

IN THE SUPREME COURT

STATE OF ARIZONA

PLANNED PARENTHOOD
ARIZONA, INC., et al.,

Plaintiff/Appellants,

v.

KRISTIN K. MAYES, 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

PIMA COUNTY ATTORNEY'S RESPONSE TO AMICUS BRIEFS

LAURA CONOVER
PIMA COUNTY ATTORNEY
Samuel E. Brown (No. 027474)
Jonathan Pinkney (No. 025689)
Pima County Attorney's Office
32 N. Stone Ave., Tucson, AZ 85701
(520) 724-5700
Sam.Brown@pcao.pima.gov
Jonathan.Pinkney@pcao.pima.gov
Attorneys for Appellant Laura Conover,
Pima County Attorney

Aadika Singh*
Joshua Rosenthal*
Public Rights Project
490 43rd St. #115, Oakland, CA 94609
(907) 331-7481
aadika@publicrightsproject.org
josh@publicrightsproject.org

**Admitted Pro Hac Vice*

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INTRODUCTION

The Court of Appeals correctly harmonized A.R.S. § 13-3603's ("section 13-3603") territorial-era prohibition on abortion with the extensive set of permissions and prohibitions found in Title 36's modern regime. Nonetheless, Intervenors and their allied amici insist on a narrow analysis that refuses to look beyond section 13-3603. The Pima County Attorney and other parties have extensively presented the flaws of this approach.¹

Yet amici inject new flaws. Speaker of the Arizona House of Representatives Ben Toma and President of the Arizona Senate Warren Petersen misapprehend the nature of prosecutorial discretion and the corresponding due-process issues with conflicting interpretations of section 13-3603. Likewise, although supporting a correct interpretation of section 13-3603, amicus Arizona Attorneys for Criminal Justice (AACJ) misconstrue Intervenors' analysis as one of prosecutorial discretion. It is not.

Prosecutorial discretion is not at issue in this case. An interpretation of the full body of Arizona statutory abortion law is essential to protect the due process rights of physicians, so they know what is legally permitted and what is not. The exercise

¹ Several amici also presented the harmful real-world consequences of this legal error. *See* Br. Nat'l Council of Jewish Women of Arizona; Br. Family & Juvenile Law Assoc.; Br. Gov. Katie Hobbs; Br. League of Women Voters of AZ and AZ Business Owners; Br. American College of Obstetricians and Gynecologists.

of prosecutorial discretion cannot remedy an unconstitutionally vague set of criminal statutes. Nor may a county attorney use her authority to seek a criminal penalty for lawful conduct. The Court of Appeals' clear and comprehensive interpretation of abortion laws provides the guidance that prosecutors need to exercise their discretion within appropriate bounds.

The Center for Arizona Policy (CAP) asserts, remarkably, that this Court should interpret section 13-3603 through the lens of a vague, challenged personhood statute which is itself unclear, *and* insists that the confusion born by conflicting statutes was intended by the Legislature as a design feature of the statutory scheme.

This Court should reject the amici curiae's flawed interpretation of prosecutorial discretion, reject post-facto reasoning of legislative intent, and affirm the decision of the Court of Appeals.

ARGUMENT

I. Prosecutorial Discretion May Not Be Used to Criminalize Lawful Behavior.

As amici correctly recognize, “[c]hoosing which offense to charge and prosecute is within the discretion of the prosecutor.” Toma/Peterson Br. at 13. A locally elected prosecutor must exercise their judgment about how to best allocate the limited resources of the office to further public safety and justice in the

community. County attorneys may well reach varying conclusions regarding these difficult questions.

What no county attorney may do, however, is prosecute an individual for conduct that the law permits. This truism is reflected in the cases AACJ relies on. *See* AACJ Br. at 16-17. None of these cases addresses the limits of prosecutorial discretion. Rather, they address the proper statutory interpretation of punitive laws—in other words, the scope of prohibited conduct. In *Bond v. United States*, 572 U.S. 844 (2014), the U.S. Supreme Court held that the chemicals at issue fell outside the “normal notion” of a “chemical weapon,” within the meaning of the Chemical Weapons Convention and its implementing legislation. *Id.* at 855-56. In *Yates v. United States*, 574 U.S. 528 (2015), the U.S. Supreme Court held that the Sarbanes-Oxley Act does not criminalize the destruction of fish, as the Act addresses only destruction of objects “that record or preserve information.” *Id.* at 536. None of their case examples relate to prosecutorial discretion.

In contrast, consider the true exercise of prosecutorial discretion, as it concerns a clearly criminalized activity. One prosecutor may make a decision to charge a physician who provided an abortion greater than 15 weeks absent a medical emergency, while another would not expend their office’s limited resources on prosecuting that same physician conduct. The ability of prosecutors to make such decisions, while important, has no bearing on whether the conduct is illegal in the

first place. And prosecutors cannot make these decisions correctly without clarity as to the scope of prohibited activity. Amici's invocations of prosecutorial discretion are a red herring. The existence of prosecutorial discretion does not diminish the need for clear judicial clarification of Arizona's abortion laws.

II. Intervenors' Interpretation Fails to Provide Adequate Clarity to Provide Due Process or Guide Prosecutorial Decision-making.

The AACJ is correct to note that due process requires that "statutes must give people of common intelligence fair notice of what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019). Intervenors' (and several amici's) proposal to ignore Title 36 when interpreting section 13-3603 runs afoul of this principle in two ways, each of which further interferes with proper exercise of prosecutorial discretion.

First, as several parties have discussed, two sets of laws governing the same conduct and applied to the same class of people cannot constitutionally make that same conduct both lawful and unlawful. Here, the text of the Title 36 laws indicates that the provision of a consensual abortion by a doctor is lawful up to 15 weeks into a pregnancy. Yet, section 13-3603, passed nearly 100 years earlier, would provide that such an act is prohibited, absent an extreme exigency. Without reconciling the two, doctors have no clear guidance regarding what they may or may not do, and prosecutors lack clarity on what charges are available.

Second, the residual “life” exception in section 13-3603 creates its own problems of vagueness. Amici state that “[n]o reasonable person could fail to grasp the meaning of those [§ 13-3603’s] words” that allow for abortion when “necessary to save [the mother’s] life.” *Toma/Petersen Br.* at 3. Facially, those words may be clear, but as applied to many emergency situations, it is impossible even for physicians to say if or precisely when an abortion is necessary to save the mother’s life.

The amicus briefs from the American College of Obstetricians and Gynecologists, American Medical Association, and other medical associations further explain the challenges trained medical doctors have in understanding the meaning of the term “necessary” in section 13-3603. Pregnancy can lead to “health issues that do not necessarily or immediately lead to death, but nevertheless pose serious health risks,” like kidney inflammation, abnormal leakage or partial closure of a heart valve, and incomplete miscarriages. *ACOG Br.* at 12-13. These conditions are likely to threaten maternal life, although the timing and probability is inherently uncertain. “It is untenable to force pregnant patients to wait until their medical condition escalates to the point that an abortion is necessary to prevent death.” *Id.* at 14.

Prosecutors—who have no formal medical training—are particularly ill suited to making fair and predictable interpretations of the meaning of “necessary” in the

context of physician-provided abortions. Prosecutors are simply not equipped to determine the imminence of a pregnant person’s death or the appropriateness of a physician’s actions for purposes of making charging decisions under section 13-3603. So, it is simply not true as Amici Speaker Toma and President Peterson suggest that the words “necessary to save [the pregnant person’s] life” in section 13-3603 provide constitutionally clear notice of what “necessary” means when applied to physician-provided abortions. The resulting reasonable fear of prosecution “could cause some physicians to second guess the necessity of critical abortion care until it is too late to save the pregnant patient’s life.” ACOG Br. at 14.

III. A.R.S. § 1-219 Cannot Apply to the Statutory Interpretation of Section 13-3603.

Amicus Center for Arizona Policy (CAP) wrongly asserts that this Court should look to A.R.S. §1-219 (“section 1-219”) for clarification on how to interpret section 13-3603. CAP Br. at 13-14. Section 1-219 is itself the subject of a preliminary injunction for being “intolerably vague” because “it is entirely unclear what it means to construe and interpret Arizona law to ‘acknowledge’ the equal rights of the unborn.” *Isaacson v. Brnovich*, 610 F. Supp. 3d 1243, 1253 (D. Ariz. 2022). There, the District Court held that “[m]edical providers should not have to guess about whether the otherwise lawful performance of their jobs could lead to criminal, civil, or professional liability solely based on how literally or maximalist state licensing, law enforcement, and judicial officials might construe [§ 1-219]’s

command.” *Id.* at 1256. This facially vague statute cannot be used to interpret the meaning of section 13-3603.²

IV. The Court of Appeals Correctly Harmonized Conflicting Language.

Amicus CAP also contends that multiple layers of prohibitions on abortion are “a feature, not a flaw, in this field” because of the possibility that section 13-3603 might “one day” fall. [CAP Br. at 15]. In their example, they say that if section 13-3603 were to fall, a doctor performing an abortion “at *sixteen weeks’ gestation without medical need* will know that doing so is forbidden under both section 13-3603 and the fifteen-week law.” *Id.* (emphasis added). But their example contains the seeds of its own destruction: without harmonization, a doctor performing an abortion at *fourteen weeks’ gestation with medical need* (that is not life threatening) cannot be certain whether doing so is forbidden when considering both statutes. Abortions for non-life-threatening medical emergencies or that are not greater than fifteen weeks are simultaneously allowed by the fifteen-week law and prohibited under section 13-3603.³ CAP appears to be proposing a new canon of statutory

² Amicus CAP also argues that nothing may be inferred from the lack of action by the Legislature to seek to resolve the issue by approving legislation favoring section 13-3603 over the fifteen-week ban. Amicus CAP claims such action, in the face of an all-but-certain veto by Governor Hobbs, may have been “futile” in terms of its final outcome. [CAP Br. at 8]. However, the Legislature has already been doing exactly that for decades: passing anti-abortion laws that have been unenforceable (“futile”) despite the post-*Roe* federal right to abortion.

³ Courts must harmonize conflicting language together as though they were one law, especially where the Legislature seeks to create “multiple layers” of laws

interpretation: courts should give particularly strong effect to legislation that is most likely to be struck down as unconstitutional. This carnival-mirror inverse of the constitutional-avoidance canon does nothing to resolve the ambiguity created by the interaction of Title 36 and section 13-3603, and the corresponding need to harmonize the two regimes as though they constituted one law. The Court of Appeals was correct in doing so here.

distinguishing prohibited from allowable conduct within the “same subject.” *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970) (“If the statutes relate to the same subject or have the same general purpose—that is, statutes which are *in pari materia*—they should be read in connection with, or should be construed together with other related statutes, as though they constituted one law.”).

CONCLUSION

For the reasons above and those detailed in our brief submitted in response to Intervenor's Petition for Review and supplemental brief on the grant of the petition, the Court of Appeals' decision should be affirmed.

RESPECTFULLY SUBMITTED October 18, 2023.

LAURA CONOVER
PIMA COUNTY ATTORNEY

By: /s/Samuel E. Brown

Samuel E. Brown (SBN 027474)
Chief Civil Deputy County Attorney
Jonathan Pinkney (SBN 025689)
Deputy County Attorney
32 N. Stone, Suite 2100
Tucson, AZ 85701
Telephone: (520) 724-5700
Firm No. 00069000

Aadika Singh*
Joshua Rosenthal*
Public Rights Project
490 43rd St. #115
Oakland, CA 94609
Telephone: (907) 331-7481
**Admitted Pro Hac Vice*

*Attorneys for Appellant Laura Conover,
Pima County Attorney*