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ARIZONA SUPREME COURT

PLANNED PARENTHOOD ARIZONA, INC., et al., Plaintiffs/Appellants, v. KRISTIN MAYES, Attorney General of the State of Arizona, et al., Defendants/Appellees, and ERIC HAZELRIGG, M.D., as guardian ad litem of all Arizona unborn infants; DENNIS McGRANE, Yavapai County Attorney, Intervenors/Appellees.	Supreme Court No. CV-23-0005-PR Court of Appeals Division Two No. 2 CA-CV 2022-0116 Pima County Superior Court No. C127867

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INTRODUCTION

Arizona has protected unborn human life longer than it has been a state. Since 1901, starting with A.R.S. § 13-211, the legislature has always restricted abortion except to save a mother's life. *Roe v. Wade* never changed that. 410 U.S. 113 (1973). *Roe* temporarily kept officials from fully enforcing § 13-211. But even then, the legislature reenacted § 13-211 as § 13-3603 and passed yet more protections—careful to say these changes created *no* abortion right, made *no* unlawful abortion legal, and did *not* repeal § 13-3603. Not one of those laws allowed abortion. Only *Roe* did that until last year, when the U.S. Supreme Court held that States could once again fully protect unborn life. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022).

Section 13-3606 now protects life again. But Respondents say the legislature impliedly repealed it. After the prior version of § 13-3606 was facially enjoined, the legislature had a choice: do nothing while abortion was fully unregulated for 50 years or pass new regulations protecting life as much as *Roe* allowed. It chose the latter. If the legislature had done nothing, no one could dispute that § 13-3603 would be fully enforceable. But because the legislature did what it could to protect life despite *Roe*, Respondents say the legislature has now sanctioned abortions up to 15-weeks' gestation. In their view, the legislature meant to allow 95% of all abortions post-*Roe*—even though the legislature consistently said it created no right to abortion and did *not* repeal § 13-3603.

This Court need look no further than the text. However Title 36 is construed, the legislature said the result cannot (1) create a right to abortion or (2) repeal § 13-3603. *E.g.*, A.R.S. § 36-2164; 2022 Ariz. Sess. Laws ch. 105, § 2 (S.B. 1164); 2021 Ariz. Sess. Laws ch. 286, § 17 (S.B. 1457); 2012 Ariz. Sess. Laws ch. 250, § 11 (H.B. 2036); 2011 Ariz. Sess. Laws ch. 9, § 4 (H.B. 2443); 2011 Ariz. Sess. Laws ch. 10, § 8 (H.B. 2416); 2010 Ariz. Sess. Laws ch. 111 (S.B. 1304); 2009 Ariz. Sess. Laws ch. 172, § 6 (H.B. 2564). Respondents' theory requires both. To be sure, Respondents say Title 36 "allows" abortion but creates no right to one. And they say that § 13-3606 can still keep regular people from performing abortions. But the first is a contradiction, the second is inept, and both shun legislative directives. Those directives ensured that Title 36 would never conflict with § 13-3603—preserving both for post-*Roe* enforcement.

Harmonization is improper both substantively and procedurally. Respondents assume Title 36 conflicts with § 13-3603. Their solution creates a right to abortion and repeals § 13-3603. But no canon requires a result that contradicts *express* legislative command. Section 13-3603 has precedence. And procedurally, the appeals court provided a remedy Respondents never even requested. Respondents' request for modification *did not relate* to the constitutionality of § 13-3603 itself, which was the sole ground for relief alleged in the underlying Complaint. So the parties had no notice and an opportunity to litigate those issues below. Using Rule 60 to limit § 13-3603 is procedurally and substantively improper.

This Court should reverse and remove the injunction below. The lives of thousands of unborn children hang in the balance.

ARGUMENT

I. This case is justiciable.

Under Arizona's Constitution, standing is not jurisdictional. *Dobson v. State ex rel., Comm'n on App. Ct. Appointments*, 233 Ariz. 119, 122 (2013). Because there is no "case or controversy" requirement, this Court need not "decline jurisdiction based on lack of standing." *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209 (2019). This call "is a matter of 'prudential or judicial restraint.'" *Id.* (citation omitted). And standing can be waived. *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005). While standing is not required, both Petitioners have it.

A. Petitioner Hazelrigg has standing.

The Attorney General says Petitioner Hazelrigg has no standing. Attorney General's Resp. to Pet. for Review (AG Br.) 13-18. But she admits "her predecessor moved to substitute [Petitioner] Hazelrigg" for the prior "guardian ad litem," which would ordinarily "result in waiver of the argument" that he "is not a proper party." *Id.* at 14 n.1. This case is no exception. While General Mayes invokes *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 482 (1986), suggesting this Court should overlook her waiver, *Dombey* disregarded a waiver *to* resolve "issues of statewide importance" and ensure such matters were "considered rather than

deferred." *Id.* at 482. Rejecting waiver here would do the exact opposite—*shield* a critical issue from judicial review. No exception applies. *See* Br. of *Amici Curiae* Speaker of the Ariz. House of Representatives Ben Toma & President of the Ariz. Senate Warren Petersen (Leg. Br.) 12-14.

Regardless, Petitioner Hazelrigg has standing. In a proceeding related to the protection of minors, "the court may appoint a guardian ad litem to represent" the interests of an "unknown," "*unborn*[,] or unascertained person." A.R.S. § 14-1408 (emphasis added); *see* A.R.S. § 14-1302(A)(2). And "[i]f not precluded by conflict of interest, the court may appoint a guardian ad litem to represent several persons or interests." A.R.S. § 14-1408. For decades, courts have appointed guardians ad litem to represent the interests of unborn children. *E.g.*, *Est. of Lawrence*, 430 N.Y.S.2d 533, 534 (Surr. Ct. 1980); *Reynolds v. Remick*, 99 N.E.2d 279, 280 (Mass. 1951); *Friedman v. Teplis*, 492 S.E.2d 885, 887 (Ga. 1997). That shouldn't change now. Unborn children deserve to be heard when their lives are at stake. *Cf.* A.R.S. § 1-219 (ensuring equal rights).

B. Petitioner McGrane has standing.

The Arizona Constitution directly creates the office of county attorney, Ariz. Const. art. XII, § 3, "a constitutional officer charged with the responsibility of enforcing the public laws" within their jurisdictions. *State ex rel. Berger v. Myers*, 108 Ariz. 248, 249 (1972). Consistent with this constitutional mandate, an Arizona statute provides that the "county

attorney is the public prosecutor of the county" and requires that county attorneys "shall" prosecute "public offenses when [he] has information that" crimes "have been committed." A.R.S. § 11-532(A)(2). Indeed, the county attorney bears "the primary responsibility for prosecuting criminal actions," *Smith v. Super. Ct. In & For Cochise Cnty.*, 101 Ariz. 559, 560 (1967) (per curiam); *accord State v. Murphy*, 113 Ariz. 416, 418 (1976). Petitioner McGrane bears primary responsibility for enforcing § 13-3603 in Yavapai County. *E.g. State v. Boozer*, 80 Ariz. 8, 10 (1955) (noting defendant "charged by the county attorney" with violating § 13-3603's statutory predecessor); *Heritage Vill. II Homeowners Ass'n v. Norman*, 246 Ariz. 567, 571 (Ct. App. 2019), *as amended* (May 22, 2019). Accordingly, he too has standing.

II. This Court should vacate the injunction below.

This Court interprets laws according to "the plain meaning of the words in their broader statutory context, unless the legislature directs [it] to do otherwise." *S. Ariz. Home Builders Ass'n v. Town of Marana*, 522 P.3d 671, 676–77 ¶ 31 (Ariz. 2023); *accord Columbus Life Ins. Co. v. Wilmington Tr., N.A.*, 532 P.3d 757, 760 ¶ 11 (Ariz. 2023); *Matthews v. Indus. Comm'n of Ariz.*, 520 P.3d 168, 175 (Ariz. 2022). A.R.S. § 13-3603 plainly regulates physicians. And because the legislature directed that Title 36 be interpreted so as *not* to create a right to abortion or to repeal § 13-3603, this Court should vacate the injunction below.

A. A.R.S. § 13-3603 unambiguously applies to physicians.

This Court interprets statutes according to their expressly defined terms. *State v. Reynolds*, 170 Ariz. 233, 234 (1992); *cf.* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 225 (2012). A.R.S. § 13-3603 applies to a "person"—defined broadly as "a human being." A.R.S. § 13-105(30). Physicians are human beings. So § 13-3603 applies to them. That's why physicians were prosecuted for violating the prior version of § 13-3603 before it was enjoined. *E.g.*, *Boozer*, 80 Ariz. at 8; *Hightower v. State*, 62 Ariz. 351 (1945). No one disputes that § 13-3603 unambiguously regulates physicians.

B. Title 36 reaffirms A.R.S. § 13-3603.

Respondents contend that § 13-3603 now unambiguously *exempts* physicians. *See* AG Br. 6-8; Pl.-Appellant Planned Parenthood Arizona, Inc's Resp. to Intervenor-Appellee Eric Hazelrigg, M.D.'s Pet. for Review (PP Br.) 10-12; Appellant Pima Cnty. Attorney's Resp. to Appellee Hazelrigg's Pet. for Review (Pima Br.) 8-10. They say § 13-3603 "conflict[s]" with § 36-2322, which in their view allows abortions restricted by §13-3603, and seek to harmonize those laws to forbid § 13-3603's continued application to physicians. AG Br. 7-8. But those laws do not conflict. So harmonization is improper. *See Romero-Millan v. Barr*, 253 Ariz. 24, 27-28 ¶ 13 (2022); *True v. Stewart*, 199 Ariz. 396, 399 (2001).

This Court does not interpret statutes "to negate their own stated purposes." *King v. Burwell*, 576 U.S. 473, 493 (2015); *e.g.*, *S. Ariz. Home*

Builders Ass'n, 522 P.3d at 676 ¶ 31. "If the legislature agrees on findings, purposes, or definitions," this Court should "ascertain statutory meaning" through those means. *State ex rel. Ariz. Dep't of Revenue v. Tunkey*, 524 P.3d 812, 818 (Ariz. 2023) (Bolick, J., concurring). After all, these directives "are part of the enacted text." Kevin M. Stack, *The Enacted Purposes Canon*, 105 Iowa L. Rev. 283, 285 (2019). Courts apply them to limit "the range of permitted meanings." *Id.*; *see* John F. Manning, *What Divides Textualists From Purposivists?*, 106 Colum. L. Rev. 70, 75 (2006) ("meaning" is informed by "context"); Scalia & Garner, *supra*, at 232 ("Legislatures [may] limit the implications of their laws.").

Take *Alabama Department of Revenue v. CSX Transportation, Inc.*, where the Court held that state diesel taxes, which applied to railroads but not to trucking companies, were prohibited under a federal railroad act. 575 U.S. 21, 28-30 (2015). Relying on the act's enacted "Declaration of Policy" expressing Congress's intention to "foster[ ] competition among all carriers by railroad and other modes of transportation," 45 U.S.C. § 801, Justice Scalia writing for the majority concluded that trucking companies were "similarly situated" to railroads because "discrimination in favor of that class most obviously frustrates the [act's] purpose," *CSX*, 575 U.S. at 28-29. Congress's enacted purpose limited the act's interpretation, which is sound construction. *E.g.*, *King*, 576 U.S. at 493; *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006); *accord*

Scalia & Garner, *supra*, at 59 (favoring "textually permissible interpretation that furthers rather than obstructs [a statute's] purpose").

Here, the legislature enacted not one but two rules for interpreting Title 36. First, in its "Construction" section, the legislature directed courts *not* to interpret S.B. 1164 as "[c]reat[ing] or recogniz[ing] a right to abortion." 2022 Ariz. Sess. Laws ch. 105, § 2(1) (2nd Reg. Sess.). Because the legislature did not define the term "right," this Court "may look to dictionaries." *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 524 (2021). Simply put, a "right" is a "privilege … secured … by law." *Right*, Black's Law Dictionary (11th ed. 2019). However S.B. 1164 is construed, the result cannot make abortion legally protected.

Second, the legislature independently directed courts *not* to interpret S.B. 1164 as repealing § 13-3603. 2022 Ariz. Sess. Laws ch. 105, § 2(2) (S.B. 1164 does not "[r]epeal, by implication or otherwise, section 13-3603."). Again, because the legislature did not define "repeal," this Court "may look to dictionaries." *Welch*, 251 Ariz. at 524. The term "repeal" means to "abrogat[e] … an existing law." *Repeal*, Black's Law Dictionary (11th ed. 2019). A repeal can be express or implied, *id.*, and it occurs even when a new "statute limits the scope of an earlier" one. *Schatz v. Allen Matkins Leck Gamble & Mallory LLP*, 198 P.3d 1109, 1119 (Cal. 2009); *see Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007). So however S.B. 1164 is construed, the result cannot limit § 13-3603.

Because Title 36 creates no right to abortion and does not limit § 13-3603, it does not conflict with § 13-3603. It's that simple.

i.

Respondents reject this logic—first by ignoring it. They say § 36-2322 expressly allows abortions restricted by § 13-3603 because it provides, "a physician may not perform . . . an abortion unless the physician or the referring physician has first made a determination of the probable gestational age." But that provision simply limits when § *36-2322's* penalties apply; it does not limit § 13-3603, nor could it given the legislature's expressed intent. Pet. for Review 7-10. Just because § 36-2322 punishes abortions after 15-weeks' gestation does not mean it allows abortions before then. Section 36-2322 was the legislature's attempt to protect life to the extent possible under *Roe*. But now *Roe* is gone, and the legislature has already declared that § 36-2322 does not impact § 13-3603.

Respondents say that § 36-2322 "allows" abortion "but does not create a right to one," AG Br. 11; *see* Pl.-Appellant Planned Parenthood Arizona, Inc.'s Resp. to Ten Amicus Curiae Briefs (PP Amicus Resp.) 10. But that's a contradiction. If § 36-2322 allows abortion, it creates a right to abortion because a right is a privilege secured by law. And the legislature says § 36-2322 creates no such right. 2022 Ariz. Sess. Laws ch. 105, § 2(1). That ends the matter. *See S. Ariz. Home Builders Ass'n*, 522 P.3d at 676-77 ¶ 31 (heeding legislative directives). What's more, Respondents'

theory would repeal § 13-3603, limiting its scope to abortionists *other than physicians*. No matter the label, this is a repeal. *See Schatz*, 198 P.3d at 1119; *Nat'l Ass'n of Home Builders*, 551 U.S. at 664 n.8. And the legislature has forbidden it. 2022 Ariz. Sess. Laws ch. 105, § 2(2).

ii.

Second, Respondents misinterpret an enacted purpose of S.B. 1164 to cancel its legislative directives. They say the legislature "only" intended the act "to restrict … elective abortion to the period up to fifteen weeks of gestation," 2022 Ariz. Sess. Laws ch. 105, § 3(B); AG Br. 10; *see* PP Br. 12; Pima Br. 6. Again, not so. This Court "should consider the entire text." Scalia & Garner, *supra*, at 167. The legislature *also* intended to create no right to abortion and not to repeal § 13-3603. 2022 Ariz. Sess. Laws ch. 105, § 2. And the legislature could regulate *Roe*-allowed abortions without limiting § 13-3603. In fact, the "historical sequence" shows this was precisely its aim. *Roberts v. State*, 253 Ariz. 259, 267 (2022); *accord Carrow Co. v. Lusby,* 167 Ariz. 18, 20 (1990).

Starting with § 13-211, Arizona has vigorously protected unborn life—restricting abortion except to save the mother's life. *Roe* temporarily stopped that protection. *Dobbs*, 142 S. Ct. at 2241. While *Roe* would have allowed § 13-211 to constitutionally regulate late-term abortion, the court below *facially* enjoined it. *Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. App. 142, 152 (1973). This left *all* unborn children

unprotected. In other words, had the legislature done nothing, unregulated abortion would be fully legal up to birth for 50 years. Rejecting this outcome, the legislature reenacted § 13-211 as § 13-3603, 1977 Ariz. Sess. Laws ch. 142, § 99 (1st Reg. Sess.); *see Summerfield v. Super. Ct.*, 144 Ariz. 467, 476 (1985), and passed a new law restricting the abortion of viable children, 1984 Ariz. Sess. Laws ch. 151 (2nd Reg. Sess.). Legally, the legislature could do nothing more. *Roe* shackled it.

Then science advanced, and the legislature challenged *Roe*'s viability line, restricting abortion after 20-weeks' gestation. 2012 Ariz. Sess. Laws ch. 250 (2nd Reg. Sess.). The law was quickly enjoined. *Isaacson v. Horne*, 716 F.3d 1213, 1231 (9th Cir. 2013). Undeterred, the legislature challenged *Roe* again, restricting abortion after 15-weeks' gestation. 2022 Ariz. Sess. Laws ch. 105. The legislature modeled this bill after a similar Mississippi law under review at the U.S. Supreme Court. AG Br. 10. And to clarify its intent, the legislature said it created no right to abortion and did not repeal § 13-3603. 2022 Ariz. Sess. Laws ch. 105, § 2. The legislature did everything it reasonably could to protect life under *Roe*.

Given this "historical sequence," only one interpretation makes sense. *Roberts*, 253 Ariz. at 267. Had the legislature done nothing, abortion would have been fully legal up to birth for 50 years, and it could now fully enforce § 13-3603. But because the legislature acted to protect life as much as *Roe* allowed, Respondents say § 13-3603 is limited. That's preposterous. Imagine the legislature had forbidden child labor before a

court declared a new constitutional right for the practice. Then the legislature responded by regulating child labor only in the most dangerous jobs—requiring parental consent, psychologist approval, and child welfare reports—but said it was creating no right to child labor and was not repealing the original prohibition. Now suppose the court reverses itself. On Respondent's logic, the legislature intended that children be allowed to work those dangerous jobs but not safer ones. That can't be right.

So too here. This Court presumes the legislature knew *Roe* allowed abortion when it enacted S.B. 1164. *See Daou v. Harris*, 139 Ariz. 353, 357 (1984) (This Court "presume[s] that the legislature … knows the existing laws" when it enacts a statute.). By intending "to restrict … elective abortion to the period up to fifteen weeks of gestation," 2022 Ariz. Sess. Laws ch. 105, § 3(B), the legislature did not allow abortions it had once restricted, *id.* § 2(1) (creating no "right to abortion"); it restricted abortions *Roe* had once allowed—just like it said. This Court should not interpret *Roe*-era regulations to restrict abortions—a forbearance forced upon the legislature—as showing express intent to *permit* abortions.

iii.

Third, Respondents suggest that § 13-3603 cannot coexist with Title 36's broader "regulatory scheme" providing consent, reporting, and other requirements related to terminations. AG Br. 12. But in developing that scheme, the legislature again said *those* rules created no right to

abortion. *E.g.*, A.R.S. § 36-2164; 2022 Ariz. Sess. Laws ch. 105, § 2 (S.B. 1164); 2021 Ariz. Sess. Laws ch. 286, § 17 (S.B. 1457); 2012 Ariz. Sess. Laws ch. 250, § 11 (H.B. 2036); 2011 Ariz. Sess. Laws ch. 9, § 4 (H.B. 2443); 2011 Ariz. Sess. Laws ch. 10, § 8 (H.B. 2416); 2010 Ariz. Sess. Laws ch. 111 (S.B. 1304); 2009 Ariz. Sess. Laws ch. 172, § 6 (H.B. 2564).

And like § 36-2322, these enactments did not repeal § 13-3603. 2022 Ariz. Sess. Laws ch. 105, § 2(2). By forbidding its repeal in S.B. 1164, the legislature accepted that § 13-3603 had not already been repealed. For good reason. Many Title 36 rules would apply to lawful terminations under § 13-3603. *E.g.*, A.R.S. § 36-449.02 (licensing requirements); § 36-2161 *et seq.* (reporting requirements); § 36-2153(C) (emergency consent requirement). And government imposes some rules mainly to aid primary enforcement. *E.g.* Sunita Lough, *How the IRS Ensures Compliance with the Tax Laws*, IRS (Dec. 17, 2020), https://tinyurl.com/y97rj3ua.

Respondents criticize this view, suggesting for example that physicians trying to save a mother's life "in compliance with § 13-3603 would be required to wait" 24 hours to "administer care in compliance with § 36-2153." PP Br. 13 n.7. That's false. Because § 13-3603 requires no waiting period, if "on the basis of the physician's good faith clinical judgment," a "medical emergency" exists as defined in § 36-2151 and the exception to § 13-3603 applies, then the termination may be performed immediately without waiting 24 hours. But if a medical emergency does not exist though the exception to § 13-3606 applies, then the termination may

occur after waiting 24 hours. In practice, the exceptions will often coincide. Respondents' criticism is unwarranted.

Regardless, state laws can overlap. A.R.S. § 13-116; *State v. Jones*, 235 Ariz. 501, 504 ¶13 (2014). "Concurrent remedies … often coexist successfully." *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 270-71 (1994). For example, "doctors and lawyers are subject to [both] administrative discipline [and] malpractice tort actions. Securities brokers and commodities traders … face both regulatory penalties and common-law actions by aggrieved investors." *Id.* The "potential for divergent results does not render" criminal, civil, and administrative remedies "mutually exclusive." *Id.* In fact, a concurrent "regime is surely preferable to" erasing key protections by judicial guesswork "about legislative intent." *Id.* at 274.

What's more, the legislature had good reason to keep concurrent regulations here. The U.S. Supreme Court had "provided no clear answer" to many abortion questions. *Dobbs*, 142 S. Ct. at 2273. Its lines drew considerable "confusion and disagreement." *Id.* And they were nearly impossible for courts to consistently apply. *See id.* at 2273-75. Indeed, there was "a long list of [lower court] conflicts." *Id.* at 2274. One day a rule was constitutional; the next day it wasn't. Given this instability, the legislature did well to regulate abortion through concurrent schemes. This better ensured that unborn life would be protected, whether *Roe* controlled, was curbed, or went away. The legislature covered its bases.

Petitioners do not seek to "effectively repeal dozens of Arizona statutes." PP Br. 9. They ask this Court to take the legislature's word: it created no right to abortion and did not repeal § 13-3603.

iv.

While the legislature is the master of its own statute, Respondents fault it for using some language, but not other language from another state's statute. Take the similar language first. The legislature adopted Mississippi's medical exemption in § 36-2322, and Respondents note this exemption is broader than § 13-3603's exemption. AG Br. 7-8. So Respondents manufacture a conflict. But that variation creates no right to abortion and does not repeal § 13-3603. 2022 Ariz. Sess. Laws ch. 105, § 2. In fact, there's good reason for it. *Dobbs* was pending. The legislature did not know whether Mississippi's law would be upheld based in part on its broader exemption. So the legislature took no chances—closely tracking the text under review. If Mississippi won, Arizona would too.

Respondents then criticize the legislature for *not* parroting other text. They say while § 13-3603 borrows from "Mississippi's 15-week law," it has no trigger provision and does not state, "[a]n abortion that complies with this [law], but that violates any other state law, is unlawful." Pima Br. 13; *see* PP Amicus Resp. 14; Miss. Code Ann. § 41-41-191(8) (2018). But this Court has "squarely rejected … that silence" reveals "legislative intent." *Sw. Paint & Varnish Co. v. Ariz. Dep't of Env't Quality*, 194 Ariz.

22, 26 (1999). And the legislature *added* other text: S.B. 1164 created no right to abortion and did not repeal §13-3603. 2022 Ariz. Sess. Laws ch. 105, § 2. This unique text shows the legislature knew it had § 13-3603 on the books, and that it fashioned S.B. 1164 to keep it there.

Legislatures across the country have used nearly identical text when regulating abortions but not sanctioning them. *E.g.* Ala. Code § 26-23A-12 ("Nothing in this chapter shall be construed as creating or recognizing a right to abortion."); Idaho Code Ann. § 39-9507 (same); Okla. Stat. Ann. tit. 63, § 1-757.14 (similar); Mont. Code Ann. § 50-20-511 (similar); N.H. Rev. Stat. Ann. § 329:41 (similar); Kan. Stat. Ann. § 65-6715 (similar). Neb. Rev. Stat. Ann. § 28-347.06 (similar). As it had repeatedly done before, the Arizona legislature followed this majority approach and did one better—specifically directing courts not to repeal § 13-3603. 2022 Ariz. Sess. Laws ch. 105, § 2. The legislature can protect § 13-3603 without copying Mississippi. Its own words work just as well.

Consider also that if the legislature had mimicked Mississippi, stating "[a]n abortion that complies with this [law], but violates any other state law, is unlawful," Miss. Code Ann. § 41-41-191(8), that text would call § 36-2322 *itself* into doubt. Section 13-3603 is "state law." 2022 Ariz. Sess. Laws ch. 105, § 2(2). It's unclear whether or how *Nelson*'s injunction would affect such a disclaimer. By copying Mississippi, the legislature would have risked canceling § 36-2322's protections. And while Respondents add, "If the legislature intended for § 13-3603 to preempt" later

"abortion laws if *Roe* were overturned, it easily could have said so," AG Br. 9-10, the reverse is also true. If the legislature intended to limit § 13-3603, it "could have said so." So consider what it *did* say: S.B. 1164 does not repeal § 13-3603. 2022 Ariz. Sess. Laws ch. 105, § 2(2). Full stop.

v.

Finally, the legislature has said Arizona laws "shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state, subject only to the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court." A.R.S. § 1-219(A). This rule directs that Arizona laws "acknowledge the equal rights" of unborn children. *Isaacson v. Brnovich*, 610 F. Supp. 3d 1243, 1248, 1251 (D. Ariz. 2022). Respondents' interpretation of Title 36 contradicts this rule—allowing the unjustified killing of unborn human lives when Arizona laws would forbid such injustice against those outside the womb. *See* Br. of Center for Ariz. Policy 4-7; *see also* Ariz. Const. art. II, § 13.

Respondents suggest this text is "purely symbolic." PP Amicus Resp. 14-15 n.2. But this Court views statutes "as a whole" to "give meaningful operation to all of [their] provisions." *Columbus Life*, 532 P.3d at 760 ¶11. And while § 1-219 is preliminarily enjoined as to some applications, it fully applies here. The injunction forbids "enforcing A.R.S. § 1-

219 *as applied* to abortion[s]" that are "*otherwise permissible* under Arizona law." *Isaacson*, 610 F. Supp. 3d at 1257 (emphasis added). It does not enjoin courts from applying § 1-219 when interpreting Arizona's abortion laws. *See id.* at 1248. This Court should apply it here.

C. Harmonization is improper.

While Title 36 and § 13-3606 do not conflict, no matter how this Court decides that issue, it should still vacate the injunction below. Harmonization is improper both substantively and procedurally.

Take substance first. When statutory "language is unambiguous," this Court applies it "*without resorting to secondary statutory interpretation principles*." *Glazer v. State*, 244 Ariz. 612, 614 ¶ 9 (2018) (emphasis added). Respondents' theory assumes Title 36 conflicts with § 13-3603. *See* AG Br. 1 ("apparent statutory conflict"); PP Br. 11 ("apparent conflict"); Pima Br. 9 ("apparent conflicts"); PP Amicus Resp. 6 ("apparent conflict"). But there's no conflict. § II.A-B, *supra*. So harmonization is improper. *See UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 329-30 ¶¶ 11-12 (2001) ("If a statute is … unambiguous, we generally apply it without using other means of construction" but "[w]hen an ambiguity or contradiction exists . . . we attempt to … interpret[ ] the statutory scheme as a whole" and "harmonize their language to give effect to each.").

Respondents say their interpretation—which creates a right to abortion and repeals § 13-3603—is compelled by canons requiring

"harmonization" and preferring the "more recent and more specific of the two statutes." PP Amicus Resp. 2, 11. But no canon can be invoked to do precisely what the legislature has forbidden—limiting § 13-3603. 2022 Ariz. Sess. Laws ch. 105, § 2; Scalia & Garner, *supra*, at 59; § II.A-B. Or, put another way, the legislature did not *imply* a repeal it *expressly* prohibited. *See Tunkey*, 524 P.3d at 818 (Bolick, J., concurring); *Schatz*, 198 P.3d at 1119 (repeal occurs when new law limits scope of earlier one); *Nat'l Ass'n of Home Builders*, 551 U.S. at 664 n.8 (looking past labels).

Respondents would limit the wrong statute. While Petitioners can marshal helpful legislative history, *e.g.* Leg. Br. 10 (sponsor statement explaining S.B. 1164 seeks "to save many more lives"); Governor's Letter dated Mar. 30, 2022 re: S.B. 1164 ("In Arizona, we will continue to protect life to the greatest extent possible."), https://tinyurl.com/2x76pezp; show why Arizona "wins the prize" for being the most pro-life state, Linda Greenhouse, *The Abortion Map Today*, New York Times (Apr. 14, 2016), https://tinyurl.com/df543c7v; *see, e.g.*, Br. of Center for Ariz. Policy 4-7 (ensuring equal rights for unborn children); and provide other indicia of legislative intent, going tit for tat with Respondents' own evidence, *e.g.*, PP Br. 2, 14-15; Pima Br. 6, here the Court need not decide whether Title 36 can fully apply given § 13-3603's precedence. It need only lift the injunction below, declare that Title 36 cannot limit § 13-3603, and allow future courts to decide which Title 36 regulations still apply. In fact, that analysis is better done in an as-applied challenge anyway.

Turn then to procedure. Rule 60(b) imposes no limitation on the relief that the court may grant, *see* Ariz. R. Civ. P. 60(b), and when the conditions of Rule 60(b) are satisfied, the trial court has discretion to vacate the judgment completely. *E.g., State v. Ornelas*, 15 Ariz. App. 580, 583 (1971). Further, because *Roe* alone required the original injunction, *Nelson*, 19 Ariz.App. at 152, the trial court reasonably vacated the full injunction based solely on reversed precedent.

Conversely, the appeals court went too far. Its reversal went outside "the issues formed by the pleadings." *Wall v. Super. Ct. of Yavapai Cnty.*, 53 Ariz. 344, 354 (1939). And it gave more than the pleadings "asked for." *Id.* at 355. The trial court correctly noted that Respondents' request for modification *did not relate* to the constitutionality of § 13-3603 itself, which was the sole ground for relief alleged in the underlying Complaint. The trial court also observed that Respondents' request for modification involved laws not in existence when the Complaint was filed, so the parties had no notice and an opportunity to litigate those issues below. Yet the appeals court overreached and granted an unlitigated, unclaimed remedy anyway. That alone warrants reversal.

So, this Court should vacate in full the injunction below. Limiting § 13-3603 in any way is procedurally and substantively improper.

CONCLUSION

This Court should reverse and remove the injunction below.

Respectfully submitted this 20th day of September, 2023.

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