ARIZONA COURT OF APPEALS

DIVISION TWO

PLANNED PARENTHOOD ARIZONA, INC., et al.,

Appellants,

v.

MARK BRNOVICH, Attorney General of the State of Arizona, et al.,

Appellees,

And

ERIC HAZELRIGG, M.D., as guardian ad litem of unborn child of plaintiff Jane Roe and all other unborn infants similarly situated,

Intervenor.

No. 2 CA-CV-2022-0116

Pima County Superior Court No. C127867

APPELLANT PIMA COUNTY ATTORNEY'S REPLY BRIEF

LAURA CONOVER
PIMA COUNTY ATTORNEY
Samuel E. Brown (No. 027474)
Jonathan Pinkney (No. 025689)
32 North Stone Ave.
Tucson, AZ 85701
(520) 724-5700
Sam.Brown@pcao.pima.gov
Jonathan.Pinkney@pcao.pima.gov
Attorneys for Appellant Laura Conover, Pima County Attorney

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Constitutional Provisions

INTRODUCTION

"No person shall be deprived of life, liberty, or property without due process of law." Ariz. Const. art. II, § 4. The Attorney General (AG) Reply cites to the Arizona Constitution selectively: "[a] frequent recurrence to fundamental principles … is essential to … the perpetuity of free government.'" [AG Answering Brief at 1]. The full text reads, "[a] frequent recurrence to fundamental principles is essential to **the security of individual rights and** the perpetuity of free government." Ariz. Const. art. II § 1 (emphasis added). Consistent with this omission is the AG's failure to respond to the Pima County Attorney's due process arguments.[1] The *security of individual rights*, including the fundamental right to know what activities are prohibited, is essential to the perpetuity of free government. While the AG claims to understand how the present statutory scheme regulating abortion fits together, no one else apparently does. As documented in this appeal, if legislators, legal scholars, county attorneys, the AG, and the Governor's office do not understand clearly what conduct is prohibited, how can we expect Arizonans of ordinary intelligence to know what acts are prohibited? The AG sidesteps due process notice requirements by

[1] To satisfy due process, "statutes must be sufficiently clear and concrete that they provide person[s] of ordinary intelligence a reasonable opportunity to know what is prohibited and contain explicit standards application so as to prevent arbitrary and discriminatory enforcement." *Martin v. Reinstein*, 195 Ariz. 293, 317 (App. 1999).

citing "prosecutorial discretion" as the solution to overlapping and conflicting criminal statutes. [AG Answering Brief at 2.] The Arizona Constitution demands more.

Where prohibited conduct is unclear due to conflicting language between statutes, Courts must harmonize the law to resolve the conflicts between statutes – courts are not limited to ambiguity within a single statute. Statutory ambiguity within a single statute is not a prerequisite for the harmonization of conflicting statutes.

In their answering briefs, the AG and Dr. Hazelrigg simultaneously argue that abortion is *prohibited by statute* as intended by the Legislature and *allowed by statute* as intended by the legislature.[2] Just as these arguments contradict one another, so too do Arizona's abortion statutes. Arizona courts must seek to harmonize conflicting statutes wherever possible to effectuate legislative intent.

Here, the Legislature intended the statutory scheme regulating abortions to limit abortions to those conducted by licensed physicians up to 15-weeks gestation, or at any time to protect a pregnant person's life or to protect a pregnant person's health, as is consistent with PPAZ's proposed harmonization. The Legislature intended to allow abortions under the above-referenced specified conditions through

[2] *See* Hazelrigg Answering Brief at 19 ("none of the laws contain language affirmatively permitting abortion…") and AG Answering Brief at 45-46 ("nothing in the text of Arizona's criminal prohibitions of abortion 'allows' any abortion"); compared with AG Answering Brief at 3 ("abortion is still permitted under § 13-3603's exception, and thus other abortion regulations apply").

its use of permissive language and by way of reasonable inference. It is not reasonable to assume that the Legislature intended to enact a statutory scheme that included contradicting bans on abortion: a total ban and a 15-week ban; an exception expressly permitting legal abortions to protect a pregnant person's health alongside the criminalization of abortions performed to protect a pregnant person's health. And, if that had been the Legislature's intent, this Court is required to resolve the statutory contradictions not only for disagreeing prosecutorial agencies who are parties to this case but also – and more importantly – for the people of Arizona who have a right to know what conduct is prohibited under the Arizona Constitution. *See* *Martin v. Reinstein*, 195 Ariz. 293, 317 (App. 1999).

PPAZ's proposed modification accomplishes the required harmonization to resolve said conflicts. We will show that this Court may also utilize implicit repeal as to scope as an alternative form of harmonization to effectuate legislative intent.

ARGUMENT

Courts must harmonize conflicting statutes "whenever possible… ." *Estate. of Hernandez*, 177 Ariz. at 249. Facial ambiguity is not a threshold for harmonization, and this Court must consider the statutory scheme as a whole where contradictions between laws exist. Here, Arizona's abortion laws are in direct conflict with each other: one refers to any person, others refer to licensed physicians; one criminalizes abortions to protect a pregnant person's health; others permit

abortions to protect a pregnant person's health; one includes a total ban, regardless of gestational age; another allows abortions up to 15-weeks gestational age. But one thing is clear: the Arizona Legislature intended to, and did, include *permissive* language within the statutory scheme to allow abortions under certain circumstances. These circumstances include abortions performed by licensed physicians, limited by Title 36 to abortions performed up to 15-weeks gestation, and those performed to protect the life of the pregnant person, or to protect the health of the pregnant person. Affirming the trial court's decision to lift the injunction without modification would do violence to the legislative intent behind these laws.

A. Facial Ambiguity is not a Threshold for Harmonization.

"If a statute is clear and unambiguous, we generally apply it without using other means of construction. When an ambiguity or contradiction exists, however, we attempt to determine legislative intent by interpreting the statutory scheme as a whole… ." *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 330 (2001). Here, and as in *UNUM*, two statutes were contained in separate titles: one in the probate code and another in the insurance code.[3] *Id.* at 329. Two parties made a claim for the same insurance proceeds: one under the probate code statute; the other under the insurance code statute. *Id*. Neither statute was alleged to be facially ambiguous.

[3] Here, we are addressing a 50-year-old statute from the criminal code (Title 13) and multiple modern statutes contained in the public health and safety code (Title 36).

Still, the Arizona Supreme Court considered harmonization because conflict existed and "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." *Id.* at 333. Thus, when two statutes apply to the same set of facts with the potential for conflicting outcomes, the courts must harmonize.

The AG and Dr. Hazelrigg assert that unless a law is ambiguous on its face, courts should never harmonize conflicting laws – even where contradictions between two separately unambiguous statutes create liberty-threatening ambiguity. *See* Hazelrigg Answering Brief at 16-18; AAB at 40. If the text of a statute is ambiguous, then a court may consider related statutes and adopt an interpretation that is harmonious with the statutory scheme and legislative intent. *See Metzler v. BCI Coca-Cola Bottling Co. of L.A.*, 235 Ariz. 141, 144–45 ¶ 13 (2014). However, that does not mean courts should never harmonize conflicting laws where ambiguity exists between, rather than within, statutes. The primary issue here is the confusion and ambiguity created from the direct conflict between statutes.

Well-established case law requires courts to harmonize conflicting statutes, or even statutes that *appear* to conflict, "whenever possible…" *UNUM Life Ins. Co. of Am.*, 200 Ariz. at 333, ("[W]hen 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.") (2001) (citing *Lewis v. Ariz. Dep't of Econ. Sec.*, 186 Ariz.

610, 614 (App.1996); *see also* *Chaparral Dev. v. RMED Int'l, Inc.*, 170 Ariz. 309, 313 (App.1991) (courts must endeavor to construe statutes to avoid conflict and give effect to each provision). There is no precedent for the proposition that Arizona courts must harmonize conflicting statutes "whenever possible" but only if the conflicting statutes are facially ambiguous.

B. Arizona's Abortion Statutes are in Direct Conflict

The AG asserts that "under § 13-3603, statutes regulating how and by whom an abortion is perform [sic] still have application. Thus, there is no conflict…" [AG Answering Brief at 3]. The medical emergency exceptions include permissive language that allows abortions in one of two scenarios: when an abortion is necessary to preserve the life of the mother or when an abortion is necessary to preserve the health of the mother. *See* A.R.S. § 36-2301.01(A)(1)("A physician shall not knowingly perform an abortion of a viable fetus unless: 1. The physician states in writing before the abortion is performed that the abortion is necessary to preserve the life **or** health of the woman."). The term "Medical emergency" is consistently defined as "a condition that, on the basis of the physician's good faith clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of the pregnancy to avoid the woman's death or for which a delay will create serious

risk of substantial and irreversible impairment of a major bodily function." § 36-2301.01(C)(2).[4]

The Arizona Legislature expressly intended to allow abortions both to save a pregnant person's life and to protect a pregnant person's health at any time during a pregnancy. By separating these conditions, the Legislature acknowledges two distinct scenarios under which an abortion is allowed at any time by law. Any person, or any physician, of ordinary intelligence would take away from these exceptions that performing an abortion to prevent a serious risk of substantial and irreversible impairment of the major bodily function of a pregnant person is not illegal, and thus carries no risk of losing one's liberty and being charged with a felony. But, any person, or any physician, of ordinary intelligence could only take away from § 13-3603 that performing such an abortion could result in a maximum sentence of up to five years.

If the AG is correct that the exceptions outline the contours of permissive abortions in Arizona, then are at least two clear conflicts. First, § 13-3603 allows abortions in only one instance (to protect a pregnant person's life), while Title 36 laws allow abortions in at least two instances (to protect a pregnant person's life or

[4] *See also* A.R.S. § 36-2151, "'Medical emergency means a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function."

their health). Second, other than to protect life, § 13-3603 prohibits abortions at any time; § 36-2322 permits abortions up to 15-weeks gestation.

"A criminal law violates one's right to due process if it is 'so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.'" *State v. Francisco*, 249 Ariz. 101, 104 (App. 2020).

The AG's position regarding the interpretation of these statutes is in direct conflict with the position of Governor Doug Ducey[5]. [ROA 77, Ex 1](noting that just weeks ago, the AG's office wrote to the Governor's office pleading for the Governor to "call a special session of the Arizona Legislature so that legislators may have an opportunity to give additional clarity about our abortion laws."). The AG's position of purported clarity and lack of conflict is itself in conflict with the conclusion of legal scholars, and the County Attorneys of Arizona's two largest counties, Maricopa and Pima [ROA 77 at 2-3 and *Id*. Ex 1]. The appropriate remedy for resolving these conflicts in light of the entire statutory scheme is harmonization.

C. The Language of the Statutes Evinces Intent to Allow Abortions

"'Our goal in interpreting statutes is to ascertain and give effect to the intent of our legislature,' and the plain language of the statute is the best and most reliable

[5] This is not an inconsequential conflict. Under the Arizona Constitution, the Attorney General is second only to the Secretary of State in the line of succession to the Office of Governor. *See* Ariz. Const. art. V, § 6.

indicator of that intent." *State v. Lockwood*, 222 Ariz. 551, 553 ¶ 4 (App. 2009) (quoting *State v. Garcia*, 219 Ariz. 104, ¶ 6 (App. 2008))." [Hazelrigg Answering Brief at 11-12].

The AG asserts there is no conflict between § 13-3603 and other abortion statutes because, "abortion is still permitted under § 13-3603's exception" [AG Answering Brief at 3].[6] If §13-3603's exception allows abortions, then exceptions in the other abortion statutes also allow abortions. Thus, these permissive exceptions conflict directly with the AG's statement that "nothing in the text of Arizona's criminal prohibitions of abortion 'allows' ***any*** abortion." *[Id.*, emphasis added].

On the other hand, also according to the AG, permissive exceptions allowing abortions exist both in § 13-3603 and in the statutes cited by PPAZ. *See* [AG Answering Brief at 39] ("licensed physicians can still perform abortions under A.R.S. § 13-3603's exceptions[7],…)" and *see* [AG Answering Brief at 33] ("[t]he Arizona Legislature has enacted at least four statutes prohibiting abortion, *with exceptions*, at various stages of pregnancy."). The AG goes on to list those exceptions, including an exception for medical emergencies in § 36-2301.01 (the

[6] After stating that the exception allows abortions, the AG later includes a subsection titled, "None Of The Statutes PPAZ Cites 'Allow' Abortion." [AG Answering Brief at 44].

[7] §13-3603 includes only one *exception* – to protect life. The other abortion statutes include two exceptions, as discussed below, to protect life or to protect health.

prohibition "does not apply if there is a medical emergency"), A.R.S. § 36-2159(B) ([e]xcept in a medical emergency, a person shall not knowingly perform…), and A.R.S. § 36-2322(B)([e]xcept in a medical emergency, a physician may not intentionally or knowingly perform…). [*Id*.].

The Legislature intended both to prohibit abortion in certain circumstances (e.g. beyond 15-weeks gestation), and to permit abortions in other circumstances (e.g. up to 15-weeks gestation, and to protect life, and to protect health). Appellee Hazelrigg cites *UNUM Life Ins. Co. of Am.*, 200 Ariz. 327 to argue against the permissive nature of the 15-week ban stating, incorrectly, that "courts harmonize the 'language' in separate statutes, not their silence." [Hazelrigg Answering Brief at 21]. *UNUM* says no such thing and, in fact, says the opposite: if "neither the statute's text nor the statement of legislative intent resolves the exact issue before us, 'we must resolve any ambiguity by considering the legislature's overall purposes and goals in enacting the body of legislation in question.'" *UNUM Life Ins. Co. of Am.*, 200 Ariz. at 330 (quoting *Ariz. Life & Disability Ins. Guar. Fund v. Honeywell, Inc.*, 190 Ariz. 84, 87 (1997)).

D. The Legislature Intended to Limit Abortions to Licensed Physicians Under the Express Limitations Contained in Title 36.

"In addition, we are guided by the rule that '[s]tatutes must be given a sensible construction that accomplishes the legislative intent and which avoids

absurd results.'" *State v. Gonzales*, 206 Ariz. 469, 471–72, 80 (App. 2003) citing *Ariz. Health Care Cost Containment Sys. v. Bentley*, 187 Ariz. 229, 233 (App. 1996).

PPAZ's proposed harmonization makes clear what is permitted: licensed physicians are permitted to perform abortions in a manner consistent with Title 36 statutes. Appellees' position – lifting the injunction without modification – is not so much wrong as it is nonsensical, as it produces absurd results. Both Appellees describe in detail their belief that overlapping violations are not in conflict, but both conspicuously avoid addressing the elephant in the room: Title 36 permits abortions to protect a pregnant person's health while § 13-3603 criminalizes the exact same act. This is a plainly absurd result that this Court should not countenance. It is unreasonable to conclude that the legislature intended for "any person" to be permitted to perform an abortion to save the life of a pregnant person. But according to the AG, the exception to § 13-3603 is permissive, and §13-3603 applies to "any person." A plain language reading of that statute suggests that "any person" is subject both to the law's prohibition and to its exception.

E. Implicit Repeal.

The AG and the Pima County Attorney have concurrent jurisdiction to prosecute crimes in Pima County. *Compare* A.R.S. § 11-532 *with* § 41-193(A). The

AG initiated this action to seek relief, for both himself and the County Attorney, "from prospective application of the declaratory and injunctive relief in the Second Amended Final Judgment as applied to § 13-3603." (S*ee* ROA 3 at 3). According to the AG, however, the County Attorney "does not have standing" to appeal the recent Order because it "neither denies a right to the PCA nor imposes a burden," and because, allegedly, no substantial rights have been affected. [AG Answering Brief at 53.] In the AG's July 2022 Motion for Relief, he argued the change in law caused by the *Dobbs* decision:

> "'affect[ed] substantial rights of a litigant'" *Edsall*, 143 Ariz. at 243. There are two classes of litigants in this action whose substantial rights are affected. First, the Attorney General and Pima County Attorney are enjoined from taking any action to enforce § 13-211, a duly-enacted statute of the Arizona Legislature. When prosecutors act to enforce state law they act on behalf of the state to enforce its sovereign interests in carrying out its criminal laws. … Erroneously depriving a State of the ability to enforce its laws, even for a brief period, is a form of irreparable injury. [citations omitted]

[ROA 3 at 11.] The Trial Court's decision in this matter affects substantial rights of the County Attorney. Its refusal to modify, or to even consider modifying, the injunction has resulted in confusion and ambiguity that deprives the County Attorney of her ability to enforce the law. [ROA 29 at 2:12-16.] The County Attorney was once enjoined by trial court ruling from enforcing a duly enacted statute, § 13-211 (renamed to § 13-3603). It is now hamstrung by the Trial Court from enforcing a number of duly enacted, conflicting statutes in a manner that is more burdensome than the 1973 injunction underlying the present action. Currently,

the County Attorney is both burdened by conflicting laws that unduly complicate prosecutorial charging analyses, and by the lack of notice present in the existing statutory scheme which increases the likelihood of future civil litigation by plaintiffs asserting constitutional due process violations for prosecutions of any of the aforementioned statutes. In 1972, at least, ordinary citizens were on notice of prohibited conduct.

This Court has discretion to consider arguments even if waived. *See* *State v. Smith*, 203 Ariz. 75, 79, ¶ 12 (2002). The County Attorney has acknowledged that SB 1164 did not, by its language, repeal the language of § 13-3603. It is appropriate to exercise this Court's discretion to consider an alternative form of harmonization, implied repeal in scope, on a question of law that affects the entire state, not just the parties involved. *See* *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 7, ¶ 24 (2013) ("Although the finding of an implied repeal or amendment is generally disfavored, it is *required* when conflicting statutes cannot be harmonized to give each effect and meaning.")

The County Attorney is not seeking to partially repeal any language included in § 13-3603. The County Attorney cites *Mead, Samuel & Co. v. Dyar*, 127 Ariz. 565 (App. 1980) because it provides a mechanism for implicit repeal in scope in rare and extraordinary case, like the present case, "[w]here the repealing effect of a statute is doubtful" and a court may construe a statute "to effectuate its consistent

operation with previous legislation." [PCAO Opening Brief at 23-24] This Court can, consistently with *Mead* and settled canons of statutory interpretation,

> "superimpose a construction of consistency that will ensure that the citizens of Arizona can rely on the published statutes, without impacting the interpretation of the statutes themselves: [by finding] section 13-3603 to be implicitly repealed in scope such that it cannot be interpreted and applied in isolation, but instead must be read in conjunction with Title 36 abortion statutes so [the entire scheme is] given "consistent operation."

Id. at 24. *See also* 1A SUTHERLAND STATUTORY CONSTRUCTION § 23:9 (7th ed.) ("In the course of enacting legislation, then, subsequent enactments can declare an intent to repeal preexisting laws without mention or reference to such laws. . . Consequently, when two statutes are repugnant in any of their provisions, the later act, even without a specific repealing clause, operates to the extent of the repugnancy to repeal the first.")

CONCLUSION

For all these reasons and those stated in her opening brief, the Pima County Attorney respectfully requests that this Court reverse the Trial Court's order and remand to the trial court to enter a modified judgment consistent with PPAZ's harmonization proposal (that § 13-3603 does not apply to abortions

provided by licensed physicians) or, in the alternative, that §13-3603 is implicitly repealed in scope as applied to Title 36 abortion statutes, as described above.

RESPECTFULLY SUBMITTED November 17, 2022

LAURA CONOVER
PIMA COUNTY ATTORNEY

By: */s/ Samuel Emiliano Brown*
Samuel E. Brown (SBN 027474)
Chief Civil Deputy County Attorney
Jonathan Pinkney (SBN 025689)
Deputy County Attorney
32 N. Stone, Suite 2100
Tucson, AZ 85701
Telephone (520) 724-5700
Firm No. 00069000
Attorneys for Appellant Laura Conover
Pima County Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14, Arizona Rules of Civil Appellate Procedure, I certify that the attached brief was prepared using a proportionately spaced typeface known as Times New Roman with a point size of 14, with double line spacing, except for single spaced footnotes and quotes; and that it contains 3734 words as determined by the word count function on the word processing system used to prepare the brief.

RESPECTFULLY SUBMITTED: November 17, 2022.

LAURA CONOVER
PIMA COUNTY ATTORNEY

By: */s/ Samuel Emiliano Brown*
Samuel E. Brown (SBN 027474)
Chief Civil Deputy County Attorney
Jonathan Pinkney (SBN 025689)
Deputy County Attorney
32 N. Stone, Suite 2100
Tucson, AZ 85701
Telephone (520) 724-5700
Firm No. 00069000
Attorneys for Appellant Laura Conover
Pima County Attorney

CERTIFICATE OF SERVICE

I hereby certify that, on November 17, 2022, Appellant Laura Conover electronically filed her Opening Brief with the Court of Appeals, Division Two, via the Arizona Court of Appeals, Division Two e-filer program to the email addresses on file with the Court and sent a copy of the same via email to the following:

Stanley Feldman
sfeldman@mpfmlaw.com
Miller Pitt Feldman & McAnally PLC
One Church Avenue, Suite 1000
Tucson, Arizona 85701
Attorneys for Plaintiffs/Appellee

Michael S. Catlett
michael.catlett@azag.gov
Kate B. Sawyer
kate.sawyer@azag.gov
Katlyn J. Divis
katlyn.divis@azag.gov
Assistant Attorneys General
Office of the Arizona Attorney General
2005 North Central Avenue
Phoenix, Arizona 85004
Attorneys for Defendant/Appellee Mark Brnovich
Attorney General State of Arizona

Kevin Theriot
ktheriot@adflegal.org
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260
Attorneys for Eric Hazelrigg, M.D., as guardian ad litem of unborn child of Plaintiff Jane Roe and all other unborn infants similarly situated

David Andrew Gaona
agaona@cblawyers.com
Kristen Yost
kyost@cblawyers.com
Coppersmith Brockelman PLC
2800 N. Central Ave., Ste. 1900
Phoenix, AZ 85004
Attorneys for Plaintiffs/Appellant Planned Parenthood Arizona, Inc.

Diana O. Salgado
diana.salgado@ppfa.org
Planned Parenthood Federation of America
1110 Vermont Ave., NW, Suite 300
Washington, D.C. 20005
Attorneys for Plaintiffs/Appellant Planned Parenthood Arizona, Inc.

Sarah Mac Dougall
sarah.macdougall@ppfa.org
Planned Parenthood Federation of America
123 William Street, 9th Floor
New York, NY 10038
Attorneys for Plaintiffs/Appellant Planned Parenthood Arizona, Inc.

By: */s/Sandra Tokin*