IN THE SUPREME COURT
STATE OF ARIZONA

PLANNED PARENTHOOD OF ARIZONA, INC., *et al.*, Plaintiffs/Appellants, v. KRISTIN MAYES, *et al.*, Defendants/Appellees, and ERIC HAZELRIGG, M.D., Intervenor-Appellee.	No. CV-23-0005-PR Court of Appeals No. 2 CA-CV-2022-0116 Pima County Superior Court No. C127867

BRIEF OF *AMICI CURIAE* SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES BEN TOMA AND PRESIDENT OF THE ARIZONA SENATE WARREN PETERSEN

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Speaker of the Arizona House of Representatives Ben Toma and President of the Arizona Senate Warren Petersen respectfully submit this brief as *amici curiae* in support of the Petition for Review.

INTRODUCTION

This case pivots on two uncontested propositions of law. First, in determining whether and under what circumstances abortions may be lawfully performed in Arizona, the judiciary must "give effect to legislative intent." *Planned Parenthood of Arizona, Inc. v. Brnovich*, 254 Ariz. 401, 524 P.3d 262, 266, ¶ 11 (App. 2022) ["COA Op."] (quoting *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327 (2001)). Second, the Legislature not only has never repealed A.R.S. § 13-3603—which for more than a century has prohibited any "person" from providing an abortion at any stage of pregnancy "unless it is necessary to save [the mother's] life"—but explicitly disclaimed any intention of doing so. *See* 2022 Ariz. Laws ch. 105, § 2(1) (S.B. 1164). The Court of Appeals and the Respondents maintain rhetorical fidelity to these premises, but their interpretive exertions deliver precisely the result they purportedly foreswear: an implied repeal of A.R.S. § 13-3603 by an archipelago of provisions scattered throughout Title 36.

Their reasoning neglects the unique historical and legal backdrop that has animated abortion legislation for the past half century. The U.S. Supreme Court's sudden appropriation of abortion policy to the federal judiciary in *Roe v. Wade*, 410

U.S. 113 (1973), inaugurated five decades of legal flux, during which the Legislature tailored iterative abortion laws to align with the mutating contours of the Supreme Court's jurisprudence. Throughout these years, however, the Legislature deliberately maintained A.R.S. § 13-3603 in place and unabridged, anticipating the day when the federal courts would return this issue to the democratic domain. That time has now arrived. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). As S.B. 1164 itself attests, it and related provisions of Title 36 were intended to codify and preserve those facets of A.R.S. § 13-3603 that the *Roe* regime would tolerate, until such time as Section 13-3603 could be fully enforced. While the Title 36 provisions are, of course, *bona fide* laws in their own right, they were enacted to supplement—not subsume or supplant—A.R.S. § 13-3603.

Post-*Dobbs*, all these statutes now stand as independent and alternative legal constraints on abortion providers. While insisting that it was "not imposing an implied repeal here," COA Op., ¶ 23, the Court of Appeals proceeded to do just that, effectively exempting all physician-performed abortions from A.R.S. § 13-3603—a diktat that defies the statute's plain text. At bottom, the Court of Appeals erred in purporting to "reconcile[]," *id.*, statutes that were never mutually inconsistent to begin with. Recognizing A.R.S. § 13-3603 and the relevant provisions of Title 36 as each embodying separate and discrete regulatory limits on abortion effectuates

the language the Legislature adopted into law, in accordance with the Legislature's intent.

The Court of Appeals rationalized its rewriting of A.R.S. § 13-3603's plain text by insisting that doing so was necessary to prevent "arbitrary enforcement" of independent, if sometimes overlapping, criminal limitations on abortion. COA Op., ¶ 17. But this reasoning injects into Arizona law a consequential distortion of foundational due process principles. A.R.S. § 13-3603 consists of a single sentence: "A person who provides, supplies or administers" an abortion is subject to criminal prosecution, unless doing so was "necessary to save [the mother's] life." No reasonable person could fail to grasp the meaning of those words.

Uncertainty surrounding whether any particular county attorney may or may not pursue prosecution (or, alternatively, charge the offender under a different statute instead) is not—and could not be—a dereliction of due process. It is, to the contrary, an entrenched hallmark of Arizona's criminal justice system, which devolves to county attorneys (limited) discretion to determine whom to charge and with what offenses. *See* A.R.S. § 11-532(A)(1), (2). The notion that variations among the respective county attorneys' enforcement priorities inflicts a due process violation is detached from precedent, logically unsound, and cannot justify a judicial abrogation of clear statutory text.

INTEREST OF THE *AMICI*

Warren Petersen is the President of the Arizona Senate, and Ben Toma is the Speaker of the Arizona House of Representatives. The *amici* proffer this brief as presiding officers of their respective chambers to articulate the perspective of the legislative branch on important issues bearing on the application and underlying aspirations of statutes the Legislature has enacted. *See generally* A.R.S. § 12-1841 (recognizing the right of the Speaker and Senate President to "be heard" in any proceeding implicating the validity of a state law); *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342, ¶ 5 (1999) ("In Arizona, the legislature is endowed with the legislative power of the State, and has plenary power to consider any subject within the scope of government unless the provisions of the Constitution restrain it.").

ARGUMENT

I. The Legislature Has Never Repealed, Abrogated or Limited A.R.S. § 13-3603 In Any Respect or in Any Application

A. The Court of Appeals' Holding Is Incompatible with A.R.S. § 13-3603's Plain Text

Few maxims have echoed with such frequency and consistency across the decades as the principle that "[t]he cardinal rule of statutory interpretation is to determine and give effect to the legislative intent behind the statute." *Calvert v. Farmers Ins. Co. of Ariz.*, 144 Ariz. 291, 294 (1985); *see also State of the Netherlands v. MD Helicopters, Inc.*, 250 Ariz. 235, 238, ¶ 8 (2020) ("When

interpreting statutes, our goal is to effectuate the legislature's intent."); *State v. Reynolds*, 170 Ariz. 233, 234 (1992) ("When interpreting the meaning of particular statutory provisions, we seek to discern the intent of the legislature."); *Town of Florence v. Webb*, 40 Ariz. 60, 63 (1932) ("We have held repeatedly that the primary consideration in interpreting the meaning of statutes is the intent of the Legislature.").

Because the law of course must be reified in written words, courts construing a statute "look first to its text." *State v. Burbey*, 243 Ariz. 145, 147, ¶ 7 (2017). Here, the Court of Appeals need not have ventured beyond A.R.S. § 13-3603's plain language. The statute's scope is clear and comprehensive; it prohibits any "person"—whether a physician or not—from providing an abortion "unless it is necessary to save [the mother's] life." That certain specific abortions (*e.g.*, an abortion performed during the fifth week of pregnancy by a licensed physician who properly documents it) may not run also afoul of other statutes (*e.g.*, A.R.S. § 36-2322) does not mean the Legislature did not or cannot separately proscribe the same abortion under A.R.S. § 13-3603. Some abortions may contravene both sets of statutes; some may violate only one.

In purporting to "harmonize" statutes that are not mutually inconsistent, the Court of Appeals crossed the perimeter that demarcates careful construction from judicial revision. *See Ballesteros v. Am. Std. Ins. Co. of Wis.*, 226 Ariz. 345, 349, ¶

17 (2011) ("[I]t is not our place to rewrite the statute."). The word "person," A.R.S. § 13-3603, simply did not, at some unspecified point during the past century, extra-textually metamorphosize into the term "non-physician," *see* COA Op., ¶ 13. *See First Nat. Bank of Arizona v. Superior Court of Maricopa Cnty.*, 112 Ariz. 292, 295, (1975) ("If this court were to insert in the statute all or any of the above qualifying provisions, it would in no sense be interpreting the statute as written, but would be rewriting the statute in accord with the presumed legislative intent. That is a legislative and not a judicial, function.'" (citations omitted)).

B. The Legislature's Incremental Amendments to Title 36 Were Intended to Effectuate A.R.S. § 13-3603 to the Fullest Extent Consistent with Federal Law

A resort to secondary interpretive methods reinforces the same conclusion: A.R.S. § 13-3603 embodies a continuous and unyielding legislative objective to protect unborn life to the fullest extent permitted by the U.S. Constitution. The Court of Appeals compounds its misconstruction of the statutory text with a disregard of the historical and legal context in which the relevant laws were adopted.

"Legislative and historical background of the statutory enactments shedding light on meaning and intent may be and often have been considered by this Court." *City of Mesa v. Killingsworth*, 96 Ariz. 290, 295 (1964). The conditions under which states regulated abortion between 1973 and 2022 are key to apprehending the interrelationship between A.R.S. § 13-3603 and the provisions of Title 36. No one

disputes that A.R.S. § 13-3603 was the controlling legislative exposition of abortion policy in Arizona until the U.S. Supreme Court in *Roe* abruptly excavated from the federal constitution an ostensible right to abortion. This novel construct conceded state interests "in maintaining medical standards, and in protecting potential life," *Roe*, 410 U.S. at 154, that "[a]t some point in pregnancy"—apparently in the second or third trimesters of pregnancy[1]—"become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." *Id.*

These inchoate judicial ruminations placed the Arizona Legislature and its counterparts elsewhere in a bind. Comprehensive protections of unborn life, such as A.R.S. § 13-3603, were effectively enjoined. The new *Roe* regime contemplated certain pro-life measures, but the parameters of the federal courts' tolerance for such laws was unknown and unknowable. The states were left to divine (often inaccurately) the haphazard trajectory of a deeply fractured Supreme Court's abortion jurisprudence. *See, e.g.*, *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (invalidating various regulations of second trimester abortions, including parental consent, waiting periods, and handling of fetal remains); *Planned Parenthood Ass'n. of Kansas City v. Ashcroft*, 462 U.S. 476 (1983) (plurality) (holding that hospitalization requirements for second trimester abortions were

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[1] The trimester framework devised in *Roe* "was the Court's own brainchild," *Dobbs*, 142 S. Ct. at 2266, with little sustenance in law or science.

unconstitutional but sustaining requirement of having a second physician present to care for infants who survived abortion attempts); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (plurality) (upholding ban on use of public resources for abortions and recognizing state interests in protecting unborn life pre-viability). Although the Supreme Court eventually discarded *Roe*'s trimester framework, the malleable "undue burden" rubric that succeeded it proved equally "inherently manipulable" and "hopelessly unworkable" in practice. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 984, 986 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *compare Stenberg v. Carhart*, 530 U.S. 914 (2000) (invaliding statutory prohibition on partial birth abortions) *with Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding statutory prohibition on partial birth abortions).

Against this backdrop, the Legislature worked within the mutating interstices of the Supreme Court's abortion case law to reconstruct and recodify as much of the dormant A.R.S. § 13-3603 as the federal authorities allowed. The Court of Appeals' assertion that the introduction of more limited abortion restrictions in Title 36 manifested "an unambiguous legislative intent to regulate but not eliminate elective abortions," COA Op., at ¶ 17, is factually and historically incorrect. It was the federal judiciary that effectively suspended A.R.S. § 13-3603, not the Arizona Legislature. The post-*Roe* statutory measures did not—and were never intended to—liberalize abortion policy relative to A.R.S. § 13-3603. Rather, they ***restricted***

abortion relative to the constitutional baseline announced in *Roe*, and bridged the regulatory gap between *Roe* and A.R.S. § 13-3603 until such time as the federal courts permitted A.R.S. § 13-3603's revivification. It is for precisely this reason that the Legislature, in the course of enacting the various Title 36 provisions, never made corresponding amendments to A.R.S. § 13-3603, and in fact repeatedly affirmed that these new measures did not legalize abortions that other laws—including the (temporarily) unenforceable, A.R.S. § 13-3603—independently prohibited. *See* A.R.S. § 36-2164; 2022 Ariz. Laws. ch. 105, § 2(1); 2016 Ariz. Laws ch. 77, § 6; 2012 Ariz. Laws ch. 250, § 11; 2011 Ariz. Laws ch. 9, § 8; 2009 Ariz. Laws ch. 172, § 6.

The prohibition on physician-performed abortions after fifteen weeks of pregnancy, *see* A.R.S. § 36-2322 (added by 2022 Ariz. Laws ch. 105 (S.B. 1164)), is consistent with this systemic legislative objective. At the time S.B. 1164 was introduced in January 2022, the *Dobbs* case, which featured a challenge to Mississippi's 15-week prohibition, was pending before the Supreme Court. Importantly, the court had granted certiorari only with respect to the question of whether all pre-viability prohibitions on elective abortions are unconstitutional. It did not, at the time it accepted review, indicate that it would entertain overruling *Roe* altogether. *See Dobbs*, 142 S. Ct. at 2313 (Roberts, C.J., concurring in the judgment) (recounting that Mississippi "went out of its way to make clear that it was

not asking the Court to repudiate entirely the right to choose whether to terminate a pregnancy”). Indeed, it was highly uncertain at the time S.B. 1164 was debated that a full abandonment of *Roe* could garner the votes of five Justices. Accordingly, S.B. 1164 was predicated on the supposition that the Supreme Court in *Dobbs* would countenance a 15-week limitation—but not necessarily anything more than that.

The text of the enacted legislation comports with precisely this design. If the Legislature had intended S.B. 1164 to legalize abortions prior to 15 weeks' gestation, it could have done so easily by repealing A.R.S. § 13-3603, or simply substituting “non-physician” for “person.” Not only did the Legislature not do so, it *explicitly disavowed* any intention to “[r]epeal, by implication or otherwise, section 13-3603.” 2022 Ariz. Laws ch. 105, § 2(1). Citing a parallel provision in the Mississippi law at issue in *Dobbs*, the Court of Appeals commented that “our legislature conspicuously avoided statutory language stating § 13-3603 should govern irrespective of other law should *Roe* be overturned.” COA Op., ¶ 24. Preliminarily, the absence of any repeal or amendment of A.R.S. § 13-3603's text is itself dispositive. The Legislature was not obligated to affirmatively ratify the truism that an extant statute remains the law of the state, and certainly need not have employed any particular semantic formulation to make that point. More fundamentally, the Legislature's explicit affirmation that S.B. 1164 did not repeal A.R.S. § 13-3603

underscores that S.B. 1164 partially revived A.R.S. § 13-3603 until a reversal of *Roe* could reimbue the latter with full effect.

In sum, the Court of Appeals ascribed to the Legislature an intention it never espoused and imposed a policy outcome the Legislature never ordained. A.R.S. § 13-3603 states now exactly what it said one hundred years ago: no "person" may provide an abortion "unless it is necessary to save [the mother's] life." While *Roe*'s 50-year *de facto* suspension of A.R.S. § 13-3603 necessitated various independent and supplementary abortion restrictions, the words of this statute—and the plain meaning they carry—have never changed.

II. <u>Differences Among County Attorneys' Prosecutorial Policies Do Not Violate Due Process Principles</u>

"A person" who performs or provides an elective abortion in Arizona is potentially subject to prosecution under A.R.S. § 13-3603 and, depending on the circumstances attendant to the abortion, certain provisions of Title 36 as well. According to the Court of Appeals, effectuating each of these independent statutory provisions would mean that "physicians performing elective abortions would not know if their conduct would be criminally prosecuted under § 13-3603 or if they could avoid criminal liability by complying with Title 36." COA Op., at ¶ 21. The concurrence echoes this sentiment, adding that the "lawfulness of elective abortions [would] vary depending on the county-by-county discretion of local law

enforcement officials, county attorneys, and the state-wide discretion of the attorney general." *Id.* at ¶ 33 (Eckerstrom, J., specially concurring). There are, however, three consequential flaws embedded in this curious reasoning.

A. Prosecutors May Select Which of Multiple Potentially Applicable Offenses to Charge

First, it conflates (unconstitutional) uncertainty in the law itself with (permissible and inevitable) uncertainty of its enforcement in any given case. The Court of Appeals is correct that "the law must be sufficiently definite to avoid arbitrary enforcement." COA Op., at ¶ 20. Notwithstanding the court's exertions to manufacture opacity from clarity, A.R.S. § 13-3603 could not be written in more easily comprehended terms. "A person" who provides an abortion has committed a crime, "unless it is necessary to save [the mother's] life." The wording is simple, lucid and categorical. Not even the Court of Appeals suggests that a reasonable person would fail to understand it. *See generally State v. McLamb*, 188 Ariz. 1, 5 (App. 1996) ("The Constitution only requires that language convey a sufficiently definite warning as to proscribed conduct when measured by common understanding and practices." (citing *State v. Cota*, 99 Ariz. 233 (1965)). And, in any event, the Court of Appeals could have dispelled any putative ambiguity simply by confirming in this proceeding that the statutory language means exactly what it says.

Rather, the Court of Appeals' actual preoccupation appears to be uncertainty over *which statute*—*i.e.*, A.R.S. § 13-3603 or some provision of Title 36—a prosecutor may or may not employ in a given case. But that concern does not evince a cognizable constitutional harm. The Legislature is entitled to enact multiple criminal prohibitions governing the same course of conduct, as long as each statute individually is sufficiently clear in its terms. Prosecutors, in turn, may properly select which of these provisions to enforce and when to do so. Indeed, "[c]hoosing which offense to charge and prosecute is within the discretion of the prosecutor. When conduct can be prosecuted under two or more statutes, the prosecutor has the discretion to determine which statute to apply." *State v. Lopez*, 174 Ariz. 131, 143 (1992); *see also State v. Far West Water & Sewer, Inc.*, 224 Ariz. 173, 184, ¶¶ 20, 22 (App. 2010) (rejecting argument that statute under which defendant was not charged was "the exclusive criminal sanction against" the relevant conduct, explaining that "[t]he fact that a prosecutor . . . chooses to apply a statute with a harsher penalty does not render [another potentially applicable statute] superfluous").

In other words, a physician who performs an elective abortion certainly would be on notice that he is violating A.R.S. § 13-3603, irrespective of whether the same abortion independently contravenes a Title 36 provision. There is not, and never has

been, a due process right to know in advance of committing a crime which of several applicable statutes prosecuting authorities will choose to charge.

B. Inter-County Variations in Prosecutorial Priorities Do Not Violate Due Process

Second, and relatedly, the Court of Appeals confounds (unconstitutional) selective prosecution with (permissible and inevitable) prosecutorial discretion. It may well be true that, if the Court affirms A.R.S. § 13-3603's plain meaning, some county attorneys will aggressively pursue every elective abortion carried out in their jurisdiction, while their counterparts elsewhere opt to prosecute fewer of such cases. That is, however, a legislatively designed feature—not a bug—of Arizona's largely decentralized criminal justice system, which empowers county attorneys with some discretion to make individualized prosecutorial judgments and prioritize finite enforcement resources. *See* A.R.S. § 11-532(A); *State v. Murphy*, 113 Ariz. 416, 418 (1976) ("The exercise of discretion by the prosecutor in the criminal justice system begins even before a case is filed. The prosecutor makes the determination whether to file criminal charges and which charges to file. The existence of this broad discretion . . . is not violative of the Constitution."). Disparate enforcement of course is constitutionally suspect if a particular defendant is targeted "based on an impermissible ground, like race or religion." *State v. Montano*, 204 Ariz. 413, 428, ¶ 78 (2003). But the Court of Appeals' perplexing position that due process is

transgressed simply because some county attorneys may regularly prosecute all A.R.S. § 13-3603 violations while other county attorneys may focus their attention on Title 36 offenses corrodes a foundational pillar of Arizona's localized criminal justice infrastructure.

C. The Courts Cannot Impose Prosecutorial Uniformity By Rewriting Statutes

Third, the specter of policy preferences pervading prosecutorial decisions does, in fact, evoke constitutional concerns. But the Court of Appeals misapprehended the danger, which has nothing to do with A.R.S. § 13-3603. A physician who is prosecuted in Yavapai County for performing an elective abortion in violation of A.R.S. § 13-3603's plain text suffers no due process injury simply because authorities in, say, Coconino County would choose not to charge the same offense. But a willful and systematic effort by the executive branch—propagated under the rhetorical veneer of "prosecutorial discretion"—to nullify duly enacted state laws does derogate the separation of powers. *See* Ariz. Const. art. III; *see also* *United States v. Texas*, 143 S. Ct. 1964, 1973 (2023) (distinguishing *bona fide* prosecutorial discretion from situations in which "the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions").

This prospect already is coming to fruition; the Governor has purported to transfer all prosecutorial decisions over abortion offenses to the Attorney General,

see Executive Order 2023-11, who, in turn, has avowed that her ideological affinity for abortion trumps her constitutional oath to enforce the law. *Mayes Says She Has No Plans to Prosecute Any Abortions*, KJZZ-FM, Jul. 3, 2023, *available at* https://kjzz.org/content/1851139/mayes-says-she-has-no-plans-prosecute-any-abortions ("Attorney General Kris Mayes says she will not prosecute any doctor who performs abortion procedures.").

That, however, is a problem for another day. For present purposes, the Court can best "harmonize" Arizona's various abortion restrictions simply by interpreting each statute in conformance with its respective text, recognizing each as independent—and, in some circumstances, complementary—components of a single regulatory structure. As in many other facets of criminal law, county attorneys will adopt variable policies and practices, with some electing to regularly pursue all violations of A.R.S. § 13-3603, while others prioritize the Title 36 provisions. As long as these variations are not undergirded by invidious discrimination or a deliberate abnegation of enforcement responsibilities, they are constitutionally sound and entrenched features of Arizona's criminal justice system. A judicial desire for policy uniformity cannot subordinate the plain meaning of statutory text that the Legislature has purposefully and explicitly left unchanged for more than a century.

CONCLUSION

For the foregoing reasons, the Court should vacate the Court of Appeals' opinion, and give effect to all of Arizona's laws restricting abortion, including A.R.S. § 13-3603.

RESPECTFULLY SUBMITTED this 4th day of October, 2023.

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