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, et al., Intervenors/Appellees.	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 MOTION FOR RECONSIDERATION

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ARCAP 22(a) authorizes motions for reconsideration based upon "erroneous determinations of fact or law." Defendant/Appellee Attorney General Mayes respectfully requests that the Court reconsider and revise certain portions of the Opinion issued on April 9, 2024, containing erroneous statements of law. In particular, the Court should reconsider those portions of its Opinion that contradict the Court's textualist approach to statutory construction and long-settled interpretive principles.

ARGUMENT

The Opinion concludes "that § 36-2322 does not create a right to, or otherwise provide independent statutory authority for, an abortion that repeals or restricts § 13-3603, but rather is predicated entirely on the existence of a federal constitutional right to an abortion since disclaimed by *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 292 (2022)." Op. ¶ 2. To reach this conclusion, the Opinion first finds A.R.S. § 36-2322(B) ambiguous because it "does not address its effect on § 13-3603." Op. ¶ 22. Having deemed § 36-2322(B) ambiguous as to "its effect on § 13-3603," the Opinion then turns to "statutory history, [the] public policy pronouncement

[in A.R.S. § 1-219], and the legislature's explicit construction provision" in S.B. 1164. Op. ¶ 61.

The Attorney General respectfully requests that the Court reconsider and amend its Opinion in two respects. First, the Opinion should be revised to conform to the Court's stated textualist commitments and settled jurisprudence regarding statutory interpretation. Second, the Court should reconsider and revise the Opinion's reliance on an unconstitutionally vague and enjoined law (A.R.S. § 1-219).

I. The Opinion conflicts with the Court's commitment to textualism and statutory construction jurisprudence.

The fundamental flaw in the Opinion's statutory interpretation analysis is its conclusion that A.R.S. § 36-2322 is textually ambiguous because § 36-2322 does not state whether or how it should be reconciled with A.R.S. § 13-3603. Because the Opinion's approach to interpreting § 36-2322 conflicts with this Court's own textualist approach and stated principles of statutory construction, the Court should reconsider its framing of the issue and thus, its ultimate conclusion. But even if this Court does not reconsider its ultimate conclusion, it should at a minimum revise certain statements

which conflict with this Court's statutory interpretation principles and may have troubling consequences for future interpretive disputes.

A. No ambiguity exists in A.R.S. § 36-2322's plain text.

The Opinion recognizes that, "*by its plain terms*, § 36-2322's proscription on elective abortion after fifteen weeks' gestation logically implies that abortion is otherwise permissible." Op. ¶ 21 (emphasis added). But the Opinion then departs from this Court's avowed commitment to textualism and precedent by finding that a statute's plain text (§ 36-2322) becomes ambiguous solely because it addresses the same subject matter as an earlier statute (§ 13-3603) without expressly addressing its relationship thereto. Op. ¶¶ 21-22, 55.

In other words, the Opinion concludes that a statute's silence regarding its effect on another previously enacted statute suffices to establish ambiguity and thus permits a court to leap to secondary interpretive principles. But it will almost always be true that when a court is asked to evaluate an apparent conflict between related laws enacted at different times, the statutes will be silent about their effect on one another—that's why the court is involved in the first place.

As a practical matter, the Opinion's approach threatens to eliminate Arizona's textualist approach to statutory construction in a large swath of cases. *Cf., e.g.*, *Ariz. Free Enter. Club v. Hobbs*, 253 Ariz. 478, 489 ¶ 38 (2022) ("We interpret constitutional and statutory provisions as they are written, and we are constrained from rewriting the law under the guise of interpreting it even if we divine a more desirable intended outcome than the text allows."). As the Opinion expressly acknowledges, § 36-2322 "by its plain terms . . . logically implies that abortion is . . . permissible" before fifteen weeks' gestation. Op. ¶ 21. Under a textualist approach, no further conjecture is necessary or permitted. *City of Phoenix v. Orbitz Worldwide Inc.*, 247 Ariz. 234, 238, ¶ 10 (2019) ("If the language of a statute is unambiguous, 'we apply it without further analysis.'") (citation omitted). In fact, if a court goes further, it exceeds its "limited constitutional authority." *State ex rel. Ariz. Dep't of Revenue v. Tunkey*, 254 Ariz. 432, 438 ¶ 27 (2023) (concurrence by majority of justices (hereafter, "majority concurrence")) ("We exceed our limited constitutional authority when we displace plain meaning with legislative intent.").

But that is precisely what the Opinion does here. The ambiguity the Opinion ascribes to § 36-2322 emerges only upon consideration of how the

statute's otherwise straightforward language might impact § 13-3603. This is squarely at odds with a textualist approach and with this Court's recent jurisprudence. As the Court recently admonished, courts cannot "read into a statute something which is not within the manifest intention of the legislature *as indicated by the statute itself*." *Mussi v. Hobbs*, 255 Ariz. 395, 402 ¶ 34 (2023) (citation omitted) (emphasis added). "Statutory interpretation requires [this Court] to determine the meaning of the words the legislature *chose to use*." *S. Ariz. Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, 286 ¶ 31 (2023) (emphasis added). It is not about "a cosmic search for legislative intent" because "the words of a statute are the only thing to which the legislature agreed." *Tunkey*, 254 Ariz. at 437-38 ¶¶ 26-27 (majority concurrence).

A faithful application of this Court's long-standing principles of statutory interpretation requires that the pursuit to understand the meaning of § 36-2322 begin—and end—with its plain language. The Opinion should have lined up § 36-2322's unambiguous, more recent, and more specific language against the older and more general language in § 13-3603 and then applied the general/specific and recency canons to harmonize the two, just as it has done countless times before. *Cf. In re Riggins*, 544 P.3d 64, 69, 71 ¶¶

25, 34 (Ariz. 2024) ("If the statutes are in conflict or are inconsistent, the subsequent statute controls, regardless of any consistency of purpose, spirit, or effect.").[1]

Left undisturbed, the Opinion's implication that silence equals ambiguity could drastically impact future interpretive disputes. Among other things, the Opinion would seem to encourage courts to engage in far-reaching inquiries to divine legislative intent with much more frequency. Such an "open-ended expression of legislative interpretation invites judicial mischief." *Tunkey*, 254 Ariz. at 438 ¶ 31 (majority concurrence). And at the very least, the Opinion's tension with this Court's previously articulated principles is bound to create confusion. For example, if a newer statute does not explicitly state how it should be interpreted in the context of a broader statutory scheme, should a lower court recognize that as ambiguity and

[1] Notably, this Court has never before struggled to interpret the "purpose and effect" of plainly written exceptions and provisos like those in § 36-2322. Op. ¶ 21. Indeed, the Court recently observed that "[a]n express exception renders inoperative the language to which the exception is directed as to the circumstances encompassed within the exception." *In re McLauchlan*, 252 Ariz. 324, 326 ¶ 15 (2022) (citing the general/specific canon outlined in Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 184 (2012)).

consult secondary methods of interpretation? May a court still presume that a "more recent, specific statute governs over an older, more general statute," *State v. Jones,* 235 Ariz. 501, 503 ¶ 8 (2014)?

B. Construction notes are not substantive law.

The Opinion also concludes that heeding the plain text interpretation of § 36-2322 would "run[] headlong into the construction provision" in S.B. 1164 based on the assertion that "[t]he construction provision . . . has the same force of law as codified law." Op. ¶¶ 22, 24. Equally troubling, the Opinion's expansive language even suggests that construction provisions are a *primary* interpretive tool, rather than a secondary one. *See, e.g.*, Op. ¶ 16. Both assertions represent a drastic departure from long-standing precedent.

First, a construction provision is not law. *Cronin v. Sheldon*, 195 Ariz. 531, 538 ¶¶ 29-30 (1999) (a legislative preamble is "not statutory text" and "is devoid of operative effect"). "[L]egislative intent properly understood is only a means to discern statutory meaning and never an object in itself." *Tunkey*, 254 Ariz. at 438 ¶ 27 (majority concurrence). Thus, while "[d]eclarations of intent may be helpful in interpretation, . . . the text of a measure must be considered first and foremost." *San Carlos Apache Tribe v.*

Super. Ct. ex rel. Cnty. of Maricopa, 193 Ariz. 195, 204-05 ¶ 14 (1999). And even when the Court considers a "statement of purpose and intent" to construe actual statutory text, "[i]f the two conflict . . . the text must prevail." *Redgrave v. Ducey*, 251 Ariz. 451, 457 ¶ 22 (2021).

Departing from this jurisprudence, the Opinion deemed the non-substantive "construction" statement about what S.B. 1164 purportedly "does not" do to be more important than the admittedly "plain terms" of the codified law, § 36-2322. Op. ¶¶ 21, 29. That approach improperly converts a possible tool of construction into "an object in itself." *Tunkey*, 254 Ariz. at 438 ¶ 27 (majority concurrence).

Further, the Opinion's only purported support for that proposition (Op. ¶ 24) is one page of the Legislative Bill Drafting Manual that does not support it. That part of the Manual (§ 2.2 at 6-7) simply discusses the difference between "permanent" statutory law and non-codified "temporary" law and makes the unremarkable observation that "[a]ny law that is enacted . . . has the same status as any other enacted law." (Emphasis omitted). Elsewhere though (§ 4.18 at 48), the Manual makes quite clear that "an intent or legislative findings section" is "nonstatutory text" and "should

not include . . . . provisions granting rights, prohibiting actions or otherwise creating substantive law."

Second, as the Opinion implicitly acknowledges, this Court has never before held that a construction provision found outside the statutory text can be used to determine the plain meaning of statutory text in the first instance. *See* Op. ¶ 16 (offering "*see*" citation to *S. Ariz. Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, 286 ¶ 31 (2023)). Indeed, the primary case the Opinion offers in support of this novel rule is one in which the construction provision appeared *directly in the statutory text*. *See S. Ariz. Home Builders Ass'n*, 254 Ariz. at 286 ¶ 31 (interpreting statute in which the legislature "expressly direct[ed]" in the statute itself "that 'all powers conferred on municipal governments in this section shall be narrowly construed to ensure that development fees are not used to impose on new residents a burden all taxpayers of a municipality should bear equally'").

This makes sense, because the codified text of the statute *is* the law, and is readily accessible by citizens.[2] Here, by contrast, the construction provision appears nowhere in the text of § 36-2322, nor any other statute codified in Title 36. This sort of legislative commentary has never before been considered a primary interpretive tool, nor is it readily accessible to the average citizen. The Opinion's endorsement of this new approach to statutory construction is a dramatic and unwarranted departure from settled precedent.

* * *

For the foregoing reasons, the Attorney General respectfully requests that the Court reconsider the Opinion's analytical approach to statutory construction. The Attorney General believes this reconsideration necessarily counsels in favor of a different result. But at the very least, this Court should revise its Opinion. Among other things, the Court should consider revising

[2] The other cases cited by the Opinion do not address legislative commentary at all. They simply reiterate settled interpretive principles that focus on the *statutory* text. *See, e.g.*, *Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶ 7 (2017) (cited at Op. ¶ 22) ("In construing a specific provision, we look to *the statute* as a whole and we may also consider *statutes* that are *in pari materia*—of the same subject or general purpose—for guidance and to give effect to all of the provisions involved." (initial emphases added)).

the following paragraphs as indicated below. (Deletions to quoted text are indicated in ~~strikethrough~~.)

- Op. ¶ 16: "~~We also may consider a statement of legislative intent, including a construction provision, in discerning the meaning of a statute. *See S. Ariz. Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, 286 ¶ 31 (2023) (noting that we determine the meaning of a statute 'according to the plain meaning of the words in their broader statutory context, unless the legislature directs us to do otherwise'); *Aros v. Beneficial Ariz., Inc.*, 194 Ariz. 62, 66 (1999). Therefore, we read a statute in the context of the law that grants it authority. *Cf. S. Ariz. Home Builders Ass'n*, 254 Ariz. at 286 ¶ 31.~~"

- Op. ¶ 22: "~~Notably, § 36-2322's text does not address its effect on § 13-3603. Given the competing plausible textual readings of § 36-2322, which create ambiguity concerning the statute's effect on § 13-3603, any interpretation of the statute that ignores or minimizes the impact of *Dobbs*' disavowal of a federal constitutional abortion right runs headlong into the construction provision of Senate Bill 1164 ('S.B. 1164') – the genesis of § 36-2322 and part of what the legislature enacted. We must interpret the statute in its proper context. This requires us to reconcile the legislature's construction provision, which specifically preserves § 13-3603, and the text of § 36-2322, which is silent on, and ambiguous as to, its effect on § 13-3603. *See Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶ 7 (2017); *S. Ariz. Home Builders Ass'n*, 254 Ariz. at 286 ¶ 31.~~"

- Op. ¶ 23: "To determine if Title 36 creates a right to abortion, or otherwise provides independent statutory authority to perform the procedure, as Planned Parenthood contends, we ~~must~~ consider S.B. 1164's construction provision."

- Op. ¶ 24: "~~The construction provision is part of the bill that legislators have before them and approve, and has the same force of law as codified law. *See* The Arizona Legislative Bill Drafting Manual 2021–2022 at 7.~~"

- Op. ¶ 25: Delete entirely.

II. The Opinion improperly relies on an unconstitutionally vague and federally enjoined statute.

Second, the Court should reconsider the Opinion's reliance on A.R.S. § 1-219 to divine the legislative intent behind § 36-2322. *See* Op. ¶¶ 23, 40, 61. Section 1-219 is unconstitutionally vague and should not be utilized to clarify the meaning of other statutes. Further, the Opinion's reliance on § 1-219 functionally narrows an existing federal preliminary injunction to which multiple parties in this action are bound.

A. An unclear statute cannot clarify the meaning of other statutes.

To start, a statute that is itself unconstitutionally unclear cannot rationally be used to clarify the meaning of other statutes. A federal district court has held § 1-219 unconstitutionally vague and preliminarily enjoined its enforcement as applied to lawful abortion care, concluding that "it is entirely unclear what it means to construe and interpret Arizona law to 'acknowledge' the equal rights of the unborn." *See* Order (Doc. 121) at *10, *17, *Isaacson v. Brnovich*, No. 2:21-cv-01417-DLR(D. Ariz. July 11, 2022). This is, perhaps, why the Petition for Review did not cite § 1-219 at all.

Due process prohibits a state from enforcing a law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so

standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015); *State v. Walton*, 133 Ariz. 282, 288 (App. 1982) (same). It matters not that § 1-219 is a non-substantive statutory construction provision—the U.S. Constitution requires due process regardless of the "label a State chooses to fasten upon . . . its statute." *Sessions v. Dimaya*, 138 S.Ct. 1204, 1229 (2018) (Gorsuch, J. concurring) (citation omitted); *see also Cohen v. State*, 121 Ariz. 6, 9 (1978) ("[I]ndefiniteness in *any* statute may constitute an unconstitutional denial of due process of law. . . .").

That standard and the federal court's injunction apply just as much to § 13-3603 as any other abortion statute. As the district court in *Isaacson* observed, "even under the most restrictive abortion law currently on the books, abortion is legal under some circumstances," and therefore § 1-219 is no less vague and incongruous with the limited legal permission in § 13-3603 than it is with the rest of Title 36. Order (Doc. 121) at *14-15 & n.8, No. 2:21-cv-01417-DLR.

The Opinion nonetheless deems § 1-219 a "pronouncement of the state's public policy essentially to restrict abortion" to the level allowed under the U.S. Constitution and that § 1-219 "belies the notion that the legislature intended to create independent statutory authority for elective

abortion." Op. ¶¶ 32, 61. But claiming § 1-219 "establishes . . . public policy" or provides guidance regarding a silent, alleged intent of § 36-2322, Op. ¶ 32, improperly ignores the federal court's conclusion that it is "entirely unclear" how to construe § 1-219 and thus the statute cannot be applied consistent with the U.S. Constitution. Nothing in Arizona law allows this Court to use unconstitutionally unclear text to guide judicial interpretation of other statutes, nor to position itself as a court of higher review regarding federal decisions. *See M'Culloch v. Maryland*, 17 U.S. 316, 382 (1819) (declaring the supremacy of federal law, which "the judges in every state are bound thereby, anything in the constitution or laws of any state to the contrary nothwithstanding").

B. The Opinion's holdings conflict with the injunction of § 1-219.

The *Isaacson* court enjoined prosecuting and disciplinary agencies, including the Attorney General and all County Attorneys "from enforcing A.R.S. § 1-219 as applied to abortion care that is otherwise permissible under Arizona law" and from "retroactively using [§ 1-219] to take enforcement action against those who performed otherwise lawful abortions during the time that this preliminary injunction is in effect." *Id.* at *17.

The Opinion acknowledges the injunction but asserts that the Opinion's reliance is nevertheless allowable because the injunction only applies to abortion "otherwise permissible." Op. ¶ 32 n.7. But the Opinion does exactly what the injunction forbids by relying on § 1-219 to criminalize abortions that would otherwise be permissible. In other words, the Opinion purports to permit the Attorney General and the County Attorneys to enforce § 13-3603 at least in part *because* of § 1-219's ostensible codification of the "state's public policy essentially to restrict abortion." Op. ¶ 61.

This Court may not narrow the scope of a federal court injunction any more than it can "restrain federal-court proceedings" and deny plaintiffs "properly in the federal court [the right] granted by Congress to have the court decide the issues they presented." *Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964). Nor may the Arizona Supreme Court position itself as a court of higher review regarding federal decisions. *See M'Culloch*, 17 U.S. at 382. But the Opinion erroneously and functionally purported to do just that by using § 1-219 in a manner the federal district court found unconstitutional and enjoined.

* * *

For the reasons discussed above, the Court should revise those aspects of the Opinion that intrude on the supremacy of federal law, as shown below. (Additions to quoted text are in **bold**, deletions in ~~strikethrough~~.)

- Op. ¶ 32 & n.7: Delete entirely.
- Op. ¶ 40: "The legislature's unwavering and unqualified affirmative maintenance of a statutory ban on elective abortion since 1864 (albeit enjoined since 1973)~~,~~ **and** S.B. 1164's construction provision that the legislature did not intend to repeal § 13-3603 in passing § 36-2322~~, and § 1-219(A)'s public policy pronouncement that the rights of the 'unborn child' were limited only by the federal Constitution and the Supreme Court's interpretation of it,~~ effectively constitute a discernible comprehensive trigger provision in the event of Roe's demise.
- Op. ¶ 58: "The dissent's reasoning is tenable only to the extent that it discounts statutory history~~, the legislature's public policy pronouncement in § 1-219(A),~~ and the construction provision that the legislature did not intend § 36-2322(B) to 'repeal, by implication or otherwise, section 13-3603.'"
- Op. ¶ 61: "In interpreting § 36-2322(B)'s ambiguity on its effect on § 13-3603, we consider Title 36's genesis as the statutory mechanism to restrict and regulate abortion in response to *Roe*, the legislature's unwavering and unqualified affirmative maintenance of a statutory ban on elective abortion since 1864 (albeit enjoined since 1973), ~~§ 1-219(A)'s pronouncement of the state's public policy essentially to restrict abortion to the extent permitted by 'the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court,'~~ and, finally, S.B. 1164's construction provision that clearly states that the legislature did not intend to repeal § 13-3603 by passing § 36-2322(B). *See* Part I, E ¶ 40. It is the dissent's interpretation—deliberately blind to Arizona's relevant statutory history~~, public policy pronouncement,~~ and the legislature's explicit

construction provision contradicting the dissent's conclusion—that is strained.

CONCLUSION

The Attorney General respectfully requests that the Court reconsider and revise its Opinion as outlined above in accordance with ARCAP 22(a).

RESPECTFULLY SUBMITTED this 23rd day of April, 2024.

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ARIZONA SUPREME COURT

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, et al., Intervenors/Appellees.	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 **CERTIFICATE OF COMPLIANCE**

CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns:

☐ A brief, and is submitted under Rule 14(a)(5).

☐ An accelerated brief, and is submitted under Rule 29(a).

☒ A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e).

☐ A petition or cross-petition for review, a response to a petition or cross-petition, or a combined response and cross-petition, and issubmitted under Rule 23(h)

☐ An amicus curiae brief, and is submitted under Rule 16(b)(4)

2. The undersigned certifies that the brief/motion for reconsideration/petition or cross-petition for review to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 3,499 words.

3. The document to which this Certificate is attached does not ☒, or does ☐ exceed the word limit that is set by Rule 14, Rule 22, Rule 23, or Rule 29, as applicable.

RESPECTFULLY SUBMITTED this 23rd day of April, 2024.

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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, et al., Intervenors/Appellees.	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 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2024, Defendant/Appellee Arizona Attorney General's Motion for Reconsideration and this Certificate of Service were electronically filed with the Clerk's Office, and pursuant to ARCAP 4(f), a copy was e-served via AZTurboCourt to:

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