IN THE SUPREME COURT
STATE OF ARIZONA

PLANNED PARENTHOOD OF ARIZONA, INC., *et al.*, Plaintiffs/Appellants, v. KRISTIN MAYES, *et al.*, Defendants/Appellees, and ERIC HAZELRIGG, M.D., Intervenor-Appellee.	No. CV-23-0005-PR Court of Appeals No. 2 CA-CV-2022-0116 Pima County Superior Court No. C127867

BRIEF OF *AMICI CURIAE* SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES BEN TOMA AND PRESIDENT OF THE ARIZONA SENATE WARREN PETERSEN

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Speaker of the Arizona House of Representatives Ben Toma and President of the Arizona Senate Warren Petersen respectfully submit this brief as *amici curiae* in support of the Petition for Review.

INTRODUCTION

This case pivots on two uncontested propositions of law. First, in determining whether and under what circumstances abortions may be lawfully performed in Arizona, the judiciary must "give effect to legislative intent." *Planned Parenthood of Arizona, Inc. v. Brnovich*, 254 Ariz. 401, 524 P.3d 262, 266, ¶ 11 (App. 2022) ["COA Op."] (quoting *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327 (2001)). Second, the Legislature not only has never repealed A.R.S. § 13-3603—which for more than a century has prohibited any "person" from providing an abortion at any stage of pregnancy "unless it is necessary to save [the mother's] life"—but explicitly disclaimed any intention of doing so. *See* 2022 Ariz. Laws ch. 105, § 2(1) (S.B. 1164). The Court of Appeals and the Respondents maintain rhetorical fidelity to these premises, but their interpretive exertions deliver precisely the result they purportedly foreswear: an implied repeal of A.R.S. § 13-3603 by an archipelago of provisions scattered throughout Title 36.

Their reasoning relies on illusory ostensible inconsistencies between these complementary but independent regulatory directives. It also neglects the unique historical and legal backdrop that has animated abortion legislation for the past half

century. The U.S. Supreme Court's sudden appropriation of abortion policy to the federal judiciary in *Roe v. Wade*, 410 U.S. 113 (1973), inaugurated five decades of legal flux, during which the Legislature tailored iterative abortion laws to align with the mutating contours of the Supreme Court's jurisprudence. Throughout these years, however, the Legislature deliberately maintained A.R.S. § 13-3603 in place and unabridged, anticipating the day when the federal courts would return this issue to the democratic domain. That time has now arrived. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). As S.B. 1164 itself attests, it and related provisions of Title 36 were intended to codify and preserve those facets of A.R.S. § 13-3603 that the *Roe* regime would tolerate, until such time as Section 13-3603 could be fully enforced. While the Title 36 provisions are, of course, *bona fide* laws in their own right, they were enacted to supplement—not subsume or supplant—A.R.S. § 13-3603.

Post-*Dobbs*, all these statutes now stand as independent and alternative legal constraints on abortion providers. While insisting that it was "not imposing an implied repeal here," COA Op., ¶ 23, the Court of Appeals proceeded to do just that, effectively exempting all physician-performed abortions from A.R.S. § 13-3603—a diktat that defies the statute's plain text. At bottom, the Court of Appeals erred in purporting to "reconcile[]," *id.*, statutes that were never mutually inconsistent to begin with. Recognizing A.R.S. § 13-3603 and the relevant provisions of Title 36

as each embodying separate and discrete regulatory limits on abortion effectuates the language the Legislature adopted into law, in accordance with the Legislature's intent.

Finally, the Attorney General's argument that the Petitioner is not a proper party comes far too late. As the Attorney General candidly acknowledged, basic principles of waiver presumptively apply, and their relevance is amplified by the *amici*'s justifiable reliance on the Petitioner's (heretofore undisputed) standing in declining to exercise their right of intervention pursuant to A.R.S. § 12-1841.

INTEREST OF THE *AMICI*

Warren Petersen is the President of the Arizona Senate, and Ben Toma is the Speaker of the Arizona House of Representatives. The *amici* proffer this brief as presiding officers of their respective chambers to articulate the perspective of the legislative branch on important issues bearing on the application and underlying aspirations of statutes the Legislature has enacted. *See generally* A.R.S. § 12-1841 (recognizing the right of the Speaker and Senate President to "be heard" in any proceeding implicating the validity of a state law); *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342, ¶ 5 (1999) ("In Arizona, the legislature is endowed with the legislative power of the State, and has plenary power to consider any subject within the scope of government unless the provisions of the Constitution restrain it.").

ARGUMENT

I. The Legislature Has Never Repealed, Abrogated or Limited A.R.S. § 13-3603 In Any Respect or in Any Application

A. The Court of Appeals' Holding Is Incompatible with A.R.S. § 13-3603's Plain Text

Few maxims have echoed with such frequency and consistency across the decades as the principle that "[t]he cardinal rule of statutory interpretation is to determine and give effect to the legislative intent behind the statute." *Calvert v. Farmers Ins. Co. of Ariz.*, 144 Ariz. 291, 294 (1985); *see also State of the Netherlands v. MD Helicopters, Inc.*, 250 Ariz. 235, 238, ¶ 8 (2020) ("When interpreting statutes, our goal is to effectuate the legislature's intent."); *State v. Reynolds*, 170 Ariz. 233, 234 (1992) ("When interpreting the meaning of particular statutory provisions, we seek to discern the intent of the legislature."); *Town of Florence v. Webb*, 40 Ariz. 60, 63 (1932) ("We have held repeatedly that the primary consideration in interpreting the meaning of statutes is the intent of the Legislature."); *Higgins' Estate v. Hubbs*, 31 Ariz. 252, 262–63 (1926) ("We have often held in the past, and we again repeat, that in the interpretation of any statute the intent of the Legislature is the real test of the meaning of the law.").

Because the law of course must be reified in written words, courts construing a statute "look first to its text." *State v. Burbey*, 243 Ariz. 145, 147, ¶ 7 (2017). If the text alone is not conclusive, the interpretive inquiry may also encompass

"consideration of the statute's 'subject matter, its historical background, its effect and consequences, and its spirit and purpose.'" *Id.* (citations omitted); *see also State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 345, ¶ 13 (2014) ("Courts also consider 'the policy behind the statute and the evil it was designed to remedy.'" (citation omitted)). While these extrinsic variables can never supersede a clear textual directive, they can—particularly in cases like this one, which implicate the interplay between multiple statutory provisions adopted over a period of years—illuminate the circumstances that precipitated legislative action and, by extension, the policy outcome the Legislature sought to secure.

Here, the Court of Appeals need not have ventured beyond A.R.S. § 13-3603's text. The statute's scope is clear and comprehensive; it prohibits any "person"—whether a physician or not—from providing an abortion "unless it is necessary to save [the mother's] life." That certain specific abortions (*e.g.*, an abortion performed during the fifth week of pregnancy by a licensed physician who properly documents it) may not run also afoul of other statutes (*e.g.*, A.R.S. § 36-2322) does not mean the Legislature did not or cannot separately proscribe the same abortion under A.R.S. § 13-3603. In short, there was nothing for the Court of Appeals to "reconcil[e]," COA Op., ¶ 23, because A.R.S. § 13-3603 and the relevant provisions of Title 36 each can be concomitantly and independently effectuated in full. Some abortions may contravene both sets of statutes; some may violate only one. The Court of

Appeals' fiat that the word "person," A.R.S. § 13-3603, had at some point during the past century extra-textually metamorphosized into the term "non-physician," *see* COA Op., ¶ 13, is untethered from the statute's crystalline language and hence necessarily contradicts the Legislature's intent. *See Palmcroft Dev. Co. v. City of Phoenix*, 46 Ariz. 200, 211 (1935) ("[I]f the language used by [the Legislature] is plain and unambiguous and leads to no absurd result, the courts are not justified in substituting their opinion of what was intended for the intent of the Legislature so expressed").

B. The Legislature's Incremental Amendments to Title 36 Were Intended to Effectuate A.R.S. § 13-3603 to the Fullest Extent Consistent with Federal Law

A resort to secondary interpretive methods reinforces the same conclusion: A.R.S. § 13-3603 embodies a continuous and unyielding legislative objective to protect unborn life to the fullest extent permitted by the U.S. Constitution. The Court of Appeals compounds its misconstruction of the statutory text with a disregard of the historical and legal context in which the relevant laws were adopted.

"Legislative and historical background of the statutory enactments shedding light on meaning and intent may be and often have been considered by this Court." *City of Mesa v. Killingsworth*, 96 Ariz. 290, 295 (1964). The conditions under which states regulated abortion between 1973 and 2022 are key to apprehending the interrelationship between A.R.S. § 13-3603 and the provisions of Title 36. No one

disputes that A.R.S. § 13-3603 was the controlling legislative exposition of abortion policy in Arizona until the U.S. Supreme Court in *Roe* abruptly excavated from the federal constitution an ostensible right to abortion. This novel construct conceded state interests "in maintaining medical standards, and in protecting potential life," *Roe*, 410 U.S. at 154, that "[a]t some point in pregnancy"—apparently in the second or third trimesters of pregnancy[1]—"become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." *Id.*

These inchoate judicial ruminations placed the Arizona Legislature and its counterparts elsewhere in a bind. Comprehensive protections of unborn life, such as A.R.S. § 13-3603, were effectively enjoined. The new *Roe* regime contemplated certain pro-life measures, but the parameters of the federal courts' tolerance for such laws was unknown and unknowable. The states were left to divine (often inaccurately) the haphazard trajectory of a deeply fractured Supreme Court's abortion jurisprudence. *See, e.g.*, *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (invalidating various regulations of second trimester abortions, including parental consent, waiting periods, and handling of fetal remains); *Planned Parenthood Ass'n. of Kansas City v. Ashcroft*, 462 U.S. 476 (1983) (plurality) (holding that hospitalization requirements for second trimester abortions were

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[1] The trimester framework devised in *Roe* "was the Court's own brainchild," *Dobbs*, 142 S. Ct. at 2266, with little sustenance in law or science.

unconstitutional but sustaining requirement of having a second physician present to care for infants that survived abortion attempts); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (plurality) (upholding ban on use of public resources for abortions and recognizing state interests in protecting unborn life pre-viability). Although the Supreme Court eventually discarded *Roe*'s trimester framework, the malleable "undue burden" rubric that succeeded it proved equally "inherently manipulable" and "hopelessly unworkable" in practice. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 984, 986 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *compare Stenberg v. Carhart*, 530 U.S. 914 (2000) (invaliding statutory prohibition on partial birth abortions) *with Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding statutory prohibition on partial birth abortions).

Against this backdrop, the Legislature worked within the mutating interstices of the Supreme Court's abortion case law to reconstruct and recodify as much of the dormant A.R.S. § 13-3603 as the federal authorities allowed. These provisions did not—and were never intended to—liberalize abortion policy relative to A.R.S. § 13-3603. Rather, they were designed to ***restrict*** abortion relative to the constitutional baseline announced in *Roe*, and to bridge the regulatory gap between *Roe* and A.R.S. § 13-3603 until such time as the federal courts permitted A.R.S. § 13-3603's revivification. It is for precisely this reason that the Legislature, in the course of enacting the various Title 36 provisions, never made corresponding amendments to

A.R.S. § 13-3603, and in fact repeatedly affirmed that these new measures did not legalize abortions that other laws—including the (temporarily) unenforceable, A.R.S. § 13-3603—independently prohibited. *See* A.R.S. § 36-2164; 2022 Ariz. Laws. ch. 105, § 2(1); 2016 Ariz. Laws ch. 77, § 6; 2012 Ariz. Laws ch. 250, § 11; 2011 Ariz. Laws ch. 9, § 8; 2009 Ariz. Laws ch. 172, § 6. Stated another way, the Title 36 provisions, while indefinite in duration, were intended effectively as partial placeholders until *Roe*'s demise.

The prohibition on physician-performed abortions after fifteen weeks of pregnancy, *see* A.R.S. § 36-2322 (added by 2022 Ariz. Laws ch. 105 (S.B. 1164)), is consistent with this systemic legislative objective. At the time S.B. 1164 was introduced in January 2022, the *Dobbs* case, which featured a challenge to Mississippi's 15-week prohibition, was pending before the Supreme Court. Importantly, the court had granted certiorari only with respect to the question of whether all pre-viability prohibitions on elective abortions are unconstitutional. It did not, at the time it accepted review, indicate that it would entertain overruling *Roe* altogether. *See Dobbs*, 142 S. Ct. at 2313 (Roberts, C.J., concurring in the judgment) (recounting that Mississippi "went out of its way to make clear that it was *not* asking the Court to repudiate entirely the right to choose whether to terminate a pregnancy"). Accordingly, S.B. 1164 was predicated on the supposition that the

Supreme Court in *Dobbs* would countenance a 15-week limitation—but not necessarily anything more than that.

In this vein, S.B. 1164's primary sponsor, Senator Barto, testified to the House Judiciary Committee that "if . . . the U.S. Supreme Court allows for limiting abortion to 15 weeks' gestation, Arizona must act to protect life." *Meeting on S.B. 1164 Before the House Comm. on the Judiciary*, 55th Legis., 2d Reg. Sess. (Mar. 9, 2022) (statement of Sen. Barto), *available at* https://www.azleg.gov/videoplayer/?eventID=2022031027&startStreamAt=440 [starting at 9:56]. In response to a committee member's query as to why S.B. 1164 did not extend to unborn life prior to 15 weeks' gestation, Senator Barto explained that the legislation was "based on the Mississippi law and the U.S. Supreme Court's decision on upholding it," adding that "[t]he reason we are moving in this direction is because we have a great opportunity to save many more lives . . . if and when the U.S. Supreme Court upholds the Mississippi law." *Id.* [starting at 23:55]. *See generally Hernandez-Gomez v. Leonardo*, 185 Ariz. 509, 513 (1996) ("We believe . . . that when the sponsors of a bill and the very committees considering that bill tell [the legislative body] and the public what they intended to accomplish with a specific provision of that bill, such expressed intentions can be useful to clarify any ambiguity in the meaning of the enacted legislation."); *Molera v. Hobbs*, 250 Ariz. 13, 25, ¶ 39 (2020) (citing committee testimony of bill sponsor in construing statute).

As Senator Barto made clear, S.B. 1164 does not permit or authorize any abortions of any kind; it simply supplements A.R.S. § 13-3603—which, by virtue of *Roe*, remained effectively suspended—with a 15-week limit that aligned with the anticipated holding in *Dobbs*.

The text of the enacted legislation comports with precisely this design. Not only did S.B. 1164 never amend A.R.S. § 13-3603 to accommodate abortions prior to 15 weeks' gestation, it *explicitly disavowed* any intention to "[r]epeal, by implication or otherwise, section 13-3603." 2022 Ariz. Laws ch. 105, § 2(1). Citing a parallel provision in the Mississippi law at issue in *Dobbs*, the Court of Appeals commented that "our legislature conspicuously avoided statutory language stating § 13-3603 should govern irrespective of other law should *Roe* be overturned." COA Op., ¶ 24. Preliminarily, the absence of any repeal or amendment of A.R.S. § 13-3603's text is itself dispositive. The Legislature was not obligated to affirmatively ratify the truism that an extant statute remains the law of the state, and certainly need not have employed any particular semantic formulation to make that point. More fundamentally, the Legislature's explicit affirmation that S.B. 1164 did not repeal A.R.S. § 13-3603 underscores that S.B. 1164 would serve as a partial proxy for A.R.S. § 13-3603 until a reversal of *Roe* could reimbue the latter with full effect.

In sum, the Court of Appeals ascribed to the Legislature an intention it never espoused and imposed a policy outcome the Legislature never ordained. The

people's will, as encapsulated by their elected representatives, is the same today as it was a century ago: no "person" may provide an abortion "unless it is necessary to save [the mother's] life." A.R.S. § 13-3603. While *Roe*'s 50-year *de facto* suspension of A.R.S. § 13-3603 necessitated various independent and supplementary abortion restrictions, the words of this statute—and the plain meaning they carry—have never changed.

II. The Attorney General Has Waived and Is Estopped From Raising Any Argument That the Petitioner Lacks Standing

The Court should deem waived the Attorney General's newfound position—apparently asserted for the first time in her response to the Petition for Review—that Dr. Hazelrigg lacks standing to seek relief in this Court. *See* Att'y Gen. Resp. to Pet. For Review at 13–18. The Attorney General invokes the "public interest" to excuse what even she acknowledges otherwise would be her office's clear-cut waiver of the issue, relying on *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 482 (1986). *See id.* at 14 n.1. The *Dombey* Court, however, overlooked a waiver for the sake of resolving "issues of statewide importance" and ensuring that such matters are "considered rather than deferred." *Dombey*, 150 Ariz. at 482. Here, though, the Attorney General deploys *Dombey* for the diametrically opposing purpose—*i.e.*, delaying, if not fully thwarting, this Court's review of consequential legal questions bearing substantial statewide significance.

Even if the principle of waiver did not foreclose the Attorney General's belated standing argument, the doctrine of judicial estoppel certainly does. "As a general rule, a party who has assumed a particular position in a judicial proceeding is estopped to assume an inconsistent position in a subsequent proceeding involving the same parties and questions." *State v. Towery*, 186 Ariz. 168, 182 (1996) (citation omitted); *see also In re Marriage of Thorn*, 235 Ariz. 216, 222, ¶ 27 (App. 2014) (observing that "[a]lthough [judicial estoppel] usually applies in the context of separate actions, there is no restriction on its application involving differing positions at trial versus on appeal"). As the Attorney General acknowledged, her office (through her predecessor) moved successfully to substitute Dr. Hazelrigg for the previous guardian ad litem in this proceeding. *See* Atty. Gen. Resp. to Pet. For Review at 14 n.1. Further, the Attorney General's oscillating position is prejudicial not only to Dr. Hazelrigg, but to the *amici* as well. The Attorney General notes correctly that the *amici* are entitled to intervene as of right in this action. *See id.* at 17 (citing A.R.S. § 12-1841). The *amici* refrained from doing so, however, precisely because Dr. Hazelrigg has capably advanced their legal positions and interests. Had the *amici* been on notice that Dr. Hazelrigg lacked standing, they certainly would have exercised their right to intervene.

Finally, even assuming, *arguendo*, that the Attorney General's argument is not procedurally precluded, the Court should set aside any questions of standing in

this case, which is undeniably one of statewide importance. This Court has repeatedly held that standing is a prudential consideration, not a jurisdictional prerequisite, in Arizona courts. *See, e.g., Biggs v. Cooper ex rel. Cty. of Maricopa*, 236 Ariz. 415, 418, ¶ 8 (2014); *State v. B Bar Enterprises, Inc.*, 133 Ariz. 99, 101 n.2 (1982) ("Arizona has no analog to the case or controversy provision in its constitution."). The Attorney General's last-ditch standing argument cannot overcome the constellation of compelling circumstances now confronting the Court—namely, the magnitude of the issues of law presented in the Petition for Review, the highly belated nature of the Attorney General's eleventh-hour standing challenge, and Dr. Hazelrigg's effective and vigorous advocacy in support of A.R.S. § 13-3603's proper construction. For all the reasons articulated in the Petition, this case warrants the Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Review, vacate the Court of Appeals' opinion, and give effect to all of Arizona's laws restricting abortion, including A.R.S. § 13-3603.

RESPECTFULLY SUBMITTED this 22nd day of May, 2023.

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