IN THE SUPREME COURT

STATE OF ARIZONA

PLANNED PARENTHOOD ARIZONA, INC., et al., Appellants, v. KRISTIN K. MAYES, Attorney General of the State of Arizona, Appellees, And ERIC HAZELRIGG, M.D., as guardian ad litem of unborn child of plaintiff Jane Roe and all other unborn infants similarly situated, Dennis McGrane, Yavapai County Attorney, Intervenors.	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 REPLY IN SUPPORT OF PLANNED PARENTHOOD ARIZONA INC.'S MOTION TO STAY ISSUANCE OF MANDATE

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*

Appellant Pima County Attorney Laura Conover replies in support of her Joinder in the Motion to Stay Issuance of Mandate filed on May 1, 2024 by Plaintiff-Appellant Planned Parenthood Arizona, Inc. (PPAZ), requesting that this Court stay the issuance of its final mandate until the Arizona Legislature's May 1, 2024 repeal of A.R.S. § 13-3603 takes effect.

INTRODUCTION

As Intervenors concede in their response brief [at 7], this Court has the power to recall or stay the issuance of the mandate in this case if "good cause" exists or the "interests of justice" so demand. *see* *Lindus v. N. Ins. Co. of New York*, 103 Ariz. 160, 162 (1968); Ariz. R. Civ. App. P. 3(a). For all the reasons already articulated in PPAZ's motion and the Pima County Attorney's joinder, a stay is justified by good cause and should be granted to prevent injustice.

Intervenors assert that Appellants have failed to satisfy the standard for this Court to issue a stay. As an initial matter, it is not clear that the standard for a stay pending appeal articulated in *Smith v. Arizona Citizens Clean Election Comm'n*, 212 Ariz. 407, 410 (2006) applies here. But assuming it does, Appellants have established that a stay is warranted. A stay is appropriate when the moving party establishes:

1. A strong likelihood of success on the merits;
2. Irreparable harm if the stay is not granted;

3. That the harm to the requesting party outweighs the harm to the party opposing the stay; and

4. That public policy favors the granting of the stay.

Smith 212 Ariz.at 410. "The scale is not absolute, but sliding." *Id*. Indeed, "the moving party may establish either: 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and that the balance of hardships tips sharply in favor of the moving party." *Id*. at 411 (emphasis added) (cleaned up). Appellants have and can establish both.

Yet, Intervenors seek to avoid this basic fact through the following assertion: though the Arizona Legislature repealed A.R.S. §13-3603, it secretly intended for §13-3603 to be enforceable. With this sleight of hand, they disregard the test for a stay of the issuance of a mandate, the constitutional questions that continue to cloud § 13-3603, and the true balance of harms.

Intervenors hypothesize that because the legislature did not repeal § 13-3603 on an emergency basis, it intended for the newly repealed law to remain enforceable. This Court cannot presume legislative silence, or failure to pass an emergency repeal, reveals legislative intent. Intervenors provide no support for this presumption beyond their own speculation.

On the issue of equities, the Pima County Attorney and PPAZ have throughout this litigation provided a solid factual basis to show the irreparable harm that will

occur by restricting access to abortion. Here, we will show why Intervenors' argument –providers "weathered" a weeklong halt so they can likewise "weather" a monthslong halt – defies reason. The two are not analogous.

In the absence of clear legislative intent to create a temporary period of enforceability, this Court is authorized to recall a mandate, or to stay issuance of a mandate, for equitable purposes. This Court should exercise that authority both to honor legislative intent and for equitable purposes.

I. There is No Evidence of Legislative Intent to Briefly Enforce §13-3603.

There is no better evidence of the legislature's intent to repeal § 13-3603 than last week's repeal of § 13-3603. House Bill 2677 and Senate Bill 1734 read: *"Be it enacted by the Legislature of the State of Arizona: Section 1. Repeal. Section 13-3603, Arizona Revised Statutes, is repealed."*

Seeking to manufacture legislative intent, Intervenors theorize that the legislature – lacking votes needed for an emergency repeal (an act which must meet certain constitutional criteria[1]) – intended for the law they *just* repealed to be

[1] "…no act passed by the legislature shall be operative for ninety days after the close of the session of the legislature enacting such measure, **except such as require earlier operation to preserve the public peace, health or safety**, or to provide appropriations for the support and maintenance of the departments of the state and of state institutions; **provided, that no such emergency measure shall be considered passed by the legislature unless it shall state in a separate section why it is necessary that it shall become immediately operative… ."** Ariz. Const. art. IV, Pt. 1 § 1(3) (emphasis added).

enforceable. Intervenors point to no statements by the legislature, or by individual legislators, expressing this secret intent, either directly or impliedly. Instead, they rely on silence, the failure to pass an emergency repeal, as evidence of legislative intent, seeking to "divine[] a legislative purpose in a vacuum," *Planned Parenthood Arizona, Inc. v. Mayes*, 545 P.3d 892, 900 (Ariz. 2024). They then take the leap further, theorizing [at 2] that the legislature declined to institute an emergency clause "to protect unborn life until § 13-3603's repeal later this year." This is pure conjecture, unsupported by the record or by Intervenors' response. It is a strained interpretation that transforms the clear repeal of § 13-3603 into a de facto legislative act *not* to repeal on a temporary basis. This Court typically does not "infer legislative intent from silence" and should not do so here. *Planned Parenthood Arizona, Inc. v. Mayes*, 545 P.3d 892, 902 (Ariz. 2024). Issuing the mandate now defies common sense, especially where the legislature's intent is clear.

II. Issuing the Mandate Despite the Repeal Will Cause Irreparable Harm.

Throughout this litigation, the Pima County Attorney, PPAZ, and (now) the Attorney General, have laid a foundation sufficient to support a conclusion that restricting access to reproductive care will cause irreparable harm to Arizonans, even if such restrictions last only for a few months.

Intervenors claim the balance of hardships cannot tip in favor of Appellants because of one week in 2022 in which § 13-3603 was enforceable. *But Arizona patients did suffer concrete harms during that one week*:

In Pima County, a 14-year-old was denied her prescription for methotrexate—the regular treatment for her "juvenile idiopathic arthritis, a form of the condition in children that can cause serious complications"—because methotrexate (when taken at a higher dose) can be used to treat ectopic pregnancies or in providing an abortion. In Maricopa County, a pregnant person was informed by her doctor that "her son had a condition called Trisomy 18"—meaning he was unlikely to survive after birth. The mother opted to induce birth; however, she was turned away from the hospital because of the legal uncertainty surrounding § 13-3603–even after "her doctor consulted with a panel of physicians and . . . got approval from the ethics team."

Here, Arizonans face much more than a week where Section 13-3603 is enforceable and will far surpass that incurred in 2022. If the mandate issues, Arizonans face a months-long blackout during which providers will struggle to keep their doors open and Arizona patients will struggle to find necessary care. This is entirely unjust where the Arizona legislature has acted swiftly to clarify that medical providers in Arizona should be allowed to perform abortions through the fifteenth week of gestation and to perform abortions necessitated by medical emergency.

These examples highlight an important group whom Intervenors blithely argue should simply "weather" a monthslong halt. But a pregnant *person* facing a non-life-threatening medical emergency cannot simply "weather" it out (to use Intervenor's terminology).

The people of Arizona, through their legislators, have not only repealed § 13-3603, but have *also* clearly expressed an intent not to inflict "substantial and irreversible" harm on pregnant persons by denying them needed reproductive health care. The lack of access to a necessary abortion during a medical emergency will, for some, lead to irreparable harm. Several Title 36 statutes expressly permit abortions during medical emergencies; § 13-3603 does not (unless the medical emergency is life-threatening). Title 36 defines a medical emergency as "a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death **or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.**" Ariz. Rev. Stat. Ann. § 36-2321(7) (emphasis added).

Rejecting multiple Title 36 provisions expressing the will of the people through the medical emergency exception, Intervenors would have this Court ignore clear legislative intent, arguing that "women will receive lifesaving care regardless

of whether the mandate drops," but omitting that under § 13-3603, pregnant persons will not receive care in medical emergencies that are not life-threatening.

Because § 13-3603 criminalizes an act that is expressly permitted under Title 36 (abortions in non-life-threatening medical emergencies), issuing the mandate to make § 13-3603 temporarily enforceable not only negates the express will of the legislature as expressed through Title 36, but also promises to threaten irreparable harm to pregnant persons who, facing non-life-threatening medical emergencies, *will not have access to the reproductive care needed to address those emergencies*, and will not have a second chance to correct what Arizona law defines as a "substantial and irreversible impairment of a major bodily function."

CONCLUSION

For the reasons stated, Appellant Pima County Attorney respectfully urges this Court to stay the issuance of its mandate until the repeal's effective date.

RESPECTFULLY SUBMITTED May 9, 2024.

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