

**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, et al.,

Intervenors/ Appellees.

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

**ATTORNEY GENERAL'S COMBINED REPLY IN SUPPORT OF  
MOTIONS TO STAY THE MANDATE**

Joshua D. Bendor (No. 031908)  
Alexander W. Samuels (No. 028926)  
Luci D. Davis (No. 035347)  
OFFICE OF THE ATTORNEY GENERAL  
2005 N. Central Ave., Phoenix, AZ 85004  
(602) 542-3333  
Joshua.Bendor@azag.gov  
Alexander.Samuels@azag.gov  
Luci.Davis@azag.gov  
ACL@azag.gov

*Attorneys for Arizona Attorney General  
Kristin K. Mayes*

This Court has before it two separate requests to stay issuance of the mandate. First, Planned Parenthood requests a stay of the mandate through the effective date of H.B. 2677, which repeals A.R.S. § 13-3603. Good cause supports this request under ARCAP 3(a). Staying the mandate in this way will avoid several months of chaos, dangerous confusion for medical providers, and serious medical harm for pregnant women. It would also conserve judicial resources and avoid significant legal questions about whether any criminal prosecutions under A.R.S. § 13-3603 must be dismissed once its repeal becomes effective.

Separately, Attorney General Mayes moved to stay issuance of the mandate for 90 days to allow her to evaluate and potentially seek certiorari in the U.S. Supreme Court. *See* ARCAP 24(d)(1)(A). Petitioners argue (at 10-11) that such a stay is unnecessary because there is no federal question or reviewable issue. But they are wrong on both points. Moreover, this Court routinely grants stay requests to evaluate and file certiorari petitions and should not depart from that standard practice here. *See* Table of Mandate Stay Requests, attached as **Appendix A**.

This Court should stay the mandate through the effective date of H.B. 2677. Alternatively, the Attorney General respectfully requests that the

Court issue a 90-day stay under ARCAP 24(d) so she may evaluate and possibly pursue a certiorari petition. Finally, this Court should reject Petitioners' improper attempt to seek additional relief that is entirely outside the scope of the two pending motions.

## ARGUMENT

### **I. Good cause supports this Court suspending its rules and staying issuance of the mandate until H.B. 2677's repeal takes effect.**

This Court is authorized to "suspend any provision" of the Rules of Civil Appellate Procedure upon a showing of "good cause." Ariz. R. Civ. App. P. 3(a). Good cause exists here. The Legislature has repealed A.R.S. § 13-3603, making clear its intent that any abortions prohibited only by that statute should not be criminal. But if this Court issues its mandate shortly, there will be a window of several months in which, contrary to the Legislature's intent, some might interpret those abortions to be unlawful. Thus, issuance of the mandate would lead to confusion that would be dangerous both to medical providers and to pregnant women. Moreover, it would raise significant legal concerns about any enforcement of § 13-3603 between now and when H.B. 2677 takes effect.

To start with the implications of enforcement before H.B. 2677 takes effect, any potential criminal prosecution under § 13-3603 may require

dismissal once H.B. 2677 becomes effective. In criminal cases, there is a “presumption of retroactivity” when the legislature repeals a criminal law. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 841 n.1 (1990) (Scalia, J., concurring). Generally, “when the legislature repeals a criminal statute ..., this action requires the dismissal of a pending criminal proceeding charging such conduct.” *State v. Serna*, 175 Ariz. 332, 334 (App. 1993) (citing *Bell v. State of Md.*, 378 U.S. 226, 230 (1964)). When a criminal statute is repealed, courts impute a legislative intent “to avoid inflicting punishment at a time when it can no longer further any legislative purpose.” *Hamm v. City of Rock Hill*, 379 U.S. 306, 313 (1964).

Here, enforcement of § 13-3603 would subject medical providers to criminal liability and the statute’s two-year mandatory-minimum penalty for conduct that the Legislature has now said should not be criminalized at all. That is precisely the type of outcome that the presumption of retroactivity is designed to avoid. Where the Legislature has decriminalized abortion before 15-weeks’ gestation and in medical emergencies, it surely did not intend health care providers to suffer lengthy, mandatory-minimum prison sentences for abortions before 15-weeks’ gestation or in medical emergencies for a few intervening months. Thus, any prosecution under

§ 13-3603 which has not received final judgment when H.B. 2677 becomes effective may require dismissal. This would include cases on direct appeal. And given the short timeframe involved, it is difficult to imagine any case could become final before H.B. 2677 takes effect.

Second, the timing of the mandate is of particularly grave concern for women who need abortions in medical emergencies. Unlike Title 36, § 13-3603 allows abortions only when “necessary to save her life,” not in medical emergencies. In certain medical emergencies, a pregnant woman “may not face an imminent threat to her life but will be at risk of serious harms to her health absent immediate pregnancy termination, such as loss of fertility; hysterectomy; sepsis; clotting disorder; heart attack; coma; stroke; cardiovascular, immune, or platelet dysfunction; and renal, liver, or other organ failure.” Brief for Respondent the United States at 15, *Idaho v. United States* (Nos. 23-726 and 23-727).

As the Attorney General has learned through conversations with medical providers, these grave medical emergencies happen every week in Arizona. Women suffering these emergencies often cannot be transferred out of state. “If a doctor acting on pain of felony prosecution must wait to provide treatment until she can deem it necessary to prevent death, the

patient ‘ may have to live the remainder of her life with significant disabilities and chronic medical conditions as a result of her pregnancy complication.’”

*Id.* at 24 (citation omitted).<sup>1</sup>

Given the legislative repeal and these grave consequences, good cause exists to delay issuance of the mandate until the repeal becomes effective.

**II. Alternatively, Petitioners offer this Court no reason to deny the Attorney General’s stay request.**

**A. This Court should not pre-assess the merits of a potential certiorari petition in the context of ARCAP 24(d) motions.**

Petitioners challenge (at 10-11) the Attorney General’s potential certiorari petition. As an initial matter, the Court need not and should not be assessing the merits of a possible certiorari petition in the context of this motion. Nothing in the text of ARCAP 24(d) or any case law suggests that in ruling on stay requests pursuant to that rule, this Court analyzes the

---

<sup>1</sup> See also Brief of Amicus Curiae Physicians for Reproductive Health in Support of Respondent the United States at 6-8, 10-11, 13-16, 18-22, 26-31, *Idaho v. United States* (Nos. 23-726 and 23-727) (explaining with multiple first-hand accounts the “rampant confusion and undue stress for practicing physicians” trying to navigate the difference between needing to provide care in a medical emergency and waiting until care is absolutely necessary to prevent immediate death); Brief of Amicus Curiae American College of Obstetricians and Gynecologists, et al. at 7-9, 11-12, 22-24, *Idaho v. United States* (Nos. 23-726 and 23-727) (explaining that medical emergencies for pregnant patients that may require abortion care include preterm prelabor rupture of membranes, miscarriage or early pregnancy loss, and placental abruption, molar and ectopic pregnancies, among others).

merits of potential federal issues. That would be inappropriate, because the certiorari petition is directed to a higher court, and if this Court were to prejudge the issue, it would frustrate parties' ability to vindicate claims under federal law. All the Court needs to do is determine that the potential certiorari petition is not frivolous and that there is no exigent need to issue the mandate. As detailed below, that bar is easily cleared here: the potential petition for writ of certiorari raises serious issues of federalism and constitutional law, and there is no pressing need to issue the mandate. While this Court may disagree with the Attorney General's assessment of the merits, it is not this Court's role to evaluate the merits of a potential certiorari petition that is not before it, especially in the context of this procedural motion.

The Court's recent practice also supports this idea. In preparation for filing this brief, the Attorney General reviewed civil and criminal decisions in which a party filed a petition for writ of certiorari in the U.S. Supreme Court between 2000 and 2024. Within that set of cases, the Attorney General identified 27 cases in which a party filed a motion to stay the mandate pending a possible certiorari petition under ARCAP 24(d) or its analogous rule of criminal procedure, Ariz. R. Crim. P. 31.22(e). *See Appendix A.* The

Court granted nearly all of those requests – 22 in total. Six of these requests were made pursuant to ARCAP 24(d); all were granted.

Indeed, since 2000, the Court has denied just five motions to stay the mandate, all of which were made under the criminal rules in plainly different circumstances. Two were denied as moot because the case was already subject to an automatic stay. The other three instances – *State v. Carreon*, 210 Ariz. 54 (2005), *State v. Ellison*, 213 Ariz. 116 (2006), and *State v. Escalante-Orozco*, 241 Ariz. 254 (2017) – were capital cases and thus, implicate different considerations than those present in this case.<sup>2</sup> In two of those cases (*Ellison* and *Escalante-Orozco*), the mandate had already issued, and the defendant moved to recall and then stay it. In the third case (*Carreon*), the defendant asked the Court to stay issuance of the mandate, suspend an automatic capital case appeal, and remand the case to the trial court.

These three denials are plainly distinguishable from this case. Seeking to recall an already issued mandate or to stay future capital appellate proceedings does not implicate the same considerations as an initial stay

---

<sup>2</sup> For example, capital cases involve an automatic appeal, A.R.S. § 13-4031, are subject to an automatic mandate stay, Ariz. R. Crim. P. 31.22(c), and often involve multiple post-conviction relief proceedings, Ariz. R. Crim. P. 32.

request in a civil matter. And absent these three instances, which involve markedly different circumstances, this Court has routinely granted requests to stay issuance of a mandate so a party may evaluate and potentially prepare a certiorari petition. The Court should not depart from its standard treatment here.

**B. The Attorney General seeks a stay to consider appealing reviewable, sufficiently final federal issues.**

Even if the merits of a potential petition for writ of certiorari were relevant, Petitioners' substantive challenges miss the mark.

As detailed in her motion for reconsideration, the Attorney General believes that the Opinion improperly relied on an unconstitutionally vague statute, A.R.S. § 1-219, and that this reliance functionally narrows the federal preliminary injunction over § 1-219 to which state prosecuting and disciplinary agencies are bound. Thus, as permitted by ARCAP 24(d), she seeks a stay to evaluate this issue and potentially file a certiorari petition.

Petitioners assert (at 10) that a stay is inappropriate because this Court's reliance on § 1-219 is merely an "additional" "statement," not subject to review. But the U.S. Supreme Court has jurisdiction whenever "a state court decision fairly appears . . . to be interwoven with the federal law."

*Hawaii v. Off. of Hawaiian Affs.*, 556 U.S. 163, 171 (2009).

In relying on § 1-219, the Opinion construes that statute and then uses it to interpret other statutes. Op. ¶ 32 (“Section 1-219(a) . . . establishes the public policy of the state, provides additional interpretative guidance, and belies the notion that the legislature intended to create independent statutory authority for elective abortion.”); Op. ¶ 61 (“In interpreting § 36-2322(B)’s ambiguity on its effect on § 13-3603, we consider [factors including] “1-219(A)’s pronouncement of the state’s public policy”). The Attorney General believes that the Opinion’s reliance on § 1-219 is in direct conflict with a federal court’s conclusion that § 1-219 is “intolerably vague because it is entirely unclear” and so the statute cannot be applied consistently with the U.S. Constitution. *See Isaacson v. Brnovich*, 610 F. Supp. 3d 1243, 1253 (D. Ariz. 2022). If correct, this implicates and interweaves issues of federal supremacy into the Court’s decision. *See M’Culloch v. Maryland*, 17 U.S. 316, 382 (1819) (explaining supremacy of federal law). And the Opinion raises serious questions by purporting to permit enforcement of § 13-3603 based on what the Opinion says § 1-219 means, thereby functionally narrowing the federal injunction that binds the Attorney General and the two county attorneys who are parties to this case. *See Isaacson*, 610 F. Supp. 3d at 1248 n.2 (listing the Defendants) & at 1257 (enjoining “Defendants”); *Donovan v.*

*City of Dallas*, 377 U.S. 408, 412-13 (1964) (explaining state courts may not “restrain federal-court proceedings”).

Similarly, Petitioners’ claim (at 10-11) that this Court’s decision to remand the case precludes U.S. Supreme Court review is misplaced. Where a “federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings,” there is “sufficient justification for immediate review of the federal question” despite the fact that additional state court proceedings may occur. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-80 (1975).

Here, this Court has purported to construe § 1-219 (thereby binding lower courts) and permit its use when enforcing abortion regulations, functionally narrowing the federal preliminary injunction over the statute. Thus, regardless of the outcome of other potential constitutional challenges to § 13-3603, questions remain regarding the effect of this Court’s reliance on § 1-219 while it is simultaneously restrained by federal proceedings. *See Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963) (“This question is independent of, and unaffected by what may transpire” in future state proceedings).

Again, though, the Court should not reach these issues. Nothing in the text of ARCAP 24(d), any case law, or this Court’s recent practice

suggests that in ruling on stay requests pursuant to that rule, this Court should examine the merits of the possible certiorari petition. The Court should grant this routine motion under ARCAP 24(d).<sup>3</sup>

**C. The Attorney General’s motion was not made for delay.**

The Attorney General, like any other litigant, may avail herself of procedural rules, such as ARCAP 24(d), and all avenues of appellate review, including review by the U.S. Supreme Court. And, since the Opinion was filed (before and after the Legislature’s repeal of § 13-3603), the Attorney General has been consistent regarding her intent to evaluate and potentially seek further review of its federal issues. *See, e.g., Leah Britton, AG Kris Mayes: AZ Supreme Court ruling to ban abortion ‘changes everything,’ AZ Mirror* (Apr. 9, 2024), <https://tinyurl.com/ycktrn28> (noting the Attorney General said she was evaluating a potential appeal to the U.S. Supreme Court). Pursuing these procedural options is not improper nor does it implicate ARCAP 25. *See Ariz. Republican Party v. Richer*, No. CV-23-0208-PR, 2024 WL 1922203, at

---

<sup>3</sup> Citing *Smith v. Arizona Citizens Clean Elections Commission*, 132 P.3d 1187, 1190 ¶¶ 9-10 (Ariz. 2006), Petitioners apply (at 7) preliminary injunction criteria to Planned Parenthood’s stay request. Resp. at 7-9. But neither *Smith* nor any other case has applied that criteria to an ARCAP 24(d) request, nor do Petitioners suggest that it applies. Resp. 9-11 (responding to Attorney General’s motion).

\*11 ¶ 48 (Ariz. May 2, 2024) (under ARCAP 25, motions are proper if the “issues raised are supportable by any reasonable legal theory, or if a colorable legal argument is presented about which reasonable attorneys could differ”) (citation omitted).

Petitioners’ disagreement about the consequences of the Opinion’s reliance on § 1-219 reflects that there is reasonable debate on this issue – not that the Attorney General’s motion was made for delay. And their attempt to impute media speculation about legal strategy as the Attorney General’s intent should be flatly rejected. *See* Resp. at 6, 11. The motion was made to allow for the certiorari review and petition process to proceed. This Court should grant the request.

**III. The only issues before the Court are those raised in the two pending motions to stay issuance of the mandate.**

Petitioners ask (at 12) this Court to “clarify that § 13-3603 is now fully enforceable” and “[n]o injunction or stay limits its application.” But presently, the only thing left for this Court to do in this matter is decide when to issue the mandate.

To be sure, this Court has the power to say whether any aspect of *this* case prevents enforcement of § 13-3603. Other litigation implicating the enforceability of § 13-3603, however, is pending and plainly not in front of

this Court. In at least one such case, a court has entered a stipulated order (resulting from a stipulation entered into by Attorney General Brnovich on behalf of the State) that affects enforcement of § 13-3603 for a limited period of time. No party appealed that order, and no putative intervenor in that case (including Dr. Hazelrigg) objected when the parties jointly moved for it. To the extent Petitioners implicitly reference that order—entered by a different court, in a different case, brought by different plaintiffs against a different defendant—their request is improper.

### CONCLUSION

For the reasons above, the Attorney General respectfully requests that the Court grant Planned Parenthood’s motion for a stay through the effective date of H.B. 2677 or, in the alternative, grant the Attorney General’s motion for a 90-day stay pursuant to ARCAP 24(d).

RESPECTFULLY SUBMITTED this 9th day of May, 2024.

KRISTIN K. MAYES, ARIZONA  
ATTORNEY GENERAL

By /s/ Joshua D. Bendor

Joshua D. Bendor

Alexander W. Samuels

Luci D. Davis

2005 N. Central Ave.

Phoenix, Arizona 85004

(602) 542-3333

Joshua.Bendor@azag.gov

Alexander.Samuels@azag.gov

Luci.Davis@azag.gov

*Attorneys for Arizona Attorney General  
Kristin K. Mayes*