*, 579 U.S. 550 (2016) ("Taking into account the text of the statute, the precedent of this Court, and the constitutional concerns raised by Governor McDonnell, we reject the Government's reading of § 201(a)(3) and adopt a more bounded interpretation of 'official act.'"); *Kelly v. United States*, 140 S. Ct. 1565, 1568 (2020) ("deception, corruption, [and] abuse of power" in creating four-day traffic jam does not violate statutes that "target fraudulent schemes for obtaining property"); *Dubin v. United States*, 599 U.S. 110, 131 (2023) ("Taken together, from text to context, from content to common sense, § 1028A(a)(1) is not amenable to the Government's attempt to push the statutory envelope.").

Justice Gorsuch has sharply criticized vague laws. In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Court struck down a residual provision of the Armed Career Criminal Act (ACCA) as unconstitutionally vague under the Fifth Amendment Due Process Clause. In the plurality opinion, the Court rejected the Government's argument for relaxing the void-for-vagueness doctrine, holding that "the doctrine

guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Id.* at 1212-13. Justice Gorsuch concurred, explaining:

> Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown's abuse of "pretended" crimes like this as one of their reasons for revolution. *See* Declaration of Independence ¶ 21. Today's vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.

Id. at 1223-24 (Gorsuch, J., concurring in part and concurring in the judgment). In *United States v. Davis*, 139 S. Ct. 2319 (2019), the Court once again struck down an AACA residual clause as void for vagueness. Delivering the majority opinion, Justice Gorsuch explained that the doctrine prohibiting enforcement of vague laws "rests on the twin constitutional pillars of due process and separation of powers":

> Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the law demands of them. Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to "make an act a crime." Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide.

Id. at 2325 (citations omitted).

Just this last term, in *Dubin*, Justice Gorsuch opted not to join the unanimous

opinion of the Court reversing convictions because he felt the Court was not strong enough in its rejection of the Government's position:

> Whoever among you is not an "aggravated identity thief," let him cast the first stone. The United States came to this Court with a view of 18 U.S.C. § 1028A(a)(1) that would affix that unfortunate label on almost every adult American. Every bill splitter who has overcharged a friend using a mobile-payment service like Venmo. Every contractor who has rounded up his billed time by even a few minutes. Every college hopeful who has overstated his involvement in the high school glee club. All of those individuals, the United States says, engage in conduct that can invite a mandatory 2-year stint in federal prison. The Court today rightly rejects that unserious position. But in so holding, I worry the Court has stumbled upon a more fundamental problem with § 1028A(a)(1). That provision is not much better than a Rorschach test. Depending on how you squint your eyes, you can stretch (or shrink) its meaning to convict (or exonerate) just about anyone. Doubtless, creative prosecutors and receptive judges can do the same. Truly, the statute fails to provide even rudimentary notice of what it does and does not criminalize. We have a term for laws like that. We call them vague. And "[i]n our constitutional order, a vague law is no law at all."

Dubin, 599 U.S. at 133 (quoting *Davis*, 139 S. Ct. at 2323).

Justice Gorsuch's view, as well as that of the other eight justices, stands in stark contrast to what has been tolerated by Arizona courts. For example, in *State v. Henry*, 205 Ariz. 229, 233 ¶ 15 (App. 2003), the court allowed a defendant's conviction for fraudulent schemes and artifices even though the "benefit" obtained was sexual gratification rather than the financial benefit contemplated by the statute. This is exactly the kind of reading that the Supreme Court rejected 12 years later in *Yates*. This kind of overbroad reading of criminal statutes is commonplace. *See, e.g.*, *State v. Gill*, 235 Ariz. 418 (App. 2014) (burglary charge can stand for reaching into

a mailbox, which is a "nonresidential structure"); *State v. Bon*, 236 Ariz. 249 (App. 2014) (reaching into open bed of a pickup truck constitutes burglary); *State v. Gagnon*, 236 Ariz. 334 (App. 2014) (allowing trafficking-in-stolen-property charge where a more specific statute directs prosecution for less serious offense of false representation in pawn transaction).

This Court should adopt Justice Gorsuch's view of how vague laws invite prosecutorial abuses. It hinted at such a concern in *Burbey*, but the time has come to fully embrace such a view.

CONCLUSION

This Court should uphold the 15-week ban because it is required by all canons of statutory construction and due process. In the process, this Court should speak clearly against prosecutorial excesses and call for narrow construction of criminal statutes to avoid abuse of prosecutorial discretion.

RESPECTFULLY SUBMITTED this 3d day of October, 2023.

By /s/ David J. Euchner

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