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, Intervenor/Appellee.	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 RESPONSE TO AMICUS CURIAE BRIEFS IN SUPPORT OF PETITION FOR REVIEW BY SUBSTITUTE INTERVENOR ERIC HAZELRIGG

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Acts

Rules

Other Authorities

INTRODUCTION

Most of the amici curiae discuss policy matters rather than the statutory construction question presented and whether this case is a proper vehicle for review. The Attorney General thus focuses on the only briefs that raise any arguments relevant to the issues here: those filed by Speaker of the House Ben Toma and Senate President Warren Petersen; former Representative Jill Norgaard; the Center for Arizona Policy ("CAP"); and Arkansas and 16 other states ("Ark.").

Amici repeat many of Petitioner's errors. They ignore or mischaracterize the text of A.R.S. § 36-2322. They maintain the fiction that § 13-3603, § 36-2322, and the rest of the modern statutory scheme are merely cumulative with no practical conflict. And they dismiss the necessity (and absence) of a trigger law that would have clearly and easily accomplished the legislative outcome they now seek through judicial means.

More than anything, amici rely on their perception of individual legislators' subjective intent and the legislative "purpose." They are mistaken—the text governs. Here, the statutory language and age-old canons of construction disprove amici's arguments at every turn, further supporting that this Court should deny review.

ARGUMENT

As amici implicitly recognize, Petitioner has only two possible paths to the result he seeks. Either (I) A.R.S. § 13-3603, § 36-2322, and the rest of the modern scheme are overlapping criminal statutes that do not conflict so no harmonization is required, or (II) the statutes do conflict, but a trigger law revives § 13-3603 as the superseding statute post-*Dobbs* and thus resolves the inconsistency.

The statutory language supports neither alternative. A conflict exists and the legislature enacted no trigger law. By trying to chart a third course with legislative intent and purpose, amici contravene the text, the Court's precedent, and established canons of construction.

I. A.R.S. § 13-3603 and the modern statutory scheme are not cumulative; they conflict and require harmonization.

A. A.R.S. § 36-2322 does not only criminalize conduct, it deems certain conduct legal.

Amici's rejection of any conflict in the statutory scheme is based on their mischaracterization of § 36-2322 as merely a flat prohibition on abortion after 15 weeks. *E.g.*, Ark. at 11-12; Norgaard at 10-11; Toma/Petersen at 11. Here's why they're wrong.

Start with a basic principle of interpretation that amici ignore. When a statute includes "except," "unless," and "if" clauses, take note. That language signals "a negative condition" or "a statutory exception or proviso." *State v. Kelly*, 210 Ariz. 460, 463 ¶ 10 (App. 2005). Statutory exceptions have a specific function. *See id.* They do not simply "excuse or justify an actor who engages in the prohibited conduct" but instead affirmatively "exclude the actor from the class of people for whom the conduct is prohibited." *Id.*; *see also Red Rover Copper Co. v. Hillis*, 21 Ariz. 87, 91-92 (1919) (a "proviso or exception is distinct from the clause defining the offense" and "excepts … a class of [conduct]").[1]

Now to the text. Under A.R.S. § 36-2322(A), a doctor "may not" perform an abortion "unless" he does two things: determines and documents the fetus' gestational age, and completes any form required under (C) (meaning, for abortions after 15 weeks). That bi-conditional prohibition is then further modified by "[e]xcept in a medical emergency."

[1] The legislature often uses conditions and exceptions to specify when conduct is authorized. *E.g.*, A.R.S. § 28-3413(A); A.R.S. § 33-1415; *cf. Ruan v. United States*, 142 S. Ct. 2370, 2379 (2022) ("the statutory clause ['except as authorized'] plays a critical role in separating a defendant's wrongful from innocent conduct").

This means that the statute does not just prohibit conduct. Rather, the "except" and "unless" clauses fill in the negative space around the prohibition and permit two classes of conduct. Thus, "in a medical emergency," a doctor "may" perform an abortion without determining and documenting the gestational age. And, when a doctor "has first" determined and documented the gestational age—and a part (C) form either is completed or not required—then a doctor "may" perform an abortion.

Likewise, part (B) delineates permissible and impermissible conduct with "except" and "if" clauses:

> ***Except in a medical emergency***, a physician may not intentionally or knowingly perform, … an abortion ***if the probable gestational age*** of the [fetus] has been determined to be greater than fifteen weeks.

A.R.S. § 36-2322(B) (emphasis added). Taking these clauses in reverse, the prohibition applies only "if" the gestational age condition is met; otherwise, "a physician may" perform an abortion. But even if the gestational age condition is satisfied, the statute again provides a carve-out: that is, "in a medical emergency" doctors may perform abortions after 15 weeks.

Taken together, § 36-2322(A) and (B) deem legal three categories of doctor-performed abortions: (1) in a medical emergency without first

determining and documenting the gestational age; (2) in a medical emergency after 15 weeks, and (3) at or before 15 weeks.

Part (C) makes this meaning inescapable. It instructs that "[i]n every case" where a doctor performs an abortion after 15 weeks, the doctor "shall file … a report" with certain information. A.R.S. § 36-2322(C); *cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 194 (2012) ("If you must do something, then you are necessarily allowed to do it."). This reporting requirement confirms that some abortions after 15 weeks are legal—indeed, the statute expressly contemplates they will occur. And it necessarily reinforces that the statute permits abortions before 15 weeks, as no reporting requirement or other conditions attach to that period.

Amici argue that the statute cannot mean what it says because the legislature did not "[c]reate or recognize a right to abortion." *E.g.*, Norgaard at 11 (quoting S.B. 1164, 55th Leg. 2nd Reg. Sess. (Ariz. 2022) [hereafter, "S.B. 1164"]). Amici's reliance on that statement is misplaced; it assumes a false dichotomy where one either has a "right" to do something or the conduct is criminal. But that's not correct. The legislature can tell the public that an act is legal without citizens having an actionable "right" to do it.

Consider this example. A criminal statute says: "Except for out-of-state visitors and in-state rentals, one may not drive a neon-painted vehicle unless the owner has obtained a permit." Plainly, that statute deems it legal to drive a neon vehicle under certain circumstances. A driver need not have a constitutional right to do so for the statute to conditionally authorize the conduct. And if the act stated it did not "create or recognize a right" to drive neon vehicles, that would not negate the statute's plain language about when the conduct is legal.

The same is true with A.R.S. § 36-2322. The statute proscribes certain abortions and deems certain abortions legal. The court of appeals relied on that text, not on any "implication that there is a recognized right to abortion." Norgaard at 6.

In sum, amici have an easy time arguing there is "nothing … to reconcile" in the law when they skip the first step of the analysis—considering *all* the law and grappling with the text of § 36-2322. Toma/Petersen at 5; *see also* Ark. at 11. But as the saying goes: "if you seem to meet an utterance which doesn't have to be interpreted, that is because you have interpreted it already." Scalia & Garner at 53 (citation omitted).

B. Read in isolation, the general prohibition in A.R.S. § 13-3603 conflicts with the specific permissions in § 36-2322.

Reading each in isolation, conflict between § 13-3603 and § 36-2322 is unavoidable.[2]

Section 13-3603 is a general prohibition that applies to "[a] person." Under the statute, abortions are illegal "unless it is necessary to save [the patient's] life." A.R.S. § 13-3603.

Section § 36-2322 is more specific and applies to "a physician." Under § 36-2322, three classes of abortions are permissible, *supra* I.A, including "in a medical emergency," which applies not only when an abortion is necessary "to avert … death," but also more broadly whenever "a delay will create serious risk of substantial and irreversible impairment of a major bodily function." *Id.* §§ 36-2322(A)-(B), 36-2321(7) (defining "medical emergency").

To illustrate the conflict, imagine the legislature enacted § 13-3603 and § 36-2322 on the same day. Thereafter, Dr. A performs an abortion at 8

[2] The many other statutes that regulate abortion exacerbate this conflict. Title 36 tells doctors, in great detail, how to perform lawful abortions, and § 13-3603 tells them such abortions are unlawful. Why have dozens of specific requirements for conduct that is prohibited? Amici fail to acknowledge this absurdity with respect to the rest of Title 36. But to focus the discussion here, the Attorney General cites primarily to § 36-2322.

weeks. And Dr. B performs an abortion at 16 weeks in a "medical emergency," where waiting to provide care would have created a serious risk that one of the patient's major bodily functions would be substantially and irreversibly impaired. A prosecutor charges each doctor under § 13-3603 because neither abortion was necessary to avert death. Each doctor then relies on § 36-2322, arguing it allows the abortions they performed.

The doctors' conduct was permitted under § 36-2322, yet prohibited under § 13-3603. This is not a situation where the doctors committed a crime in such a way that only one of two statutes applies, and the other is irrelevant. Rather, one statute said their conduct was legal, and one said it was criminal. The courts could not wave away that conflict—as amici do here—by defining § 36-2322 at an erroneously high level of generality and shrugging it off as cumulative. That's not what *this* text says.

True, criminal laws can overlap and sometimes conduct can be prosecuted in different ways. *E.g.*, Ark. at 11-15. And under some circumstances, the laws here may be merely duplicative: an abortion after 15 weeks without a medical emergency or life-threatening circumstance would violate both § 13-3603 and § 36-2322. But in many circumstances, they will conflict.

Fortunately, a "general prohibition that is contradicted by a specific permission" is the "most common example of irreconcilable conflict—and the easiest to deal with." Scalia & Garner at 183 (general/specific canon). The court of appeals dealt with it correctly here. The court's harmonization gave greater effect to the more recent and more specific laws in Title 36, but only to the extent of any conflict with § 13-3603. *State v. Jones*, 235 Ariz. 501, 503 ¶ 8 (2014) ("[T]he most recent, specific statute governs over an older, more general statute." (citation omitted)).

Under the court of appeals' decision, § 13-3603's general prohibition on a "person" has force until it bumps up against § 36-2322's specific permissions for doctors. Scalia & Garner at 185 ("The specific provision does not negate the general one entirely, but only in its application to the situation that the specific provision covers."). Thus, § 13-3603 still has possible applications (e.g., for non-doctors) without swallowing many more recent, more specific laws.

In contrast, amici's approach flips the canons and precedent upside down, favoring an older, more general law and rendering superfluous

dozens of newer statutes. *See* Scalia & Garner at 180-81 (harmonious-reading canon).[3]

What's more, some amici would not even bother trying to construe the statutes in harmony. According to one, the territorial law is the cornerstone and "the Court of Appeals need not have ventured beyond A.R.S. § 13-3603's text." Toma/Petersen at 5. Another amicus raises a rebuttable (or not) presumption in favor of § 13-3603, and simply asks whether the modern scheme "amends, modifies, or otherwise repeals § 13-3603." Norgaard at 10. Both approaches stack the deck in one direction and are plainly wrong.

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[3] If, as amici insist, Title 36 statutes are "independent and alternative legal constraints" that "supplement" § 13-3603 (Toma/Petersen at 2-3, 5, 11), then § 36-2322(C) would remain effective. So, if a doctor performed an abortion after 15 weeks, he must—under threat of a $10,000 penalty and losing his license (*see id.* §§ 36-2325, 36-2326)—submit a form that could be used to support a prosecution against him.

Amici's "complimentary" construction raises—and the court of appeals' harmonization avoids—potentially significant questions under the Fifth Amendment's right against self-incrimination. *E.g.*, *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 78-79 (1965) (violation where registration scheme required information that "might be used as evidence in … prosecution" or to "supply investigatory leads" and pertained to "an area permeated with criminal statutes, where response … might involve … the admission of a crucial element of a crime"); *California v. Byers*, 402 U.S. 424, 429-30 (1971) (discussing precedent); *Salinas v. Texas*, 570 U.S. 178, 185 (2013) (same).

When faced with conflicting statutes, this Court will "adopt a construction that reconciles them whenever possible, giving force and meaning to each." *Jones*, 235 Ariz. at 502 ¶ 6. The Court considers all statutes on level ground, not skewed against—and certainly not ignoring—the more recent and more specific laws.

II. No trigger law resolves the statutory conflict, and amici cannot rewrite the law with their preferred view of legislative intent.

Amici want this Court to read § 13-3603 as if § 36-2322 and the rest of Title 36 do not exist. But that reading obtains only if the legislature enacted a trigger law before *Dobbs*—or new legislation after—that revives § 13-3603 as the superseding statute and subordinates everything else. The legislature has not done so.

A. The legislature never enacted a trigger provision for § 13-3603.

In recent years, many states have enacted trigger laws regarding abortion. *E.g.*, 2019 Ark. Acts 180 (S.B. 149); Idaho Code § 18-622 (2020); Att'y General's Resp. to Pet. at 10 (citing examples). But Arizona has not.

Just last year too, our legislature declined to adopt language from Mississippi's 15-week law that could have easily clarified the relationship between § 13-3603 and § 36-2322 if the injunction against § 13-3603 were

lifted: "An abortion that complies with this section, but violates any other state law, is unlawful. An abortion that complies with another state law, but violates this section is unlawful." Miss. Code Ann. § 41-41-191(8).

The legislature's decision not to include that language is telling. Despite modeling § 36-2322 after Mississippi's law in essentially every other way, "our legislature conspicuously avoided statutory language stating that § 13-3603 should govern irrespective of other law should *Roe* be overturned." *Planned Parenthood Ariz., Inc. v. Brnovich*, 524 P.3d 262, 268 ¶ 24 (Ariz. App. 2022). Amici say the court of appeals' reliance on this fact is an "analytical problem[]" and that any comparison to other laws is a-textual. Norgaard at 4-5; *see also* Ark. at 10. Far from it.

When the legislature models Arizona law after uniform codes, this Court also has considered which language the legislature chose or rejected from the model. *State v. Bowsher*, 225 Ariz. 586, 588 ¶ 10 (2010) ("[A]lthough the Legislature adopted many MPC provisions, it chose to not enact that one, instead opting for [different language, which] 'evidences its rejection' of the MPC section." (citing cases)).

Comparing "the legislature's chosen (and unchosen) words" in light of other state laws is just as sound and useful. *Welch v. Cochise Cnty. Bd. of*

Supervisors, 251 Ariz. 519, 529 ¶ 36 (2021) (stating the "legislature could have included a provision barring post-ratification recovery as other states have done" and citing examples); *see also Rountree v. Clanton*, 17 Ariz. 107, 110 (1915) (comparing absent language in Arizona statute to language in Texas statute, after which Arizona's was modeled); *Kries v. Allen Carpet, Inc.*, 146 Ariz. 348, 351 (1985) (noting that Arizona's amended statute "did not follow California's lead" on same issue).

Having copied the Mississippi law almost verbatim, the legislature plainly was aware of that state's trigger law, Miss. Code Ann. § 41-41-191(8). Exclusion of that key language is textually significant and should not be ignored. To find the legislature "implicitly" meant what it purposefully excluded would "add a term to the statute that the legislature did not include." *Wilks v. Manobianco*, 237 Ariz. 443, 447 ¶ 13 (2015).

Some amici try a different tack. The legislature did not need to *do* anything, they say, because "the absence of any repeal" of § 13-3603 "is itself dispositive." Toma/Petersen at 11. Not quite. There's no question that § 13-3603 "remains the law of the state." *Id.* The issue here is how to harmonize now-effective § 13-3603 with Title 36, which likewise "remains the law of the state." *See id.* The legislature's statement in S.B. 1164 that it was not

repealing § 13-3603 is no substitute for an affirmative statutory provision that would repeal § 36-2322 once *Roe* was overturned. Especially when the legislature, in fact, did not "[r]epeal … any other applicable state law regulating" abortion. S.B. 1164, § 2(2).

Amici dub Title 36 a "placeholder" and "stop-gap" (Toma/Petersen at 9; CAP at 4), but those conclusory characterizations simply assume their view of the legislature's intent, while ignoring that no statute manifests such intent. Indeed, Title 36 is a pretty confusing placeholder when, as amici acknowledge, its "provisions [are] indefinite in duration." Toma/Petersen at 9.

Amici's "placeholder" premise also misunderstands statutory repeal and revival. It's just not true that the "reversal of *Roe* could reimbue [§ 13-3603] with full effect." Toma/Petersen at 11. The overturning of *Roe* allowed the superior court to lift the injunction against § 13-3603. Lifting the injunction did not repeal Title 36 or turn back time to 1973. It simply brought § 13-3603 out of hibernation, in the context of the statutory scheme as it exists today. Scalia & Garner at 334 (discussing repeal-of-repealer canon).

Bottom line, the legislature knows exactly how to draft a trigger law. *See* Arizona Legislature Bill Drafting Manual § 4.4 at 30-32 (2021-2022)

(discussing conditional enactments and repeals).[4] At any point before or since *Dobbs*, the legislature could have easily accomplished what Petitioner and amici now ask this Court to do—a "short sentence would have done the trick." Scalia & Garner at 182 (citation omitted). It just didn't.

Amici's elaborate responses to that reality boil down to this: when the legislature said it was not repealing § 13-3603 "or any other applicable" abortion law, everyone should have understood that, actually, the legislature was subordinating "[all] other applicable" abortion laws to § 13-3603 if *Roe* were overturned. That's not just hiding elephants in mouseholes. That's more like promising a mousehole exists—somewhere out there, just keep looking—and once you find it, some elephants are sure to be hiding there.

This Court has long followed "the rule that the legislature is presumed to express its meaning in as clear a manner as possible." *Mendelsohn v. Super. Ct. in & for Maricopa Cnty.*, 76 Ariz. 163, 169 (1953). There's no reason to deviate from that rule now.

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[4] *See Fann v. State*, 251 Ariz. 425, 435 ¶ 27 n.5 (2021) (citing Bill Drafting Manual in interpreting statute).

B. Amici's reliance on asserted legislative intent is misplaced.

This Court should "assum[e] that the legislature has said what it means" and deny review. *Cundiff v. State Farm Mut. Auto. Ins.*, 217 Ariz. 358, 360 ¶ 8 (2008) (citation omitted). Amici's attempts to "look beyond the [statutory] language," *id.*, fail in three ways.

1.

To establish what the legislature collectively "expected" and "believed" about § 13-3603, amici cite the statements of a single legislator and a private individual who testified before house and senate committees regarding S.B. 1164. CAP at 9-11; Toma/Petersen at 10-11. Amici rely too much on too little.

In general, "there is little reason to believe that the members of the committee reporting the bill hold views representative of the full chamber." Scalia & Garner at 376. And amici certainly offer "no indication that [any cited] statement was adopted by the Senate, let alone the House of Representatives and the Governor." *State v. Bayardi*, 230 Ariz. 195, 200 ¶ 17 (App. 2012). Senator Barto may have believed no trigger provision was necessary to resurrect § 13-3603 and repeal § 36-2322. But other legislators

may very well have voted for S.B. 1164 precisely because its text did not guarantee a return to territorial law if *Roe* were overturned.[5]

Even if Senator Barto's statements "constituted the understanding and intent of at least some individual legislators, [this Court] cannot assume [her perspective] represents the intent of the entire collection of legislators who voted in favor of the bill." *Sempre Ltd. P'ship v. Maricopa County*, 225 Ariz. 106, 111 ¶ 21 (App. 2010). "The intent of the Legislature can only be determined by the language used, aided by the canons and rules of construction founded upon reason and experience." *Golder v. Dep't of Rev., State Bd. of Tax Appeals*, 123 Ariz. 260, 265 (1979) (citations omitted)); *cf. Ariz. Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 325 ¶ 12 (2014) (noting that "a legislator, lobbyist, or other interested party lacks competence to testify about legislative intent in passing a law").

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[5] One amicus cites A.R.S. § 1-219—which is preliminarily enjoined as unconstitutionally vague—as a sort of substitute trigger provision and evidence of what "the legislature intended." CAP at 4-7. That's a stretch, to put it mildly. That provision "is not a substantive law; it is a rule of statutory construction." *Isaacson v. Brnovich*, 610 F. Supp. 3d 1243, 1251 (D. Ariz. 2022). And it's a poor guide for construction at that: as the defendants in that case acknowledged, "whether or how the [statute] might be applied 'is anyone's guess.'" *Id.* at 1247, 1253-56.

But if we are to analyze the statements and apparent beliefs of public officials to reconcile conflicting statutes, why stop where amici draw the line? Governor Ducey understood that S.B. 1164 would supersede § 13-3603, regardless of the outcome in *Dobbs*. Does his intent when signing the bill into law matter less?[6] And what about other statements that some, but not all, legislators may have heard. Should any and all testimony about legal conclusions—even if unanchored to the bill's language—be read into the "legislative intent"?[7]

No. Courts read laws, not minds. The legislature voted on the text of S.B. 1164, not on "what the people who drafted the law[] intended" or hoped about how it would be interpreted. Scalia & Garner at 375, 377-86 (discussing problems with legislative history); *Sempre*, 225 Ariz. at 111 ¶ 21

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[6] Howard Fischer, *Arizona Gov. Ducey: abortion illegal after 15 weeks*, KAWC (Apr. 24, 2022), https://www.kawc.org/news/2022-04-24/arizona-gov-ducey-abortion-illegal-after-15-weeks.

[7] For instance, the same private individual also testified that the 15-week law "would not go into effect" if the Supreme Court overturned *Roe* and, if it did go into effect, would likely not apply to non-viable pregnancies. S. Judiciary Comm. Hearing, at 39:40–41:00 (2/3/2022); H. Judiciary Comm. Hearing, at 50:10–52:08 (3/9/2022). Another individual suggested that S.B. 1164's emergency clause would apply whenever it's "unsafe to continue the pregnancy." S. Judiciary Comm. Hearing, at 35:15–36:00 (2/3/2022).

("In general, little legislative history is helpfully relevant. Much of it is unreliable or unreliably revealed." (citation omitted)).

2.

Amici rely on "the legislature's long-term intent" and purportedly "unyielding … objective" to restrict abortion. CAP at 4; Toma/Petersen at 6-7. Because the legislature has regulated abortion in the past, they contend, the most restrictive interpretation must prevail, regardless of what the text says (or doesn't say). Ark. at 9-11; Norgaard at 7-9.

Considering statutes *in pari materia* is one thing. But it simply is not "a proper use of the [whole-text] canon to say that since the overall purpose of the statute is to achieve x, any interpretation of the text that limits the achieving of x must be disfavored." Scalia & Garner at 168. Indeed, courts have "long rejected the notion that '*whatever* furthers the statute's primary objective must be the law.'" *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1073 (2018) (citation omitted).

The mere fact that the legislature has regulated abortion does not require or support the most maximalist interpretation here. The textual "limitations on a statute's reach are as much a part of the statutory purpose as specifications of what is to be done," Scalia & Garner at 168, and "are [just

as] worthy of a court's respect," *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2181 (2021) (citation omitted).

3.

Ultimately, amici turn to "legislative history" and "purpose" not because the meaning of § 13-3603 and § 36-2322 is "unclear from language and context"—those statutes are perfectly clear. *Rasor v. Nw. Hosp., LLC*, 243 Ariz. 160, 164 ¶ 20 (2017). Rather, amici rely heavily on secondary tools of interpretation so they can cobble together a construction that the text does not support. The Court should reject amici's views about "what [the legislature] meant to say" and stick to "what the legislature said through the words it enacted." *State ex rel. Ariz. Dep't of Rev. v. Tunkey*, 524 P.3d 812, 817-18 ¶ 27 (Ariz. 2023) (Bolick, J., concurring).[8]

* * *

[8] Although the *Tunkey* concurrence demonstrates why the Court should reject amici's reliance on intent, contrary to one amicus, this case does not squarely present an opportunity to clarify "what [the Court is] looking for when interpreting a statute," *id.* at 818-19 ¶ 32, because this case does not hinge on the interpretation of an ambiguous statute. Nor is this a case where the text and legislative intent "diverge." *Id.* Although unnecessary to get there, the best evidence of the legislature's intent—statements in S.B. 1164 and its deliberate refusal to adopt certain statutory language—supports the court of appeals' plain text reading and harmonization. *See* Att'y General's Resp. to Pet. at 9-11.

It's not difficult to imagine a number of reasons why the legislature has never passed a guaranteed reversion to the territorial law. Maybe it will try. In the meantime, amici and Petitioner cannot ignore Title 36, and they cannot conjure up a trigger law that does not exist. The court of appeals' careful harmonization is the only alternative. This Court should let that decision stand and leave to the legislature the job of resolving the conflict differently, if it so chooses.

III. Amici raise issues that are not before the Court.

As the Attorney General has argued (Resp. to Pet. at 13-18), the Court should be wary of granting review because the plaintiff and defendants have accepted the well-reasoned decision below, and the only party who seeks review is a substitute intervenor whose connection to the case is no different than any amicus and whose involvement rests on shaky and unsettled ground. These are important "reasons the petition should [not] be granted." Ariz. R. Civ. App. P. 23(d)(3).

The legislative leaders (at 12-14) portray these arguments as about standing, and contend that they are waived because the former Attorney General previously supported Petitioner's substitution. But principles of waiver and estoppel do not apply. Regardless of what her predecessor did

in the trial court, the Attorney General has since assessed the court of appeals' decision and concluded that it properly harmonized the statutory scheme, and therefore review by this Court is unnecessary.[9] The Attorney General has not asked this Court to issue a ruling on Petitioner's standing, nor does the Court need to consider and decide that issue. Instead, the Court need only recognize that discretionary review is unwarranted here when the court of appeals issued a careful decision on a delicate issue, which the plaintiff and defendants have accepted, and the only objector is a substitute

[9] The legislative leaders insist that they would have sought to intervene had they known of the Attorney General's position earlier. But they were on notice at least by February 2023, when the Attorney General filed a brief in another case explaining the problems with Dr. Hazelrigg's guardian ad litem appointment and his lack of an intervention-worthy interest. *See* State's Resp. to Mot. to Lift Stay, *Isaacson v. State*, CV2022-013091 (Maricopa Cnty. Super. Ct., Feb. 24, 2023). Dr. Hazelrigg's lawyers in that case (the same ones here) represent the legislative leaders in another pending abortion matter, *Isaacson v. Mayes*, Case No. 2:21-cv-01417-DLR (D. Ariz.). Presumably, the legislative leaders were aware of the Attorney General's position and its relevance to this case, yet they chose not to intervene and seek review. That decision is telling.

(Whether legislative leadership would have been entitled to intervene is another question. A.R.S. § 12-1841 applies only when "a state statute … is alleged to be unconstitutional," *id.* (A), (D), and no such allegation is pending here. Still, as previously noted, the Attorney General likely would not have opposed a timely motion to intervene from legislative leadership.)

intervenor whose status in the case is highly unusual. The Attorney General is not precluded from raising these issues for the Court's consideration.

CONCLUSION

The Court should deny the Petition.

RESPECTFULLY SUBMITTED this 12th day of June, 2023.

KRIS MAYES, ARIZONA ATTORNEY GENERAL

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