

ARIZONA SUPREME COURT

PLANNED PARENTHOOD ARIZONA,
INC., et al.,

Plaintiffs/Appellants,

v.

KRISTIN K. MAYES, Attorney Gen-
eral of the State of Arizona, et al.,

Defendants/Appellees,

and

ERIC HAZELRIGG, M.D., as guardian
ad litem of all Arizona unborn infants;
DENNIS McGRANE, Yavapai County
Attorney,

Intervenors/Appellees.

Supreme Court
No. CV-23-0005-PR

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

Pima County Superior Court
No. C127867

INTERVENORS' COMBINED RESPONSE TO RESPONDENTS' MOTIONS TO STAY ISSUANCE OF MANDATE

Kevin H. Theriot (No. 030446)
Jacob P. Warner (No. 033894)
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
ktheriot@adflegal.org
jwarner@adflegal.org

*Attorneys for Eric Hazelrigg, M.D., intervenor and guardian ad litem of
all Arizona unborn infants and Dennis McGrane, intervenor*

INTRODUCTION

Last month, this Court upheld A.R.S. § 13-3603. The Court exercised commendable restraint, interpreting the law as written, consistent with its duty. Rather than substituting its views for the Arizona people's, the Court respected the legislature's choice to fully protect unborn life. So the Court reversed the court of appeals, lifted the stay, and allowed § 13-3603 to become fully enforceable, but it also remanded the case so Respondents could weigh pursuing other challenges to the law.

The Attorney General said this decision is “insane.” Planned Parenthood said the Court “ignor[ed] long-settled precedent and principles of law to reach [a] preferred policy result.” It even called the decision “cruel”—claiming the Court refused “to look past personal ideology and impartially apply the law.” Respondents now seek to stay the issuance of the mandate so they may consider an appeal, and to respect the legislature's recent repeal of § 13-3603. But any appeal is futile. There is no final judgment. Nor is there a reviewable federal issue. And to respect the legislature, this Court should allow § 13-3603 to be enforced.

Respondents seek unjust delay. They also seek judicial approval for abortions the legislature has forbidden. But the legislature has chosen to protect unborn life until § 13-3603's repeal later this year. This Court should deny Respondents' motions and issue the mandate.

BACKGROUND

Last month, this Court upheld A.R.S. § 13-3603 despite individual justices’ personal “morals or public policy views regarding abortion.” *Planned Parenthood Ariz., Inc. v. Mayes*, 545 P.3d 892, 895 (Ariz. 2024). The Court exercised commendable restraint, following its “limited constitutional rule and duty to interpret the law as written.” *Id.* at 908. Rather than substituting its policy choice for the Arizona people’s, the Court respected the legislature’s “unwavering intent” to protect unborn life. *Id.* So the Court reversed the court of appeals, lifted the stay, and allowed § 13-3603 to become fully enforceable, but it also remanded the case so Respondents could weigh pursuing other challenges to the law. *Id.*

That ruling sparked strong reactions. Planned Parenthood said the majority “judges” “ignor[ed] long-settled precedent and principles of law to reach their preferred policy result.” Press Release, Planned Parenthood Ariz., Inc., *Planned Parenthood Arizona Condemns Arizona Supreme Court’s Decision to Revive Archaic, Near-Total Abortion Ban* (Apr. 9, 2024), <https://tinyurl.com/yc6j6z2t>. It called the decision “deplorable” and “cruel”—claiming the Court refused “to look past personal ideology and impartially apply the law.” *Id.* And it said the “decision adopts [a] fringe policy agenda” over “common-sense arguments.” *Id.*

The Attorney General said this Court’s decision is “insane, unconscionable, outrageous, and ... enraging.” Lauren Gilger & Amber Victoria

Singer, *Kris Mayes says Arizona Attorney General's Office is working on a plan to fight abortion ban*, KJZZ (Apr. 10, 2024), <https://tinyurl.com/3m7hhf2d>. She also said the decision is “an affront to freedom” and “a stain on our state.” AZ Attorney General Kris Mayes (@AZAG-Mayes), X (Apr. 9, 2024), <https://tinyurl.com/mr22u3js>. And while General Mayes has said she will not prosecute any “doctor” for any “abortion” under any law, Attorney General Kris Mayes, Facebook (Apr. 12, 2024), <https://tinyurl.com/69yrx7mm>; see *Reproductive Rights*, Kris Mayes Att’y Gen., <https://tinyurl.com/52ea6d9j> (“As Attorney General, I will not prosecute doctors ... or pharmacists for providing ... abortions.”), she also promised to pursue “every legal avenue to stop” § 13-3603 “from taking effect.” Attorney General Kris Mayes, Facebook (Apr. 24, 2024), <https://tinyurl.com/69yrx7mm>. That campaign has begun.

The Attorney General first moved this Court to reconsider its well-reasoned opinion. Att’y Gen.’s Mot. for Recons. (Apr. 23, 2024). Three days later, that motion was denied. Order (Apr. 26, 2024). She then moved to stay the mandate, requesting 90 days to consider an appeal. Att’y Gen.’s Mot. to Stay Issuance of Mandate (Apr. 30, 2024) (AGMTS). In her view, this Court improperly cited A.R.S. § 1-219 because a federal court had partially enjoined the law. *Id.* at 3. Not so. *Mayes*, 545 P.3d at 901 n.7. But critical for appeal, this Court’s ruling does not turn on that citation, and even General Mayes admits this case is “not yet fully litigated”—citing her “opportunity” to further challenge § 13-3603 on

remand, including on federal grounds. Leah Britton, *AG Kris Mayes: AZ Supreme Court ruling to ban abortion ‘changes everything,’* AZ Mirror (Apr. 9, 2024), <https://tinyurl.com/ycktrn28>. An appeal is futile.

Meanwhile, lawmakers went to work. State abortion policy must “be resolved by [Arizona] citizens through the legislature or the initiative process”—not by courts. *Mayes*, 545 P.3d at 908. As this Court observed, the issue raises strong “morality and public policy concerns,” and it “invariably ... engenders passionate disagreements among citizens.” *Id.* The day after this Court’s ruling, the House rejected efforts to repeal § 13-3603 as abortion advocates shouted, “Shame on you!” to pro-life officials. AP, *Shouts of ‘Shame! Shame!’ during abortion fight in Arizona House*, YouTube (Apr. 10, 2024), <https://tinyurl.com/b9r3ywr5>. Two weeks later, the House passed the repeal but refused to immediately send the bill to the Senate. HB2677, 56th Leg., 2d Reg. Sess. (Ariz. 2024), <https://tinyurl.com/2kv2bvbh> (search “HB2677”). The Senate later approved the bill, and Governor Hobbs signed it into law just last week. *Id.*

This repeal will not take effect immediately. The Arizona Constitution allows lawmakers to immediately effectuate repeals to “preserve ... public ... health or safety.” Ariz. Const. art. IV, pt. 1 § 1(3). But lawmakers refused to exercise that power. So the repeal will take effect 91 days after the legislative session ends. *Id.* That is by design. As General Mayes lamented, “without an emergency clause,” the repeal cannot “take effect immediately” and § 13-3603 may become enforceable. *Attorney General*

Mayes Issues Statement on Repeal of 1864 Abortion Ban (May 1, 2024), <https://tinyurl.com/3k952ryv>. But she reassured constituents that her office “is exploring every option available to prevent this outrageous” law “from ever taking effect.” *Id.* So she joined with Planned Parenthood to move for delay. Att’y Gen.’s Joinder in Planned Parenthood Ariz., Inc.’s Mot. to Stay Issuance of Mandate (May 2, 2024) (AGJ).

Anticipating repeal, Planned Parenthood moved to stay the mandate. Mot. to Stay Issuance of Mandate (May 1, 2024) (PPMTS). General Mayes and the Pima County Attorney joined this motion. Planned Parenthood says this motion tests whether this Court will “stay[] true to its word and respect[]” lawmakers. Press Release, Planned Parenthood, *Planned Parenthood Arizona Files Motion at Arizona Supreme Court to Preserve Abortion Access* (May 1, 2024), <https://tinyurl.com/3mf8e7hu>. But “legislative deference” requires no stay on enforcing a duly enacted law. *Id.* Far from viewing the repeal as medically urgent, the legislature refused to immediately effectuate it for “public ... health” or any other reason. Ariz. Const. art. IV, pt. 1 § 1(3). That was its call to make.

In truth, the legislature had insufficient votes to prioritize abortion providers over unborn children for the next few months. Public health records show that more than 10,000 unborn Arizona children are aborted each year. Ariz. Dep’t of Health Servs., *Abortions in Arizona* 5 (Dec. 5, 2023), <https://tinyurl.com/3x87fsht>. That’s over 25 abortions per day. Respondents do not mention, much less weigh the threat to these lives in

seeking delay. Nor do they show evidence of harm to abortion providers when § 13-3603 fully applied for “a weeklong period in 2022” before the court below stayed its enforcement. PPMTS 9. Respondents again seek judicial approval for abortions that lawmakers have forbidden.

News reports say Respondents aim “to delay the enforcement” of § 13-3603. Howard Fischer, *AG Mayes looks to delay enforcement of 1864 abortion law*, KAWC (May 1, 2024), <https://tinyurl.com/3bps2fzf>. They are working “night and day” to stop the law. Sarah Robinson, *Arizona AG Kris Mayes files motion seeking 90-day delay before abortion ban takes effect*, AZ Family (Apr. 30, 2024), <https://tinyurl.com/4c3erfhr>. One predicted delays the day this Court released its opinion, saying the “mandate won’t issue for at least several weeks” despite rules requiring one much sooner. Press Release, Planned Parenthood Ariz., Inc., *Planned Parenthood Arizona Condemns Arizona Supreme Court’s Decision to Revive Archaic, Near-Total Abortion Ban* (Apr. 9, 2024), <https://tinyurl.com/yc6j6z2t>. This Court should deny Respondents’ motions.

ARGUMENT

This Court “must issue the mandate 15 days after” deciding “a motion for reconsideration.” Ariz. R. Civ. App. P. 24(b)(3). A party may move “to stay issuance of the mandate pending” appeal, Ariz. R. Civ. App. P. 24(d)(1), or “to prevent injustice,” *Lindus v. N. Ins. Co. of N.Y.*, 438 P.2d 311, 313 (Ariz. 1968), but those motions cannot be “frivolous” or “filed solely for ... delay,” Ariz. R. Civ. App. P. 25. Regardless, this Court may “suspend” its rules for “good cause.” Ariz. R. Civ. App. P. 3(a). And Respondents show no such cause to stay issuance of the mandate.

I. This Court should issue the mandate.

To stay a judgment, parties typically must prove “a strong likelihood of success on the merits” and “irreparable harm.” *Smith v. Ariz. Citizens Clean Elections Comm’n*, 132 P.3d 1187, 1190 (Ariz. 2006). That test applies here. But Respondents do not attempt to satisfy it, despite seeking stays that (in their view) would delay enforcement of § 13-3603. They show no likelihood of success on present claims. That should end the analysis, but even if relief were allowed for rejected claims, Respondents have not proved the balance of harms tips their way.

A. Issuing the mandate is just.

This Court should issue the mandate. While Respondents say that would disrespect “the legislature’s judgment,” PPMTS 2; *see id.* at 9-10, they wrongly assume the legislature intended to immediately effectuate

the repeal. The Constitution requires the repeal to become effective 91 days after the current legislative session ends. Ariz. Const. art. IV, pt. 1 § 1(3). Lawmakers could have voted to immediately effectuate the repeal to “preserve ... public ... health.” *Id.* But they refused. So issuing the mandate would not be “inconsistent” with that legislative judgment. *Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 90 (2d Cir. 1996). Nor would it “directly contradict[]” the repeal. *People v. McAfee*, 160 P.3d 277, 280 (Colo. App. 2007). It would “protect the integrity of [the] process.” *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989).

Rejecting enacted text, Planned Parenthood cites one sentence from one legislator to suggest the legislature “does not want [§ 13-3603] to be enforceable.” Notice of Suppl. Auth. 1 (May 3, 2024). But that comment does not prove legislative intent. *Hernandez-Gomez v. Leonardo*, 917 P.2d 238, 242 (Ariz. 1996); see *Coal. for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 227 (9th Cir. 1992) (statements of individual legislators “entitled to little, if any, weight”). As its sponsor lamented, the repeal does not become effective until “[91] days after sine die” because lawmakers lacked “needed votes for an emergency” repeal. Ariz. House Democrats (@AZHouseDems), X (May 3, 2024), <https://tinyurl.com/4e9kaseh> (Rep. Stahl-Hamilton statement beginning at 2:23). Planned Parenthood again seeks judicial approval for abortions that state law forbids. That does *not* honor “the will of the Arizona electorate.” PPMTS 5.

Respondents otherwise skirt the equities. Without data, supporting affidavits, or other evidence, they say issuing the mandate would “needlessly disrupt” the “status quo,” risking women and imposing “grave consequences that will almost certainly result in [more] litigation.” PPMTS 9; *see id.* at 2. But abortion providers weathered a “weeklong” halt before. *Id.* at 9. Respondents show no evidence that another short window for life would do worse. And while women will receive lifesaving care regardless of whether the mandate drops, the same is *not* true for unborn children. On average, 25 unborn children will lose their life each day § 13-3603 does not protect them. Ariz. Dep’t of Health Servs., *Abortions in Arizona* 5 (Dec. 5, 2023), <https://tinyurl.com/3x87fsht>. Rejecting the requested delay is necessary to “prevent injustice.” *Lindus*, 438 P.2d at 313.

B. Any appeal is futile.

The Attorney General also seeks delay to consider an appeal. But any appeal to the U.S. Supreme Court would be futile. Because this Court’s ruling does not turn on a federal issue and there is no final judgment to review, the U.S. Supreme Court lacks jurisdiction.

1. There is no reviewable federal issue.

To respect federalism and avoid “advisory opinions,” the U.S. Supreme Court does not review state court decisions based on “adequate” and “independent” nonfederal grounds. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). It lacks “jurisdiction” to do so. *Id.* at 1042; *see* Stephen M.

Shapiro et al., *Supreme Court Practice* 207 (10th ed. Bloomberg 2013); William J. Brennan, Jr., *State Constitutions & the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977). The Attorney General believes this Court improperly cited § 1-219 because a federal court had partially enjoined the law. AGMTS 3. Not so. *Mayes*, 545 P.3d at 901 n.7. Nor does its ruling turn on that citation. There's no reviewable issue.

Midway through its opinion, this Court said § 1-219 “provides additional interpretive guidance” for the decision it had made—that S.B. 1164 does not override § 13-3603. *Id.* at 901; *see id.* at 897-901. That reference to § 1-219 was “additional” because S.B. 1164’s construction rule was dispositive. *See id.* at 897-901. Even the dissent said § 1-219 “adds nothing and does not support the majority’s position.” *Id.* at 917 (Timmer, J., dissenting). The U.S. Supreme Court “reviews judgments, not statements.” *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956). Because this Court’s ruling stands no matter whether § 1-219 is properly cited, the U.S. Supreme Court lacks jurisdiction to review this case. *See Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636 (1874). Any appeal is futile.

2. There is no final judgment.

Appeal is also futile because the U.S. Supreme Court reviews “final judgments or decrees.” 28 U.S.C. § 1257 (cleaned up). *See Jefferson v. City of Tarrant*, 522 U.S. 75, 80-81 (1997). This Court hasn’t given “the final word.” *Id.* at 81. It remanded the case to allow other “challenges to § 13-

3603.” *Mayes*, 545 P.3d at 895, 908. That precludes federal review. *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (per curiam); *O’Dell v. Espinoza*, 456 U.S. 430, 430 (1982) (per curiam). While there are limited exceptions to this rule, see *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-83 (1975), none apply here. On remand, the outcome is not certain; this case may be resolved on other grounds; and this Court’s ruling can stand without seriously eroding federal policy. Any federal appeal is premature.

C. Delay is unwarranted.

General Mayes has said she seeks “to prevent [this Court’s] decision from going into effect.” *ICYMI: Arizona AG Kris Mayes Will Never Stop Fighting For Abortion Access*, Democratic Att’ys Gen. Ass’n (Apr. 10, 2024), <https://tinyurl.com/mwb9t7nx>. News reports corroborate this. Howard Fischer, *AG Mayes looks to delay enforcement of 1864 abortion law*, KAWC (May 1, 2024), <https://tinyurl.com/3bps2fzf>. Given that appeal is futile, it seems that General Mayes aims to keep prosecutors from enforcing a duly enacted law. Respondents’ comments and policy commitments support this inference. That is improper. Ariz. R. Civ. App. P. 25. Respondents have shown no good cause for delay to seek a futile appeal, or to prevent enforcement of § 13-3603 before its repeal.

II. Alternatively, this Court should clarify that the stay on enforcing A.R.S. § 13-3603 is lifted pending further legal action.

Respondents seek to prevent the enforcement of § 13-3603. PPMTS 9-10. Their motions to stay assume § 13-3603 is unenforceable until the mandate is issued. But this Court “lift[ed] the stay” below. *Mayes*, 545 P.3d at 908. And while this Court issued a new stay temporarily stopping “enforcement of § 13-3603” for 14 days “from the filing date” of its opinion, that stay has expired. *Id.* This Court should deny Respondents’ motions for stay. But regardless, the Court should clarify that § 13-3603 is now fully enforceable. No injunction or stay limits its application.

CONCLUSION

This Court should deny Respondents’ motions to stay the issuance of the mandate. Lawmakers refused to immediately repeal § 13-3603. So Respondents seek judicial approval for abortions the legislature has forbidden. This Court should deny that request. It should also reject delay for a futile appeal. The Court should issue the mandate.

Respectfully submitted this 7th day of May, 2024.

By: /s/ Jacob P. Warner

Kevin H. Theriot (No. 030446)
Jacob P. Warner (No. 033894)
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
ktheriot@adflegal.org
jwarner@adflegal.org

*Attorneys for Eric Hazelrigg, M.D., intervenor and guardian ad litem of
all Arizona unborn infants and Dennis McGrane, intervenor*