ARIZONA SUPREME COURT

PLANNED PARENTHOOD ARIZONA, INC., et al., Plaintiffs/Appellants, v. KRISTIN 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; 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

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INTEREST OF AMICI CURIAE

Amici are law professors who specialize in statutory interpretation, constitutional law, and family law. Although amici have various scholarly focuses, they agree that under standard tools of statutory interpretation, the Court of Appeals was correct to harmonize the territorial-era ban with more recent statutes. Amici have a strong interest in assisting this Court in resolving questions of law centering their professional expertise and scholarship. Amici are:

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- Greer Donley, Associate Dean for Research and Faculty Development July 2023, John E. Murray Faculty Scholar, and Associate Professor of Law, University of Pittsburgh School of Law
- Toni Massaro, Regents Professor, Professor of Law and Milton O. Riepe Chair in Constitutional Law Emerita, University of Arizona, James E. Rogers College of Law
- Victoria Nourse, Ralph V. Whitworth Professor in Law, Georgetown University Law Center

INTRODUCTION

The question presented in this case is whether the Court of Appeals erred when it held that Arizona's territorial-era abortion ban can and should be harmonized with Arizona's later-enacted regulatory scheme. Applied properly, every principle of statutory interpretation confirms the Court of Appeals arrived at the correct answer. The Court should affirm that decision.

Petitioners misconstrue and misapply basic tenets of construction and ask the Court to resurrect Arizona's territorial-era abortion ban in full. That outcome not only contravenes fundamental principles of statutory interpretation, but also requires that the Court ignore the detailed statutory scheme that Arizona has developed over the past half century to regulate abortion, most recently in 2022. *See* A.R.S. §§ 36-2151–2162, 36-2301, 36-2322 ("Title 36").

That is not how statutory interpretation works. As the Court's precedents make clear, courts must assess a law's meaning not in isolation, but within its proper statutory context, construing statutes governing the same subject as though they are part of one comprehensive

law. In this way, courts give meaning to everything the legislature has said while avoiding the reduction of statutory components to surplusage.

The outcome Petitioners seek, and the path they urge the Court to take in getting there, will do the opposite, leaving Arizona's physicians wondering whether their compliance with some laws will expose them to criminal liability under other laws. The Court should reject that approach and outcome and, like the Court of Appeals, give clarity and meaning to the law where Petitioners ask for uncertainty.

ARGUMENT

I. ARIZONA'S ABORTION LAWS SHOULD AND CAN BE HARMONIZED.

Arizona's laws regulating abortion relate to the same subject. As such, the Court should "construe them together as though they constitute one law and attempt to reconcile them to give effect to all provisions involved." *Fleming v. State Dep't of Pub. Safety*, 237 Ariz. 414, 417 ¶12 (2015). Where statutes are ambiguous or contradictory, they must be harmonized, if at all possible, before a court may consider whether some provision has been impliedly repealed.

A. Arizona courts have a duty to harmonize ambiguous related statutes and the Court of Appeals did so properly.

When interpreting statutes, courts reconcile conflict and resolve ambiguity. As a first priority, courts give statutory text its plain meaning, unless "an ambiguity or contradiction exists." *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 330 ¶ 12 (2001). Where such ambiguity arises, courts must look to "the statutory scheme as a whole" to ascertain the correct meaning. *See id.*; *see also id.* at 333 ¶ 28 (explaining that, in examining the statutory scheme, "[courts] adopt a construction . . . giving force and meaning to all statutes involved").

Ambiguity exists "where the legislature has enacted two or more statutes which appear to be inconsistent." *City of Mesa v. Killingsworth*, 96 Ariz. 290, 294, 394 P.2d 410, 413 (1964); *see also Weekly v. City of Mesa*, 181 Ariz. 159, 165 (Ct. App. 1994). Ambiguity can come from statutory language itself, *see Romero-Millan v. Barr*, 253 Ariz. 24, 27 ¶ 13 (2022), or it "may arise in respect to the general scope and meaning of a statute when all its provisions are examined," *State v. Sweet*, 143 Ariz. 266, 269 (1985) (quoting 73 Am. Jur. 2d, *Statutes* § 195). Ambiguity, then, can occur from the interaction of two provisions.

The Court does not need to find a direct conflict to determine that it must harmonize § 13-3603 and Title 36 to give full effect to the legislature's intent. Harmonization is required even "when two statutes *appear* to conflict," *UNUM*, 200 Ariz. at 329 ¶ 11 (emphasis added). Wherever "sound reason and good conscience will allow, this court has a duty to harmonize statutes where there is a possibility of conflict," *Ard v. State ex rel. Superior Ct. of Pima Cnty.*, 102 Ariz. 221, 224 (1967). Thus, actual conflict is not a prerequisite to harmonization; ambiguities and apparent conflicts require reconciliation all the same.

Harmonization is required here. Section 13-3603 and Title 36 appear ambiguous when considered in each other's light.[1] Section 13-3603 bans non-emergency abortions outright, while Title 36 permits physicians to perform non-emergency abortions in certain cases, up to 15 weeks of gestation, and permits emergency abortions after 15 weeks of

[1] Petitioner correctly asserts that facial ambiguity in a statute necessitates a harmonization analysis. Petitioners' Answering Br. at 17–18. But ambiguity of that type is not the only "predicate" for a harmonization analysis. *Id.* at 17. We agree that Section 13-3603 and Title 36 are not individually ambiguous on their face. But the appearance or possibility of conflict between two statutes—ambiguity between statutes—prompts Arizona courts to exercise their duty to harmonize all the same. *See UNUM*, 200 Ariz. at 329¶ 11; *Ard*, 102 Ariz. at 224.

gestation. *Compare* A.R.S. § 13-3603 (forbidding anyone from using "any . . . means whatever . . . to procure the miscarriage of [a] woman, unless it is necessary to save her life") *with id.* § 36-2322 (forbidding physicians to "induce an abortion unless the physician . . . has first [determined] the probable gestational age," "[e]xcept in a medical emergency").

"Reading § 13-3603 to impose criminal liability for physicians providing those restricted abortions would eliminate the elective abortions the legislature merely intended to regulate under Title 36"—despite the fact that it "created a complex regulatory scheme to . . . restrict—but not to eliminate—elective abortions." Op. at 8 ¶ 16. Those two propositions appear to conflict, unless reconciled to give meaningful effect to both.

Petitioners insist that ambiguity or contradiction could only exist between the statutes if Title 36 created a right to abortion, Hazelrigg Supp. Br. at 9, which Title 36 explicitly does not do, *see id.* § 36-2164 ("This article does not establish . . . a right to abortion[.]"). On Petitioners' reading, however, there would be a glaring contradiction between the two laws: non-emergency abortions would be entirely criminalized under § 13-3603, even though the legislature explicitly chose to permit them

under certain circumstances in Title 36. The fact that Title 36 did not create a right to obtain an abortion is thus irrelevant to how the statutes must be read together.

Petitioners' reading also invites contradiction with respect to emergency abortions because many abortions that Title 36 would authorize past the fifteenth week of gestation in the event of a "[m]edical emergency," A.R.S. § 36-2322, would be prohibited at any point by Section 13-3603 because, although emergent, the life of the person requiring an abortion is not sufficiently at risk, *id.* § 13-3603. Title 36 defines a "medical emergency" to include cases where an abortion is necessary "to avert the . . . death" of the person requiring an abortion, but also in less emergent cases where "a delay will create serious risk of substantial and irreversible impairment of a major bodily function." *Id.* § 36-2321(7). The disjunctive manner in which "medical emergency" is defined confirms that Title 36 intended to authorize abortions in even these lesser emergencies, which necessarily conflicts with Section 13-3603.

B. Traditional methods of statutory construction support the Court of Appeals' conclusion.

When interpreting ambiguous text, courts rely on accepted canons of statutory construction. *See Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 559 ¶ 22 (2018) ("If a statute is ambiguous, we may consider secondary tools of statutory construction."). The Court of Appeals was correct to do so here. *See* Op. at 6 ¶ 11; *see id.* at 11 ¶ 27 (Eckerstrom, J., concurring) ("To the extent detailed legislative instruction is not provided, we apply settled canons of construction for integrating new statutes with old."). In harmonizing the provisions here, those canons indicate the Court should give effect to specific provisions over general provisions, give full effect to exceptions and limitations, avoid interpretations that result in surplusage or constitutional problems, and construe penal statutes in favor of defendants.

i. The recent and specific regulations in Title 36 govern over the older general ban in § 13-3603.

In Arizona, courts follow the interpretive maxim that "the more recent, specific statute governs over the older, more general statute." *In re Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 157 (1997) (quoting *Lemons v. Superior Ct. of Gila Cnty.*, 141 Ariz. 502, 505 (1984)

and explaining the priority given to recent, specific statutes in the face of apparent conflict); *see also* Op. at ¶ 29 (Eckerstrom, J., concurring) (citing *State v. Cassius*, 110 Ariz. 485, 487 (1974)). Section 13-3603 is a territorial-era near-total abortion ban. 1977 Ariz. Sess. Laws ch. 142, § 99 (1st Reg. Sess.) (renumbering the 1901 abortion ban, which had previously been codified at § 13-211). It has not been amended or enhanced since. *See Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. App. 142 (1973) (finding the text of § 13-211 unconstitutional as enacted in 1901 and maintained since). It could hardly be older or more general. Conversely, Title 36 was enacted entirely within the last fifty years and updated as recently as 2022. *See* 2022 Ariz. Sess. Laws, ch. 105, §§ 1-5. It provides a rigorous reporting regime, A.R.S. § 36-2162–2164; detailed disclosure requirements, *id.* § 36-2152, 36-2153, 36-2156; and multi-element exceptions, *id.* § 36-2322. It is recent and specific.

Accordingly, any apparent conflict between Section 13-3603 and Title 36 or ambiguity about their interaction should be resolved in a manner that allows the scope of the earlier, general provision to make room for the later, specific provision. Section 13-3603 always prohibited abortions, except in the case of a life-threatening emergency; Title 36

broadened that emergency exception to include the health, and not just the life, of the person requiring an abortion, and created a second exception allowing physicians to perform non-emergency abortions up to a gestational age of fifteen weeks. A.R.S. § 36-2322. *See* Op. at 10 ¶ 23. In other words, Title 36 updated and added to the category of exceptions. The parallel structure of the various provisions reinforces this conclusion. *Compare* A.R.S. § 13-3603 (prohibiting abortion "unless it is necessary to save [the] life" of the person requiring an abortion) *with id.* 36-2301.01(A) (prohibiting abortion "unless . . . the abortion is necessary to preserve the life or health of the woman") *and id.* § 36-2322(A) (prohibiting abortion "unless the physician has made a determination" that the probable gestational age of the unborn child is no greater than fifteen weeks). This reading reconciles both Title 36 and Section 13-3603, giving meaning to all provisions in the law.

ii. Title 36's limited prohibition on abortions after fifteen weeks implies an equal and opposite limited authorization of abortions up to fifteen weeks.

The expression of one thing implies the exclusion of another. *City of Surprise v. Arizona Corp. Comm'n*, 246 Ariz. 206, 211 ¶ 13 (2019) (applying the *expressio unius est exclusio alterius* canon). Here, the

expression of a ban on physicians performing abortions after fifteen weeks implies the exclusion of abortions outside that window from the prohibition, and so authorizes such conduct. *See* PPAZ Supp. Br. at 6–9 (explaining the constructive effect of "except" and "unless" in the 15-week law); AG Supp. Br. at 3–7 (same). There would be no reason to draw a line if there were not permissible conduct on one side of it, and no reason to regulate abortion before that point if it were banned.

In Arizona, as elsewhere, a court's interpretation of a statute may be guided by its exceptions. *Indus. Comm'n of Arizona Lab. Dep't v. Indus. Comm'n of Arizona*, 253 Ariz. 425, 428 ¶ 15 (2022). The exceptions of both laws here should be given effect in order to give effect to the laws as a whole. *See Rapanos v. United States*, 547 U.S. 715, 752 (2006) ("[N]o law pursues its purpose at all costs, and . . . the textual limitations upon a law's scope are no less a part of its 'purpose.'"). And despite what Petitioners might suggest, Arizona's abortion laws cannot be reduced to an "intent to protect unborn life as much as possible." Pet. for Review at 12. Before the Legislature even enacted Title 36, its intent in restricting abortions under Section 13-3603 was two-pronged: it was meant to simultaneously "embody the belief in the right to life and the necessity of

preserving human life . . . *and* to protect the health and life of pregnant women." *Nelson*, 19 Ariz. App. at 144 (emphasis added). Exceptions to preserve the life and health of the person requiring an abortion are just as much a part of Arizona's abortion laws as the prohibitions they limit and must be given full effect. The same is true of the Legislature's more recent decision to allow, but heavily regulate, abortions up to 15 weeks and for the health (and not merely life) of the person requiring the abortion.

Read as a whole, the natural meaning of the provisions here is as the Court of Appeals concluded: physicians who perform abortions in compliance with Title 36 are not liable under Section 13-3603 and Section 13-3603 remains operative as to all other abortions. Op. at 7 ¶ 13.

iii. Harmonizing the statutes renders all of the language of each statute meaningful.

Courts typically construe statutory schemes to "avoid interpreting a statute so as to render any of its language mere 'surplusage.'" *Herman v. City of Tucson*, 197 Ariz. 430, 434 ¶ 14 (Ct. App. 1999). Rather, they "give meaningful operation to each of its provisions," *Ruiz v. Hull*, 191 Ariz. 441, 450 ¶ 35 (1998), "so that no part of the statute will be void, inert, redundant, or trivial," *Walker v. City of Scottsdale*, 163 Ariz. 206,

210 (Ct. App. 1989) (citing *City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949); *see* Antonin Scalia & Bryan J. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) ("[No provision] should needlessly be given an interpretation that causes it to . . . have no consequence.").

As explained by the Attorney General, Petitioners' approach would leave vast swathes of Arizona's abortion laws meaningless. *See* AG Supp. Br. at 9–15 (listing redundancies created by Petitioners' reading). The requirement that providers report the reason for an abortion is meaningless if, under Section 13-3603, saving the life of the person requiring an abortion is the only legal reason to perform an abortion; in that case the mere fact that the abortion took place would establish the justification for it. *See id.* § 36-2161(A)(12); *id.* § 36-2163 (requiring breakdown of reasons given by month).

Indeed, the entirety of Title 36's system of informed consent would be rendered surplusage. That is, presuming that an abortion to save the life of the person requiring an abortion would qualify as "a medical emergency," there is no reason to have any system of informed consent that applies "except in the case of a medical emergency." *See id.* § 36-2158 Thus, there would be no point in the legislature requiring that physicians

providing non-emergency abortions notify their patient that "perinatal hospice services are available," *id.* § 36-2158(A)(1)(a), or that non-emergency abortions "based on the sex or race" or "genetic abnormality of the child" are prohibited, *id.* § 13-3603.02, if physicians could not perform non-emergency abortions at all.

As these examples illustrate, without harmonization, Title 36 would be left littered with pointless law. Courts have fit their interpretation to avoid surplusage for much less. *See In re Est. of Zaritsky*, 198 Ariz. 599, 602, ¶ 11 (Ct. App. 2000) (refusing to leave even a single word ("such") as surplusage). Harmonizing Section 13-3603 and Title 36 as the Court of Appeals did gives effect to statutory language that Petitioners would leave inert.

iv. Harmonizing the statutes avoids constitutional concerns.

Where "alternate constructions are available," this Court chooses "that which avoids constitutional difficulty." *Slayton v. Shumway*, 166 Ariz. 87, 92, 800 P.2d 590, 595 (1990) (modified on other grounds) (citing *Greyhound Parks, Inc. v. Waitman*, 105 Ariz. 374, 377, 464 P.2d 966, 969 (1970)). "[T]he law must be sufficiently definite to avoid arbitrary enforcement." *State v. Schmidt*, 220 Ariz. 563, 565 ¶ 5 (2009). To satisfy

due process requirements, "statutes must be sufficiently clear and concrete that they provide person[s] of ordinary intelligence a reasonable opportunity to know what is prohibited and contain explicit standards of application so as to prevent arbitrary and discriminatory enforcement." *Martin v. Reinstein*, 195 Ariz. 293, 317 ¶ 79 (Ct. App. 1999) (internal quotations omitted). *See* PCA Supp. Br. at 15–16. But as discussed at length, unless the statutes are harmonized and understood to permit physicians to perform abortions that comply with Title 36, physicians (at a minimum) will lack the necessary clarity to know whether their careful compliance with Title 36 will result in their incarceration under Section 13-3603.

Petitioners insist that this Court need not decide whether Section 13-3603 leaves any of the regulations in Title 36 intact, and that such analysis would be better addressed in an as-applied challenge. Hazelrigg Supp. Br. at 19. But avoiding that question will only exacerbate the constitutional problems that will result if the provisions are read as Petitioners suggest. No further factual development is necessary to conclude that doctors will face uncertainty as to their own criminal liability and healthcare providers will face uncertainty as to their

reporting and disclosure obligations regarding procedures prohibited by Section 13-3603 but authorized by Title 36.

Moreover, the indeterminacy of imposing a near-total ban in the face of a detailed regulatory scheme authorizing part of what the ban forbids would leave physicians subject to arbitrary enforcement in violation of due process. *Schmidt*, 220 Ariz. at 565 ¶ 5 ("[T]he law must be sufficiently definite to avoid arbitrary enforcement."). The Court of Appeals harmonized Section 13-3603 and Title 36 in a manner that avoids these due process concerns. The Court should do likewise and affirm that approach.

v. If the scales are balanced, the rule of lenity tips them in favor of future defendants.

If, after considering all of the interpretive tools discussed above, the Court still finds the arguments in equipoise, the rule of lenity directs that any remaining ambiguity be resolved in favor of future defendants under Arizona's abortion laws. Where a penal statute is "susceptible to more than one interpretation," *State v. Pena*, 140 Ariz. 545, 549–50 (App. 1983) (decision approved and adopted in *State v. Pena*, 140 Ariz. 544, 683 P.2d 743 (1984)), and other mechanisms of statutory construction are inconclusive, *State v. Bon*, 236 Ariz. 249, 253 ¶ 13 (Ct. App. 2014), the

rule of lenity "dictates that any doubt should be resolved in favor of the defendant," *Pena*, 140 Ariz. at 550; *see also State v. Barnett*, 209 Ariz. 352, 355 ¶ 16 (Ct. App. 2004) ("[W]hen we analyze and construe penal statutes susceptible to different interpretations, we resolve all doubts in the defendant's favor.").

Any uncertainty in Arizona's abortion laws should be resolved in favor of potential defendants to ensure fair notice of criminal liability. The Court of Appeals did just that by holding that "physicians who perform abortions in compliance with Title 36 are not subject to prosecution under § 13-3603." Op. at 7 ¶ 13. This Court has applied the logic of lenity in situations much less dire. In *BSI Holdings*, the Court applied the rule to a tax on nonresident aircraft and held that, if the tax court found the statute ambiguous on remand, it "should construe it in favor of the taxpayers" in a manner "similar to the rule of lenity in the criminal context." *BSI Holdings, LLC v. Arizona Dep't of Transp.*, 244 Ariz. 17, 22 ¶25 (2018) (citing *Bon*, 236 Ariz. at 253 ¶ 13). The Court emphasized its desire to provide "clear notice of obligations" to taxpayers so that they "may comply and order their affairs accordingly." *Id.* Physicians inarguably have a greater interest in clear notice of

obligations when it comes to their lives and liberty than taxpayers do in their tax liabilities on private aircraft.

II. THE COURT OF APPEALS' APPROACH DID NOT REPEAL SECTION 13-3603.

Harmonizing these statutes to permit physicians to continue performing abortions in compliance with Title 36 does not constitute the repeal, implied or otherwise, of any part of the Arizona statutory code. Rather, this approach gives meaning and force to each, while rendering the full text whole. Petitioners accuse the Court of Appeals of repealing Section 13-3603 by sleight of hand. *See* Hazelrigg Pet. for Review at 7. But harmonizing two texts to give effect to all provisions does not repeal any of those provisions; it makes them effective. As discussed above, *supra* Part I.B.iii, it is Petitioners' suggested reading that would render inert entire sections of Arizona code. *See, e.g.*, A.R.S. § 36-2158(A) (informed consent for non-emergency abortions).

As the Court of Appeals explained, implied repeal requires as a matter of doctrine that the provisions be irreconcilable. Op. at ¶ 23. Statutes are irreconcilable only if they cannot operate simultaneously. *See Mead, Samuel & Co. v. Dyar*, 127 Ariz. 565, 568 (Ct. App. 1980) (explaining implied repeal is disfavored and courts must "harmonize

statutes . . . so that both will be operative."). But, as noted above, Section 13-3603 and Title 36 can coexist. The plain text of Section 13-3603 and Title 36 shows that they overlap and admit of harmonization by understanding the recent and specific Title 36 to establish a second exception to the territorial-era generality of Section 13-3603, and by looking to each law's limits as inherent to its purpose. And where courts can harmonize statutes, they are duty-bound to do so in lieu of impliedly repealing them. *See id.* ("Repeal or partial repeal by implication is not favored, however, and it is our duty to harmonize statutes whenever and to the extent possible so that both will be operative."). That is what the Court of Appeals did here. Op. at 11 ¶ 26.

CONCLUSION

The applicable canons of statutory interpretation, when applied properly, all support the Court of Appeals' approach in harmonizing Section 13-3603 and Title 36, as well as the interpretation it ultimately arrived at. The Court should affirm.

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Dated: October 4, 2023

Respectfully submitted,

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ARIZONA SUPREME COURT

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CERTIFICATE OF COMPLIANCE

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This certificate of compliance concerns an amicus curiae brief, submitted under Rule 16(b)(4), Arizona Rules of Civil Appellate Procedure. Undersigned counsel certifies that the Brief of *Amici Curiae* Law Professors to which this certificate is attached is double-spaced, uses proportionately spaced typeface, and was prepared in Century Schoolbook 14-point font. The Brief, excluding the elements listed in Rule 4(b)(9), Arizona Rules of Civil Appellate Procedure, is 20 pages in length, with each page containing no more than 280 words per page, and thus complies with the Court's August 22, 2023 Order.

RESPECTFULLY SUBMITTED this 4th day of October, 2023.

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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, Intervenor/Appellee.	No. CV-23-0005-PR Court of Appeals Division Two No. 2CA-CV-2022-0116 Pima County Superior Court No. C127867

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