**ARIZONA SUPREME COURT**

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| PLANNED PARENTHOOD ARIZONA, INC., et al.,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>KRISTIN K. MAYES, Attorney General of the State of Arizona, et al.,<br><br>Defendants/Appellees,<br><br>and<br><br>ERIC HAZELRIGG, M.D, as guardian ad litem of all Arizona unborn infants, et al.,<br><br>Intervenors/Appellees. | No. CV-23-0005-PR<br><br>Court of Appeals Division Two<br>No. 2CA-CV-2022-0116<br><br>Pima County Superior Court<br>No. C127867 |

## MOTION TO STAY ISSUANCE OF MANDATE


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Plaintiff-Appellant Planned Parenthood Arizona, Inc. ("PPAZ") requests that this Court stay the issuance of its final mandate until the Arizona Legislature's recent repeal of A.R.S. § 13-3603 takes effect. PPAZ conferred with the parties before filing this Motion, with Arizona Attorney General Kris Mayes and Pima County Attorney Laura Conover consenting to the requested relief, and Dr. Eric Hazelrigg and Yavapai County Attorney Dennis McGrane objecting.

## INTRODUCTION

On April 9, 2024, this Court issued an opinion lifting the 50-year-old injunction against A.R.S. § 13-3603's near-total ban on abortion, citing the Legislature's "unwavering and unqualified affirmative maintenance of a statutory ban on elective abortion since 1864[.]" *Planned Parenthood Arizona v. Hazelrigg*, No. CV-23-0005-PR, 2024 WL 1517392, at *8 ¶ 40 (Apr. 9, 2024). Its decision rested largely on a desire to defer to the Legislature's purported intent:

> We defer, as we are constitutionally obligated to do, to the legislature's judgment, which is accountable to, and thus reflects, the mutable will of our citizens."

*Id.* at *13 ¶ 63.

But that same Legislature has now voted to enact House Bill ("H.B.") 2677, which will repeal A.R.S. § 13-3603. And Governor Katie Hobbs already stated publicly that she will sign H.B. 2677 the very moment it reaches her desk. The result? This Court's final mandate, if issued, will directly undercut "the legislature's judgment . . . and thus . . . the mutable will of our citizens." *Hazelrigg*, 2024 WL 1517392, at *13 ¶ 63.

This Court's "constitutionally obligated" legislative deference thus demands that it withhold the final mandate here. Otherwise, abortion care in Arizona will all-but-stop for several months leading up to H.B. 2677's effective date. Providers will not provide abortion care if there is any chance of current or future enforcement, and pregnant patients will have nowhere to turn within the borders of their state. It's no exaggeration to say that some may die or suffer serious and permanent injuries because they can't obtain a legal abortion.

Appellate courts have inherent authority to recall their final mandates for equitable purposes. Here, of course, no recall is required. All this Court must do to "defer . . . to the legislature's judgment" is refrain from acting at all. *See id.* at *13 ¶ 63. Exercising this restraint, in

extraordinary circumstances such as these, will give effect to the will of the Arizona electorate, ease the burden on the state's health care providers, and save the health and lives of countless Arizonans.

## BACKGROUND

On April 9, this Court held that A.R.S. § 13-3603, a territorial-era abortion ban, was enforceable, effectively nullifying A.R.S. § 36-2322, a 2022 law that allows physicians to perform abortion through 15 weeks LMP and thereafter when there is a "medical emergency."

That ruling promised that, absent legislative intervention, a draconian law first enacted in 1864 would soon become enforceable in modern-day Arizona. The ban contains no exception for rape or incest, and on its face would apply "even if a physician concludes that continuing the pregnancy would substantially and irreversibly impair the woman's health." *Id.* at *15 ¶ 67 (Timmer, VCJ., dissenting).[1]

The Court's decision caused chaos on both sides of the political aisle[2] and prompted swift legislative action (in what may be the quickest

[1] PPAZ believes that under such circumstances, the federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, should control.

[2] *See, e.g.*, Shelby Slade, Laura Daniella Sepulveda, and Mary Jo Pitzl, *What Arizona leaders and lawmakers are saying about abortion ban after*

response to a decision made by this Court in recent history). On April 24, the Arizona House of Representatives voted to repeal the Territorial Ban in bipartisan fashion, and the Arizona Senate followed suit earlier today.[3] Governor Hobbs will sign the law as soon as it hits her desk, perhaps even later today.[4]

But H.B. 2677 will not go into effect immediately. The Arizona Constitution requires that no new law be operative until ninety days after the close of the legislative session, Ariz. Const. art. IV, pt. 1, § 1(3), and recent history suggests that the Legislature will only adjourn in June or July. The repeal will thus not take effect until September 2024 at the earliest. Yet the Court's issuance of the mandate will eventually trigger a months-long blackout period during which a since-repealed nineteenth century near-total abortion ban will technically be enforceable. Health

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*high court ruling*, ARIZ. REPUBLIC, (Apr. 9, 2024), https://www.azcentral.com/story/news/local/arizona/2024/04/09/arizona-abortion-ban-reactions/73263283007.

[3] *See* Bill History for H.B. 2677 (56th Leg., 2nd Reg. Sess.), *available at* https://apps.azleg.gov/BillStatus/BillOverview/80760 (last accessed May 1, 2024); Bill History for S.B. 1734 (56th Leg., 2nd Reg Sess.), *available at* https://apps.azleg.gov/BillStatus/BillOverview/81538 (last accessed May 1, 2024).

[4] *See* May 1, 2024 Declaration of Governor Katie Hobbs [attached as **Exhibit 1**]. PPAZ will supplement this filing with the fully executed bill as soon as it's available.

care providers will be understandably reluctant to provide abortion care for fear of current or future prosecution, and pregnant patients will be left distressed, confused, and without access to critical care.

This Court is in a unique position to avoid this unjust result by simply honoring the will of the Arizona electorate and doing what the law and equity permit: staying the issuance of its mandate until H.B. 2677's effective date in just a few months' time.

## ARGUMENT

### A. Arizona Law Permits This Court to Recall or Stay Its Mandate.

"The mandate is the final order of the appellate court, which may command another appellate court, superior court or agency to take further proceedings or to enter a certain disposition of a case." Ariz. R. Civ. App. P. 24(a). "When the Supreme Court has entered any disposition that requires the issuance of the mandate, the Supreme Court clerk must issue the mandate 15 days after the entry of the disposition, or, if a party files a motion for reconsideration in the Supreme Court, 15 days after a final disposition of the motion." Ariz. R. Civ. App. P. 24(b)(3).[5]

[5] On April 26, 2024, the Court denied the Arizona Attorney General's motion for reconsideration. *See* Apr. 26, 2024 Order.

Given the interests in finality, appellate courts seldom recall mandates once they are issued, but this Court has made clear that they can and should do so if the equities so demand:

> A decision to recall a mandate must of necessity include a balancing of competing interests. Where the interests of justice outweigh the interest in bringing litigation to an end the court *should* recall the mandate.

*Lindus v. N. Ins. Co. of New York*, 103 Ariz. 160, 162 (1968) (emphasis added). In short, "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules." *Id.* (quoting *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)) (internal quotation marks omitted); *see also* Ariz. R. Civ. App. P. 3(a) (authorizing this Court to "suspend any provision of these rules in a particular case" upon a showing of "good cause").

This principle applies with even greater force when, as here, the mandate has not yet been issued and this Court still retains jurisdiction over the appeal. Ariz. R. Civ. App. P. 24(a); *see also Arizona Com. Min. Co. v. Iron Cap Copper Co.*, 29 Ariz. 23, 25-26 (1925) ("The jurisdiction of an appellate tribunal, in the absence of a constitutional provision or statute, does not terminate until the case has been returned to the trial

court. Indeed, the right of recalling the judgment has frequently been exercised even after the mandate has been sent down.") (cleaned up).

### B. Courts Routinely Recall or Stay Issuance of Their Mandates After a Change in the Law.

Withholding issuance of the mandate would not be unprecedented in extraordinary circumstances such as these. On the contrary, several appellate courts have stayed or recalled their final mandates following a significant change in the law. *See, e.g.*, *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529-30 (9th Cir. 1989) (recognizing "a circuit court's inherent power to recall its mandate to prevent injustice or to protect the integrity of its process" and applying the same equitable principles to stay issuance of a mandate after Congress passed legislation directly conflicting with its recent ruling); *Sargent v. Columbia Forest Prod., Inc.*, 75 F.3d 86, 90 (2d Cir. 1996) (recalling mandate for equitable reasons after a supervening change in law that was inconsistent with the court's earlier decision); *People v. McAfee*, 160 P.3d 277, 280 (Colo. App. 2007), *as modified on denial of reh'g* (Mar. 1, 2007) (staying mandate where subsequent supreme court decision "directly contradicted the critical premise upon which we reached our decision in a part of the original opinion in this case.").

*Bryant* proves the point. There, the Ninth Circuit originally held that the inclusion of "Doe defendants" in a complaint defeated diversity jurisdiction. *Bryant*, 886 F.2d at 1527. But while the case was pending on certiorari, Congress amended the removal jurisdiction statute and directly contradicted the appellate ruling. A few weeks later, the Supreme Court denied certiorari. *Id.* At the time, Rule 41(b) of Federal Rules of Appellate Procedure stated that the appellate court's mandate "shall issue immediately upon the denial of certiorari." *Id.* (emphasis added). But given legislative action in the interim, the Ninth Circuit stayed the mandate, citing another case in which it had taken an even more drastic step—recalling its mandate—due to "an overpowering sense of fairness" and a desire "to prevent injustice[.]" *Id.* at 1530 (quoting *Zipfel v. Halliburton Co.,* 861 F.2d 565, 567 (9th Cir.1988)). As the *Bryant* court described,

> [Just as] an abrupt change in the law shortly after the panel's opinion justifies a recall of the mandate, Congress's action while this case was pending on certiorari justifies a stay of the mandate, and we choose to exercise our discretion to do just that in this case.

*Id.* at 1530.

So too here. Under longstanding and widely accepted equitable principles, Rule 24(b) does not bar this Court from exercising its jurisdiction to withhold its mandate when, as here, the Arizona Legislature has voted to repeal A.R.S. § 13-3603. Indeed, quite the opposite: Rule 24(b) "must yield" to the Legislature's recently expressed intent. *Lindus*, 103 Ariz. at 162.

### C. Staying the Mandate Preserves the Status Quo and Serves the Interests of Justice.

Apart from a weeklong period in 2022 between the trial court's order and the court of appeals' emergency stay order, abortion care has been continuously available in Arizona for over 50 years. Issuing the mandate now would needlessly disrupt that status quo for several months until the repeal goes into effect. That disruption, although temporary, would have grave consequences that will almost certainly result in additional litigation meant to obtain a "stop gap" until the repeal takes effect. While some prosecutors may voluntarily decline to enforce A.R.S. § 13-3603 now, the threat of future prosecution will nonetheless have a chilling effect on thousands of conscientious, law-abiding Arizona health care providers who seek to provide their patients with much-needed care while also remaining on the right side of the law. That

applicable "law" should not be an archaic, since-repealed statute that no longer reflects the intent of the Legislature or the will of Arizona's electorate.

To avoid this grossly unequitable and entirely unnecessary result, this Court should exercise its discretion and stay the issuance of the final mandate until H.B. 2677's effective date. The political branches have now spoken in bipartisan fashion to reject a reality in which the Territorial Ban controls, and their voice demands this Court's recognition and deference.

RESPECTFULLY SUBMITTED this 1st day of May, 2024.

**COPPERSMITH BROCKELMAN PLC**

By: /s/ D. Andrew Gaona
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# EXHIBIT 1

# DECLARATION OF GOVERNOR KATIE HOBBS

I, Governor Katie Hobbs, declare as follows:

1. I am over the age of 18 and have personal knowledge of all the matters set forth herein.

2. It is my great privilege to serve as Governor of the State of Arizona.

3. As Governor, I am committed to protecting reproductive freedom and maintaining access to reproductive healthcare in Arizona, including abortion care.

4. On April 24, 2024, the Arizona House of Representatives passed H.B. 2677, a bill to repeal Arizona's territorial abortion ban currently codified at A.R.S. § 13-3603. Earlier today, the Arizona Senate substituted H.B. 2677 for S.B. 1734 (which are identical bills), passed H.B. 2677, and transmitted that bill back to the House.

5. As I have stated publicly before today, I will sign H.B. 2677 after it is transmitted to me for my consideration.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED THIS 1st day of May, 2024, in Phoenix, Arizona.

Governor Katie Hobbs