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 PETITION FOR REVIEW BY SUBSTITUTE INTERVENOR ERIC HAZELRIGG

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INTRODUCTION

Presented with an apparent statutory conflict, the court of appeals conducted a careful analysis and reached the significantly more reasonable of two conclusions. Instead of reading a civil-war era law as rendering superfluous dozens of more specific statutes enacted since then, the panel heeded this Court's precedent and harmonized the older statute with the scheme as a whole, thus preserving more law than not.

The decision is clear, consistent with precedent, and creates no split of authority between the divisions. The parties accepted the ruling and resolved their dispute. Ordinarily, that should be the end of this case.

Recently substituted intervenor Eric Hazelrigg, however, would like an exception from the ordinary course. But Hazelrigg is not a proper party with authority to petition this Court for review on behalf of a class of ambiguous fetuses with disparate interests. For that additional reason, the Court should deny his petition.

ISSUE PRESENTED

Did the court of appeals correctly harmonize Arizona's various abortion laws to give effect to all of them?

BACKGROUND

I. Territorial Ban and *Roe v. Wade*.

In 1901, Arizona's territorial legislature codified several abortion-related laws, including a complete ban "unless it [was] necessary to save [the woman's] life." A.R.S. § 13-211 (1901) (subsequently renumbered as A.R.S. § 13-3603). In 1971, Planned Parenthood of Tucson, several physicians, and a pregnant woman seeking an abortion brought this action challenging the constitutionality of § 13-3603 and related territorial laws. *Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. App. 142, 142–43 (1973).

The superior court appointed a doctor "as guardian ad litem for the unborn [fetus of the pregnant plaintiff] and 'all other unborn [fetuses] similarly situated.'" Pet. App. 70. The parties then stipulated to the doctor's intervention, but the record does not indicate whether the court granted permissive intervention or intervention as of right, nor the legal basis for doing so. *Id.*

The superior court ultimately held the laws unconstitutional and permanently enjoined them. *See Nelson*, 19 Ariz. App. at 143. A divided court of appeals reversed. *Id.* at 149–50. A few weeks later, however, *Roe v. Wade* held the right to privacy includes the decision to terminate a pregnancy. 410 U.S. 113, 154 (1973). The court of appeals then vacated its opinion and affirmed the injunction. *Nelson*, 19 Ariz. App. at 152.

A.R.S. § 13-3603 thus became dead letter. Against this backdrop, the statutory landscape continued to evolve, with the legislature enacting and continually revising a complex and detailed scheme regulating abortion. *See e.g.*, A.R.S. §§ 36-2152 to -2163, 36-2301.01–.02, 36-2321 to -2326, 36-449.01–.03, 13-3603.01–.02.

II. *Dobbs* and Recent Statutes.

In anticipation of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), several states—including Arizona—adopted more stringent abortion restrictions. In March 2022, the legislature enacted a 15-week cut-off for obtaining an abortion, with exceptions only for a specifically defined "medical emergency." A.R.S. §§ 36-2322(A)-(B), 36-2321(7). Unlike similar legislation adopted elsewhere,

the 15-week ban did not include a provision for reviving the territorial-era ban if *Roe v. Wade* were overturned. (*See* Arg. § II.B.)

Shortly thereafter, the Supreme Court overturned *Roe v. Wade*. *See Dobbs*, 142 S. Ct. at 2284. Former Attorney General Brnovich subsequently moved for relief from the decades-old injunction against § 13-3603. Pet. App. 71. He also asked the superior court to substitute Hazelrigg for the original doctor. *Id.* Despite acknowledging the "procedural irregularities surrounding the previous decision to permit intervention," the court declined to revisit those earlier issues, granted substitution, and proceeded to lift the injunction. Pet. App. 73-75.

The court of appeals reversed in part. *Planned Parenthood Ariz., Inc. v. Brnovich*, 254 Ariz. 401 (App. 2022) ("Op."). Applying fundamental statutory construction principles, the court concluded that § 13-3603 could be construed harmoniously with subsequent abortion laws, thus "giving force and meaning to all statutes involved." Op. ¶¶ 11, 13-24 (citation omitted). Specifically, the court held "[l]icensed physicians who perform abortions in compliance with Title 36 are not subject to prosecution under § 13-3603." Op. ¶ 26.

Substitute intervenor Hazelrigg petitioned for review.

ARGUMENT

The Court should deny the petition. It fails to raise any novel or unresolved legal issues, the court of appeals reached the correct result, and no party with authority to appeal seeks to disturb that result.

I. A controversial subject matter is not a reason for review.

This Court is one of last resort, not cleanup. The petition does not contend "that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, [or] that there are conflicting decisions by the Court of Appeals." ARCAP 23(d)(3). Instead, it asserts only that the appellate court wrongly decided a legal question, and review is warranted because the decision involves a "critically important issue for all Arizonans." Pet. at 6, 14.

No one disputes that healthcare is an issue of statewide importance. But the legal question here is whether the court of appeals correctly harmonized apparently conflicting laws using settled interpretive principles. The spicy subject matter of those statutes does not change the fact that the underlying legal issue is plain vanilla. Statutory harmonization is not a novel issue on which courts and parties are lacking this Court's guidance. Even Petitioner does not contend otherwise. *See* Pet. at 14-15

(urging review because Petitioner does not want to be bound by a decision with which he disagrees).

II. The court of appeals correctly harmonized the statutes.

A. The decision faithfully applied this Court's precedents and the statutory text.

The Court should also decline Petitioner's invitation to conduct error correction because the decision reached the right result.

The decision proceeds from settled canons of construction. "[W]hen statutes relate to the same subject matter," courts must "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); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) ("[L]aws dealing with the same subject . . . should if possible be interpreted harmoniously."). The court considered two constructions: one would read § 13-3603 to render superfluous the dozens of more granular regulations enacted since 1901, while the other would give meaning and effect to both § 13-3603 and Title 36. Arriving at the latter conclusion, the court properly "harmonize[d] apparently conflicting statutes" to give each of them force and effect. *Ariz.*

Chapter of the Associated Gen. Contractors of Am. v. City of Phoenix, 247 Ariz. 45, 47 ¶ 10 (2019) (citation omitted); *UNUM Life Ins. Co. v. Craig*, 200 Ariz. 327, 333 ¶ 28 (2001) ("when two statutes appear to conflict, whenever possible, we adopt a construction that reconciles one with the other, giving force and meaning to all statutes involved").

Perhaps the most important harmonization question involves the territorial-era ban and the 15-week law. Among other things, the 15-week law provides that "[e]xcept in a medical emergency, a physician may not perform . . . an abortion unless the physician . . . has first made a determination of the probable gestational age" and found it not "greater than fifteen weeks." A.R.S. § 36-2322(A)-(B).

This prohibits an abortion unless (1) there is a "medical emergency," or (2) the physician determines that the probable gestational age is fifteen weeks or less. *Id.* Conversely, if there is a medical emergency or the probable gestational age is fifteen weeks or less, the physician may legally perform an abortion. *Id.*

Read in isolation, the territorial-era ban, § 13-3603, would conflict with this part of the 15-week law, § 36-2322. Section 36-2322 allows abortions before 15 weeks and in case of a "medical emergency," which is statutorily

defined more broadly than just life-saving measures. On its own, § 13-3603 prohibits all abortions unless "necessary to save [the] life" of the mother. This isolated reading of § 13-3603 prohibits abortions that § 36-2322 permits, such that the two statutes apparently conflict.

But that is not the only reading. As the court of appeals correctly observed, the plain text of the statutes can also be read as *prohibiting* non-physician-provided abortions, while *regulating* physician-provided abortions. Op. ¶ 23. This reading harmonizes the legislature's statutes on the subject and avoids impliedly repealing or rendering null any portion.

That is precisely what Arizona law requires. "To the extent possible, the courts must enforce all statutes that have been duly enacted." *Hounshell v. White*, 219 Ariz. 381, 385 ¶ 12 (App. 2008). Rather than "override[] the will of Arizonans" by impliedly repealing duly enacted legislation, Pet. at 2, the court's ruling does the opposite—it preserves all of the legislature's abortion laws instead of erasing newer, detailed laws in favor of an older, broad one. *See also State v. Jones*, 235 Ariz. 501, 503 ¶ 8 (2014) (when statutes conflict, "the more recent, specific statute governs over an older, more general statute") (citation omitted).

B. Petitioner asks the Court to ignore the plain text.

Petitioner claims (at 7-12) that there is nothing to harmonize and no conflict to resolve because § 36-2322 is a criminal provision which only forbids conduct (abortions after 15 weeks), without affirmatively authorizing any other conduct. But the plain text of the statute belies this argument. The natural reading of the words "[e]xcept in a medical emergency, a physician may not perform . . . an abortion" is that a physician *may* perform an abortion in a "medical emergency." A.R.S. § 36-2322(A). Similarly, the natural reading of the words "a physician may not perform . . . an abortion unless the physician or the referring physician has first made a determination of the probable gestational age" is that a physician *may* perform an abortion *if* the physician has made a determination of the probable gestational age. *Id.*

Instead of grappling with the obvious, Petitioner asserts (at 12) that "context" shows "[t]he Legislature did not intend to allow *any* abortions; it intended to regulate *Roe*-era abortions while § 13-3603 remained enjoined." In other words, Petitioner asks this Court to ignore the statutes' plain text in favor of extrinsic evidence of legislative intent. If the legislature intended for § 13-3603 to preempt subsequent abortion laws if *Roe* were overturned, it

easily could have said so. But it didn't, and as Petitioner notes, "It is not the function of the courts to rewrite statutes." Pet. at 13 (quoting *Lewis v. Debord*, 238 Ariz. 28, 31–32 ¶11 (2015)).

For example, the 15-week law is nearly identical to the Mississippi law pending before the Supreme Court in *Dobbs*. *Compare* A.R.S. §§ 36-2321–26, *with* Miss. Code Ann. § 41-41-191 (2018). Unlike Mississippi, however, the Arizona legislature did not provide that "[a]n abortion that complies with this section, but violates any other state law, is unlawful." Miss. Code. Ann. § 41-41-191(8). Nor did the legislature include any "trigger" provision that would revert to the territorial ban if *Roe* were overturned, as other states have. *E.g.*, La. Stat. Ann. § 40:1061 (2018); Mo. Rev. Stat. § 188.017 (2019); 2021 Tex. Sess. Law Serv. Ch. 800 (H.B. 1280).

Indeed, far from including a trigger provision in the 15-week law, the legislature specified that it only "intend[ed] … to restrict the practice of nontherapeutic or elective abortion to the period up to fifteen weeks of gestation." 2022 Ariz. Leg. Serv. Ch. 105, § 3(B). So, even accounting for the legislative intent, a holding that abortion is illegal before 15 weeks except when necessary to save the life of the mother would contradict the legislature's specific statements here.

The other statements in the "Construction" section of the 15-week law do not change the analysis. The legislature stated that the act did not "create or recognize a right to abortion." *Id.* § 2(1). That is consistent with the plain meaning of § 36-2322, described above, which allows certain abortions (and not others), but does not create a right to one. It simply provides that some highly-regulated physician abortions can proceed.

The act also expressly did not "[r]epeal … section 13-3603 … or any other applicable state law regulation or restricting abortion." *Id.* § 2(2). That shows the legislature recognized that there were other "applicable state law[s] regulating or restricting abortion," i.e., that § 13-3603 did not render all others superfluous. Appropriately, the court of appeals did not construe the 15-week ban to repeal section 13-3603; it read them together.

Petitioner also suggests (at 9-10) that no conflict exists because §§ 36-2322 and 13-3603 do not share identical elements of proof. But § 36-2322 is not a stand-alone criminal provision. *See* Op. ¶ 19 ("We are not evaluating separate statutes prohibiting the same conduct."); *cf. State v. Weiner*, 126 Ariz. 454, 456 (App. 1980) (applying the "elements of proof" test to determine whether one criminal statute preempted another). Rather, § 36-2322 is part of a larger regulatory scheme that includes a criminal provision.

In particular, § 36-2322 specifies when physicians may perform abortions (in medical emergencies or at or before 15 weeks), when they may not perform abortions (after 15 weeks), and what they must do if they perform an abortion (determine gestational age and record it on a government-provided form). The subsequent statutes direct the department to create those forms (§ 36-2323), impose civil penalties for submitting false forms or not submitting forms (§ 36-2325(B)-(C)), make it a felony and professional misconduct for a physician to intentionally or knowingly provide an abortion after 15 weeks (§ 36-2324, -25(A)), and allow the Attorney General to enforce these provisions (§ 36-2326).

Petitioner attempts to establish a lack of conflict by comparing his incorrect reading of § 36-2322 with the criminal elements of proof for § 13-3603. The two statutes cannot be compared in a vacuum, however. Instead, as the appellate court recognized, § 13-3603 must be read in light of, and harmonized with, the larger regulatory scheme and the precise text of § 36-2322. These statutes—and numerous others enacted since 1973—establish a comprehensive regulatory scheme that cannot be reconciled with Petitioner's reading of § 13-3603.

The court of appeals correctly decided the statutory interpretation question in this case. This Court should let that decision stand.

III. This Court should not disturb a well-reasoned decision when no proper party seeks review.

There is another reason not to disturb the court of appeals decision: no proper party has chosen to challenge it. The Court should be wary of overturning a well-reasoned decision on an issue of great public importance when no proper party seeks review.

The superior court in 1971 appointed a guardian ad litem for a specific plaintiff's fetus and "all other . . . similarly situated" fetuses. Pet. App. 70. That appointment is the supposed basis for Petitioner's legal authority to petition for review. But there is no legal basis to appoint a guardian ad litem for such a broad, undefined class. And even if there was such a basis in 1971,

there is no basis for Petitioner to continue in that role today.[1]

First, various statutes provide for guardian ad litem appointments in specific situations *for specific individuals*. *See, e.g.*, A.R.S. § 8-291.08(D) (juvenile standing trial), § 8-291.05(B) (civil commitment proceedings for a minor), § 8-522(A) (dependency and termination of parental rights), § 12-2451(E) (emancipation), § 14-1408 (probate, allowing guardian ad litem to represent "several persons" absent a conflict), § 36-2152(D) (pregnant minor seeking court authorization for abortion). Similarly, Rule of Civil Procedure 17(g)(1)(B) assumes that a guardian ad litem is appointed to "bring, or defend against, the action" for a specific minor.

The State is unaware, though, of any statute that contemplates a guardian ad litem for an undefined *class* of hypothetical and dissimilar

[1] The Attorney General acknowledges that her predecessor moved to substitute Hazelrigg for the previous guardian ad litem. Ordinarily, that would result in waiver of the argument that Hazelrigg is not a proper party. But even if the procedural history of this case prohibits the Attorney General from now asking this Court to reverse Hazelrigg's appointment, the fact that Hazelrigg's appointment was without legal basis is an additional reason for the Court to exercise its discretion to deny his petition. *See Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 482 (1986) (waiver "may be suspended in [this Court's] discretion," e.g., when "the public interest is better served by having the issue considered rather than deferred").

fetuses. In some instances, a guardian ad litem may be permitted to represent "several persons," absent a conflict between them. A.R.S. § 14-1408 (probate). But "several" means "more than one or two ***but not a lot***." Several, Black's Law Dictionary (11th ed. 2019) (emphasis added). It also implies an identifiable set of individuals. Petitioner does not purport to represent "several" fetuses; he purports to represent "all" fetuses who are "similarly situated" to the fetus originally involved in this case in 1971 (whatever that means).

Second, even if it was right for the superior court in 1971 to appoint Petitioner's predecessor as guardian ad litem for the "unborn [fetus] of Plaintiff Jane Roe and all other [fetuses] similarly situated" to it, Pet. App. 18-19, the current posture of the case does not implicate Petitioner's substitute role. The individual plaintiff in this case was dismissed long ago. Now, there is no plaintiff seeking an abortion, and therefore no individual fetus or "similarly situated" fetuses for Petitioner to represent. How can there be a guardian when there are no wards?

Third, it is not clear *which* fetuses Hazelrigg purports to represent. Does his appointment cover *all* fetuses that exist in Arizona right now? Fetuses at all gestational stages, or only after a certain point? What about

fetuses that would be born with diseases that guarantee an early and extremely painful death?

The class of "all other" unborn fetuses plainly is not homogenous. At a minimum, the variety of medical characteristics and risks unique to any given pregnancy guarantees that not all fetuses share common circumstances and interests. *Cf.* Ariz. R. Civ. P. 23 (requirements for establishing a class); A.R.S. § 14-1408 (guardian ad litem may represent several persons in probate "[i]f not precluded by conflicts of interest"). The petition offers no explanation or support for how Hazelrigg can fairly and adequately represent an indefinite group of fetuses with innumerable differences, much less why he is particularly suited to select and present arguments to the Arizona Supreme Court on this subject. Is it really appropriate for one Petitioner to speak to a court of last resort on behalf of *every fetus* in *every womb* in Arizona?

Clearly not. At this juncture, Petitioner's role in this case is closer to that of amicus curiae than guardian ad litem. His proclaimed interest is indistinguishable from that of any other bystander who might wish to vindicate a general moral disagreement with abortion. *See* Pet. at 6 ("This is a critically important issue for all Arizonans . . . ."). And this Court has long

held that "amici curiae . . . have no right to create, extend or enlarge the issues" before it. *Bristor v. Cheatham*, 75 Ariz. 227, 230 (1953). It is similarly ill-advised—even dangerous—to rule on critical issues of statutory harmonization at the request of one generally interested citizen like the Petitioner here. *See Diamond v. Charles*, 476 U.S. 54 (1986) (doctor lacked standing to appeal decision invalidating abortion statutes when the state declined to appeal).

The absence of a proper adverse party in this case is telling. Other parties, such as the House Speaker and the Senate President, could have intervened and sought review if they disagreed with the decision. *See* A.R.S. § 12-1841. They have already intervened in several cases since Attorney General Mayes took office, including one case involving abortion. *See Isaacson v. Mayes*, No. CV-21-01417-PHX-DLR, 2023 WL 2403519 (D. Ariz. Mar. 8, 2023); *id.* Doc. 155 (motion to intervene). In almost every case, the Attorney General decided not to oppose the legislative leaders' intervention, both out of respect for their office and to facilitate the healthy presentation of opposing legal arguments to the court. *See, e.g.*, *id.* Doc. 160. If legislative leadership had decided to timely intervene here, the Attorney General likely would have taken the same approach.

But legislative leadership chose not to intervene and petition for review. The only parties seeking the Court's attention here are a private individual and a county attorney, neither of whom are proper parties. The fact that no party involved in the law-making process or with a direct interest has sought review in this case should give the Court serious pause about entertaining a request to resurrect an extreme law from a time before women could vote.

CONCLUSION

The Court should deny the petition.

RESPECTFULLY SUBMITTED this 1st day of May, 2023.

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