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

BRIEF OF *AMICI CURIAE* ARKANSAS & 16 OTHER STATES IN SUPPORT OF PETITION FOR REVIEW

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INTEREST OF AMICI

Nearly a year ago, the Supreme Court overruled *Roe v. Wade* and returned the authority to regulate or prohibit abortion to "the citizens of each State." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022). With *Roe* gone, States are free to enforce previously enjoined abortion restrictions and enact new ones. The amici States of Arkansas, Alabama, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, South Carolina, South Dakota, Texas, Utah, and West Virginia all prohibit, restrict, or otherwise regulate abortion. Though *Roe* tied their hands for a half century, Amici have an interest in finally enforcing their abortion restrictions and protecting unborn life. *Id.* at 2284. Amici write to ensure that Arizona may as well.

INTRODUCTION

Abortion has long "distorted" the law. *Dobbs*, 142 S. Ct. at 2275. Jurisdictional rules, statutory interpretation, and, of course, the Constitution itself were forced to give way to a "right" invented out of whole cloth, until the Supreme Court corrected course last year in *Dobbs*. *Id.* at 2275-76.

Yet the "abortion distortion[]" apparently lingers on in the Arizona court of appeals. *SisterSong Women of Color Reproductive Justice Collective v. Gov.*, 40 F.4th 1320, 1328 (11th Cir. 2022). The plain text of Arizona's abortion statutes and enacted intent confirm that the legislature wished to ban elective abortion. But under

the guise of obeying legislative intent, the court of appeals proclaimed that Arizona law allows "[l]icensed physicians" to perform abortions for up to 15 weeks of pregnancy. App. 87. This Court should grant the petition for review and reverse.

BACKGROUND

In 1865, Arizona's territorial legislature banned elective abortions. *See Dobbs*, 142 S. Ct. at 2298 (reproducing the statute). A materially identical ban has remained on the books for the more than 150 years since. *See* Ariz. Rev. Stat. 13-3603.

But for the past half century, Arizona hasn't been able to enforce its law. In 1971, Planned Parenthood sued to enshrine its policy preferences and make them constitutional law. *See Nelson v. Planned Parenthood Ctr. of Tucson*, 19 Ariz. App. 142, 143 (1973). Like other litigants across the country, its arguments were "remarkably loose in [their] treatment of the constitutional text." *Dobbs*, 142 S. Ct. at 2245. It grounded an alleged right of abortion somewhere in "the Ninth and Fourteenth Amendments." *Nelson*, 19 Ariz. App. at 143.

In January 1973, the court of appeals correctly rejected that theory, concluding that no part of the Constitution enshrined a right to abortion and that "[h]istory side[d] with the state." *Id.* at 149 (internal quotation marks omitted). But just three weeks later, the Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973). Bound by that "egregiously wrong" decision, *Dobbs*, 142 S. Ct. at 2265, the court of appeals

vacated its opinion and declared Arizona's ban unconstitutional. *Nelson*, 19 Ariz. App. at 152. "[T]hose who sought to advance the State's interest in fetal life[] could no longer" enforce "policies consistent with their views." *Dobbs*, 142 S. Ct. at 2265.

Still, the Arizona legislature did not acquiesce to *Roe*; instead, it "re-enact[ed] statutes criminalizing abortion." *Summerfield v. Sup. Ct.*, 144 Ariz. 467, 476 (1985) (en banc). Indeed, just a few years after *Roe*, the legislature recodified the elective-procedure ban as Arizona Revised Statute 13-3603, where it remains codified to this day. But so long as *Roe* and its progeny, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), remained good law, Arizona's ban existed in name only. Indeed, it did little more than "register [Arizona's] disagreement." Amy Coney Barrett, *Stare Decisis and Nonjudicial Actors*, 83 Notre Dame L. Rev. 1147, 1147 (2008). If Arizona wanted to protect the unborn, it had to work within *Casey*'s extra-legal "undue burden" standard.

Of course, that standard "proved to be unworkable." *Dobbs*, 142 S. Ct. at 2275. States seeking to regulate abortion were hauled into court to defend nearly any restriction, and *Casey* provided little clarity on whether their restrictions would still be standing when the dust settled. *Id.* at 2274-75.

Arizona was no exception. It enacted several regulations, with mixed success. Courts upheld an informed consent provision and a 24-hour waiting period. *See* Ariz. Rev. Stat. 36-2153; *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life*

Obstetricians & Gynecologists, 227 Ariz. 262 (2011); *Tucson Women's Ctr. v. Ariz. Med. Bd.*, 666 F. Supp. 2d 1091 (D. Ariz. 2009). They struck down a ban on experimenting with an unborn child's remains, *see* Ariz. Rev. Stat. 36-2302; *Forbes v. Napolitano*, 236 F.3d 1009 (9th Cir. 2000); a ban on partial-birth abortions, *see* Ariz. Rev. Stat. 13-3603.01; *Planned Parenthood of S. Ariz., Inc. v. Woods*, 982 F. Supp. 1369 (D. Ariz. 1997); and a prohibition on eugenic abortions, *see* Ariz. Rev. Stat. 13-3603.02; *Isaacson v. Brnovich*, 563 F. Supp. 3d 1024 (D. Ariz. 2021). And when Arizona tried to protect unborn children who were capable of feeling pain by banning abortions after 20 weeks—just shortly before viability—a court struck down that restriction too. *See* Ariz. Rev. Stat. 36-2159; *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013).

Then the Supreme Court took *Dobbs* to decide whether Mississippi's ban on elective abortions after 15 weeks was constitutional. Anticipating that decision, Arizona, like many of the amici here and other States, enacted a 15-week ban that "closely mirror[ed] the Mississippi law" so that it could "take[] effect ... if the Supreme Court" allowed Mississippi's law to stand but "stop[ped] short of fully overturning *Roe*." The Associated Press, *Arizona Joins a Growing List of States That Have Passed a 15-Week Abortion Ban*, NPR (Mar. 24, 2022, 3:30 P.M.).[1] But

[1] https://www.npr.org/2022/03/24/1088623491/arizona-abortion-ban-15-weeks.

the legislature expressly noted that 15-week ban did not "[r]epeal, by implication or otherwise," Arizona's still-existing elective-procedure ban. 2022 Ariz. Sess. Laws ch. 105, sec. 2 (2d Reg. Sess.). If the Supreme Court "return[ed] the issue of abortion to the people and their elected representatives," *Dobbs*, 142 S. Ct. at 2279, Arizona law would bar elective abortion, not simply restrict it after a certain point.

Ultimately, the Court declined to chart a "middle way" and overruled *Roe* and *Casey* in their entirety. *Id.* at 2283. With the only obstacle to enforcing the elective-procedure ban gone, then-Attorney General Mark Brnovich asked the superior court to terminate the 50-year-old injunction against it. App 1, 59, 69.

Yet Planned Parenthood resisted. It couldn't deny that *Roe* is dead and that States may constitutionally prohibit abortion. So instead, it concocted a novel theory that the 15-week ban somehow superseded the elective-procedure ban and authorized physicians to perform abortions—though the 15-week ban expressly left the elective procedure ban in place. App. 38. Rather than lift the injunction and allow Arizona to resume enforcing its law, Planned Parenthood suggested, the superior court should modify it "to allow licensed physicians to provide abortions up until 15 weeks." App. 48.

The superior court correctly declined Planned Parenthood's invitation. App. 69-75. But the court of appeals reversed and, though it denied doing so, essentially declared Arizona's elective-procedure ban impliedly repealed. App. 87. Now,

Arizona may only apply that law to non-physicians; any "[l]icensed physician[] who performs abortions in compliance with" *Roe*-era regulations is "not subject to prosecution." *Id.*

Since the court of appeals' decision, former-Attorney General Brnovich has left office, and his successor has declined to defend the elective-procedure ban. That falls to Dr. Eric Hazelrigg, who was appointed by the superior court to represent the unborn and who now asks this Court to hear this case. The Court should do so and should reverse the court of appeals' egregious decision.

ARGUMENT

Arizona's elective-procedure ban bars any "person" from acting "with intent ... to procure" an abortion. Ariz. Rev. Code 13-3603. That prohibition is categorical and applies to physician and non-physician alike. *See* App. 83 (acknowledging that the "plain language would encompass abortions performed by licensed physicians").

Yet the court of appeals carved physicians out of Arizona's elective-procedure ban anyway, for two reasons. *First*, it believed the legislature intended "to regulate but not eliminate elective abortions" when performed by physicians. App. 84. *Second*, it considered the elective-procedure ban "irreconcilable" with the 15-week ban and other *Roe*-era regulations. *Id.* And because it viewed the regulations as irreconcilable, it assumed enforcement would be "arbitrary," violating due process.

App. 85. The court of appeals was wrong on both counts and this Court should reverse.

I. The Legislature Intended to Preserve, Not Repeal, Arizona's Elective Abortion Ban.

For more than 150 years, Arizona law has barred elective abortions, and that prohibition has never been repealed—not after *Roe*, not when the legislature enacted 20- or 15-week bans, and not even when it repealed a neighboring provision that would have authorized prosecution of the pregnant woman. *See* 2021 Ariz. Sess. Laws ch. 286, sec. 3 (1st Reg. Sess.). Rather, the legislature reiterated with each new abortion restriction that it wished to protect unborn children as much as possible, *id.* sec. 1; that it did not "recognize a right to an abortion," *id.* sec. 17; 2022 Ariz. Sess. Laws ch. 105, sec. 2 (2d Reg. Sess.); and that it did not wish to "[r]epeal" the elective-procedure ban "by implication or otherwise," *id.*

Against that backdrop, the court of appeals' assertion that the legislature intended to "permit[] physicians to perform abortions" up to 15 weeks is jarring. App. 86. Unsurprisingly, the "evidence" it provides does not support that proposition.

First, the court suggested that the legislature demonstrated an intent to "restrict" but not "eliminate[] elective abortions" by creating a "complex regulatory scheme" through the 15-week ban and other safety regulations. App. 84. But those regulations don't demonstrate an intent to authorize abortion; if anything, they cut

the other way. For though that court forswore "narrowing" its analysis "to only part of the current legal landscape," App. 81, it ignored the most important piece of the puzzle: *Roe*.

"*Roe* imposed the same highly restrictive regime on the entire Nation." *Dobbs*, 142 S. Ct. at 2241. While it remained good law, Arizona could legislate in only one direction: it could expand abortion access but couldn't protect the unborn. *Id.* at 2265. Yet Arizona never authorized abortion beyond what *Roe* and *Casey* required. *Id.* at 2242. To the contrary, it consistently tried to regulate abortion—even under a regime where nearly any regulation was labeled an "impediment[]" that could not "survive judicial inspection." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J., concurring) (internal quotation marks omitted). Indeed, Planned Parenthood previously said as much, deriding Arizona's abortion regulations as mere "pretext[s] for anti-abortion regulation." *See, e.g.*, Appellants' Opening Brief at 30, *Planned Parenthood Ariz., Inc. v. Humble*, No. 14-15642 (9th Cir. Apr. 18, 2014) (quoting *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 540 (9th Cir. 2004)). And the *Dobbs* dissenters described 15-week bans as designed to "gin[] up new legal challenges to *Roe* and *Casey*," not to authorize abortion. *Dobbs*, 142 S. Ct. 2349 (Breyer, Sotomayor, & Kagan, J.J., dissenting). The court of appeals can't rewrite history now by editing out *Roe*.

Even if *Roe* were taken out of the picture, the court of appeals' argument would fail on its own terms. That's because the elective-procedure ban has always been part of the code too. Though Arizona was prevented from enforcing it for 50 years, that injunction did not erase it from the books or change its status as law. Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 944 (2018).

Neither did the legislature's addition of separate or cumulative abortion crimes. The legislature adds cumulative crimes in many contexts. Yet we would not understand a new vehicle theft statute to wipe theft and robbery statutes off the books—not without express repeal. *Cf. State v. Carter*, 249 Ariz. 312, 319 ¶ 24 (2020). Same for overlapping prohibitions on drug possession and drug possession with intent to distribute. *See, e.g.*, Ariz. Rev. Stat. 13-3405(A)(1)-(2). So too, enacting a ban on dilation and evacuation procedures performed after 15 weeks doesn't demonstrate an intent to authorize vacuum aspiration or medication abortions performed earlier in pregnancy while a ban covering those procedures remains on the books. *Cf. Gonzales v. Carhart*, 550 U.S. 124, 134-36 (2007) (describing these abortion procedures). If the court of appeals wanted to consider the entire "legal landscape" as evidence of intent, App. 81, it should have factored in the elective-procedure ban.

If the whole code doesn't demonstrate a legislative intent to authorize abortion, the court of appeals' fallback argument is even less persuasive. Comparing

Arizona's 15-week ban to Mississippi's near-identical one, the court inferred intent from a supposedly missing provision. App. 87. Mississippi's law included a "[c]onstruction" clause stating that its 15-week ban did not "recogniz[e] a right to abortion" and that "[a]n abortion that complies with this section, but violates any other state law, is unlawful." Miss. Code Ann. 41-41-191(8). The Arizona law, according to the court of appeals, "contains no such clause" and thus "reflects [the legislature's] intent that licensed physicians not face criminal prosecution." App. 87.

Even if this were an accurate depiction of Arizona's 15-week ban, it would be unpersuasive. "Legislative silence is a poor beacon to follow" when discerning intent. *Zubar v. Allen*, 396 U.S. 168, 185 (1969). It certainly can't trump what the legislature did say—let alone repeal an enacted statute. Without other indicia confirming that the elective-procedure ban had been repealed or didn't apply to physicians, the court couldn't infer much from the absence of a duplicative provision confirming the obvious: that ban remained on the books.

But the court of appeals' description isn't even accurate. True, the 15-week ban didn't include the precise wording in Mississippi's construction clause. But contrary to what the court of appeals suggested, it had a construction clause of its own—and that clause confirmed that the legislature was not "recogniz[ing] a right to abortion" and that the 15-week ban did not "[r]epeal, by implication or otherwise,"

the elective-procedure ban. 2022 Ariz. Sess. Laws ch. 105, sec. 2 (2d Reg. Sess.). The legislature could hardly have been clearer that it intended to bar elective abortions, not authorize them.

II. The Elective-Procedure and 15-Week Bans Are Complimentary: Both Ban Abortions.

The court of appeals also claimed that the elective-procedure ban could not be applied to physicians because doing so "would criminalize conduct under one statute that our legislature has expressly allowed under another" and render whole swaths of the code "meaningless." App. 84-85. Thus, the court said, it had to "harmonize[]" the statutes by carving physicians out. App. 79, 82 (internal quotation marks omitted).

The court created conflict where none exists. If the 15-week ban did, in fact, authorize abortion, it would have a point: prosecutors and courts can't apply both a statute that says "abortion is legal" and one that says "abortion is illegal." But the 15-week ban did not "[c]reate or recognize a right to abortion." 2022 Ariz. Sess. Laws ch. 105, sec. 2 (2d Reg. Sess.). It banned abortions.

True, "[a]t the time the legislature enacted the 15-week law ... [e]lective abortions were ... permitted." App. 85. But the 15-week ban did not codify the abortion regime in place when it was enacted. Rather, it tried to push the limit and bar more abortions than Supreme Court precedent allowed. *Dobbs*, 142 S. Ct. at 2242. Treating that ban as authorizing abortion makes the same mistake as conjuring

up a legislative intent to legalize abortion; it writes *Roe* and the elective-procedure ban out of the equation entirely. Without explicitly legalizing abortion or repealing the elective-procedure ban, the 15-week ban cannot be described as authorizing abortion.

And laws that say "abortion is illegal" and "abortion is illegal after 15 weeks" aren't contradictory. *Cf. Carter*, 249 Ariz. at 319 ¶ 24. Indeed, other States have multiple bans pegged to different points in pregnancy:

- Arkansas has two prohibitions on all elective abortions, Ark. Code Ann. 5-61-304, -404. It also bans abortions after 12 weeks, *id.* 20-16-1304, 18 weeks, *id.* -2004, 20 weeks, *id.* -1405, and viability, *id.* -705, plus sex-selective abortions, *id.* -1904, eugenic abortions, *id.* -2103, and "dismemberment abortion[s]," *id.* -1803.
- Alabama also has two prohibitions on elective abortions, including one enacted pre-*Roe*. Ala. Code 13A-13-7; *id.* 26-23H-4. That State also bans abortions after 20 weeks, *id.* 26-23B-5, and viability, *id.* 26-22-3.
- Louisiana prohibits all elective abortions, La. Stat. Ann. 87.7, as well as abortions when the unborn child has a heartbeat, *id.* 1061.1.5, abortions after 20 weeks, *id.* 1061.1.2, late-term abortions, *id.* 87.8, "[a]ggravated abortion by dismemberment," *id.* 87.11; *accord id.* 1061.1.3, and eugenic abortions, *id.* 1061.1.4.

- Missouri prohibits elective abortions. Mo. Rev. Stat. 188.017. It also enacted "backup provisions" banning abortion at 8, 14, 18, and 20 weeks. Tara Law, *Here Are the Details of the Abortion Legislation in Alabama, Georgia, Louisiana, and Elsewhere*, Time (July 2, 2019, 5:21 P.M.);[2] *see* Mo. Rev. Stat. 188.056-058, 188.375.
- Tennessee adopted a provision criminalizing abortions "at cascading intervals of two to three weeks beginning at six weeks." *Dobbs*, 142 S. Ct. at 2283 (internal quotation marks omitted); *see* Tenn. Code Ann. 39-15-216(c)(2)-(12). Tennessee also bans abortions after 20 weeks, *id.* -212, post-viability abortions, *id.* -211, and eugenic abortions, *id.* -217.

As these state laws illustrate, multiple bans can coexist.

Arizona's 15-week ban and its elective-procedure ban not only coexist but may be concurrently applied; a physician could be prosecuted simultaneously under both. That's because the two do not have the same elements. *Carter*, 249 Ariz. at 319 ¶ 24 (citing *Blockburger v. United States*, 284 U.S. 299 (1932)). Prosecuting under the 15-week ban requires a circumstance not necessary for prosecutions under the elective-procedure ban: the abortion must have occurred at least 15 weeks into pregnancy. Ariz. Rev. Stat. 36-2322(B). And the elective-procedure ban includes a

[2] https://time.com/5591166/state-abortion-laws-explained.

higher mens rea than the 15-week ban. *Compare id.* 13-3603 ("intent ... to procure the [abortion]"), *with id.* 36-2322(B) ("intentionally or *knowingly*" (emphasis added)). Because they are sufficiently distinct, a physician may face "cumulative punishment" under both. *Carter*, 249 Ariz. at 319 ¶ 24.

That makes sense. Though all abortion destroys "an unborn human being," the legislature found that abortions "performed after fifteen weeks' gestation" are particularly "barbaric" and "demeaning to the medical profession." 2022 Ariz. Sess. Laws ch. 105, sec. 3 (2d Reg. Sess.). The legislature could reasonably impose a double punishment on physicians who not only intentionally kill an unborn child but also violate the "integrity of the medical profession" by performing a "particularly gruesome [and] barbaric medical procedure[]." *Dobbs*, 142 S. Ct. at 2284 (approving those state interests).

Indeed, several other provisions "not at issue" here let Arizona impose cumulative punishment on especially egregious abortions. App. 79. For instance, Arizona bans partial-birth abortions, Ariz. Rev. Stat. 13-3603.01, a particularly gruesome late-term abortion procedure that would also be prohibited under either the elective-procedure or 15-week bans. *See Carhart*, 550 U.S. at 134-40 (describing the procedure). And to "prevent[] ... discrimination on the basis of race, sex, [and] disability," *Dobbs*, 142 S. Ct. at 2284, it also bans eugenic abortions. Ariz. Rev. Stat. 13-3606.02(A). *But see Isaacson v. Brnovich*, 610 F. Supp. 3d 1243 (D.

Ariz. 2022) (preliminarily enjoining the provision of 13-3606.02(A) that prohibits abortions sought because of "genetic abnormality" on "vagueness" grounds). That no one argues these provisions conflict with the 15-week or elective-procedure bans further illustrates that those bans do not conflict with each other.

Because both laws prohibit, rather than authorize, abortions, the court of appeals' concern that physicians would face "uncertainty" about whether "their conduct would be criminally prosecuted" is unwarranted. App. 86. The elective-procedure ban prohibits any "person" from performing an abortion, and physicians are undoubtably persons. Ariz. Rev. Stat. 13-3603. No statute authorizes them to perform an abortion. So there's no ambiguity: physicians may not perform abortions and may be prosecuted if they do.

CONCLUSION

For a half century, the United States Supreme Court wrongly "prohibit[ed] the citizens of [Arizona] from ... prohibiting abortion." *Dobbs*, 142 S. Ct. at 2284. Last year, the Supreme Court finally "corrected [its] mistake" and "return[ed] the issue of abortion to the people and their elected representatives." *Id.* at 2262, 2279. And yet, the court of appeals still accepted Planned Parenthood's invitation to "short-circuit[] the democratic process" and blocked Arizona from resuming enforcement of a ban long on its books. *Id.* at 2265. The Arizona judiciary should not continue

to deny the people "the power to address [this] question of profound moral and social importance." *Id.* This Court should grant the petition for review and reverse.

Respectfully submitted on this 22nd day of May, 2023,

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CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns an amicus curiae brief, and is submitted under Rule 16(b)(4).

2. The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 3408 words.

3. The document to which this Certificate is attached does not exceed the word limit that is set by Rule 23.

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