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

INTERVENORS/APPELLEES' RESPONSE TO AMICUS BRIEFS

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INTRODUCTION

Arizona has protected unborn human life longer than it has been a state. 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* right to abortion, made *no* unlawful abortion legal, and did *not* repeal § 13-3603. Yet *amici* now say that Title 36 allows abortions § 13-3603 forbids. Some dismiss the legislature's directives as "irrelevant." Others never mention them. But those directives define and limit Title 36.

Amici argue that their counterintuitive interpretation is compelled by canons requiring "harmonization" and preferring the more "recent" and "specific" statute. But *amici*'s race to canons tramples the text. The legislature's express directives forbid these outcomes. The legislature enacted Title 36 to apply *alongside* § 13-3603, allowing prosecutors to enforce both laws. This path is legal and logical, accounting for abortion's unusual and litigious regulatory history.

Accordingly, this Court should reverse and remove the injunction below. The lives of thousands of unborn children depend on it.

ARGUMENT

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 *not* to create a right to abortion, to legalize otherwise unlawful abortions, or to repeal § 13-3603, this Court should vacate the injunction below. *See* Intervenors/Appellees' Suppl. Br.

I. 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 after *Roe*. *E.g.*, *State v. Boozer,* 80 Ariz. 8 (1955*)*; *Hightower v. State*, 62 Ariz. 351 (1945). No one disputes that § 13-3603 regulates physicians.

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

Amici contend that § 13-3603 now unambiguously *exempts* physicians. *See* Br. of Amici Curiae Law Professors (Law Professors Br.) 5, 15, 18; Br. of Amicus Curiae Ariz. Att'ys for Criminal Justice (AACJ Br.) 6-7. Like Respondents, *amici* say "Section 13-3603 bans non-emergency abortions outright, while Title 36 permits physicians to perform non-emergency abortions in certain cases, up to 15 weeks of gestation." Law Professors Br. 5-6; *accord* The Attorney General's Suppl. Br. (AG Br.) 2-5; Suppl. Br. of Pl.-Appellant Planned Parenthood Ariz., Inc. (PP Br.) 5-10. But those laws do not conflict. Title 36 *reaffirms* § 13-3603.

A. *Amici* disregard Title 36 construction directives.

Amici disregard Title 36 construction directives. They say these directives are "irrelevant" to how Title 36 "must be read." Law Professors Br. 7. But courts do not interpret statutes to negate legislative directives. *E.g.*, *S. Ariz. Home Builders Ass'n*, 522 P.3d at 676 ¶ 31. "If the legislature agrees on findings, purposes, or definitions," or otherwise limits how statutes must be interpreted, this Court should "ascertain statutory meaning" through those directives. *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).

Here, the legislature enacted multiple rules for interpreting Title 36. First, the legislature 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."). Because the legislature did not define "repeal," this Court "may look to dictionaries." *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 524 (2021). A "repeal … terminat[es] … the effect of a statute." *Repeal of Statute*, Ballentine's Law Dictionary (3d ed. 1969); *accord Repeal*, Black's Law Dictionary (11th ed. 2019) (A repeal "abrogat[es] … an existing law."). It can be full or partial and 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 Wood v. United States*, 41 U.S. 342, 362-63 (1842); *United States v. Tackett*, 113 F.3d 603, 608 (6th Cir. 1997). So however S.B. 1164 is construed, the result cannot limit § 13-3603.

Second, the legislature repeatedly directed courts *not* to interpret Title 36 as creating "or recogniz[ing] a right to an abortion." A.R.S. § 36-2164; 2022 Ariz. Sess. Laws ch. 105, § 2(1) (2nd Reg. Sess.) (S.B. 1164); 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). Again, because the legislature did not define the term "right," this Court may again consult dictionaries.

Welch, 251 Ariz. at 524. Simply put, a "right" is the "privilege of doing something." *Right*, Ballentine's Law Dictionary (3d ed. 1969); *accord Right*, Black's Law Dictionary (11th ed. 2019).

Because the legislature did not say "constitutional right," "fundamental right," or otherwise limit the type of right it did not create, this Court should interpret "right" according to its plain meaning. *See S. Ariz. Home Builders Ass'n*, 522 P.3d at 676-77 ¶ 31. In other words, by enacting Title 36, the legislature created no negative right to perform an abortion. A negative right "entitle[s] a person to have another," such as the government, "refrain from doing an act that might harm the person entitled." *Right*, Black's Law Dictionary (11th ed. 2019). Per this legislative directive, Title 36 does not authorize physicians to perform abortions without facing prosecution under § 13-3603. Regardless of how Title 36 is construed, the result cannot legally sanction abortion.

Third, the legislature repeatedly directed courts *not* to interpret Title 36 as legalizing any "abortion that is currently unlawful." *E.g.*, 2022 Ariz. Sess. Laws ch. 105, § 2(1) (2nd Reg. Sess.) (S.B. 1164); 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); *see* A.R.S. § 36-2164 ("This article does not … make lawful an abortion that is otherwise unlawful."). "Unlawful" means

"illegal," *Unlawful*, Black's Law Dictionary (11th ed. 2019), or more specifically, "actions that violate statutory law." *Unlawful*, Cornell Law School, Legal Information Institute, https://tinyurl.com/twz6vyc7. However Title 36 is construed, the result cannot legalize abortions the legislature had made illegal under another statute—including § 13-3603.

Some may say that because § 13-3603 was enjoined, no abortions it regulated were "unlawful" when Title 36 regulations were adopted. But that view confuses "unlawful" and unenforceable. In context, "unlawful" describes "actions that violate statutory law." *Id*. The legislature accepted that § 13-3603 still made abortion unlawful by reaffirming it in Title 36. 2022 Ariz. Sess. Laws ch. 105, § 2(1) (2nd Reg. Sess.). Sure, *Roe* required Arizona courts to temporarily stop executive officials from enforcing § 13-3603, but that ruling did not make abortions regulated by § 13-3603 lawful; it made § 13-3603 unenforceable. "A court that enjoins the *enforcement* of a statute has not enjoined or revoked the statute itself." Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 948 (2018). The "statute continues to exist as a law until it is repealed by the legislature that enacted it." *Id.* at 941. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1991 (2021) (Gorsuch, J., concurring); *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., concurring); *Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020).

"Judicial pronouncements of unconstitutionality … are temporary." Mitchell, *supra*, at 941. While a court may "announce its opinion that the

statute violates the Constitution, decline to enforce the statute in cases before [it], and instruct executive officers not to initiate enforcement proceedings," *id.*, this interference lasts "only as long as the judiciary adheres to its belief that the statute violates the Constitution," *id.* at 942. So a statute should never be "regarded as 'blocked,' 'struck down,' 'nullified,' rendered 'void,' or 'invalidated' by" judicial non-enforcement rulings. *Id.* at 944; *accord Seila*, 140 S. Ct. at 2220 (Thomas, J., concurring); *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020).

In fact, unless an affirmative defense prevails, "those who violate the statute while the injunction is in effect can be subject to … penalties if the injunction is vacated on appeal or by a future court." Mitchell, *supra*, at 948. So abortions regulated by § 13-3603 have always been "unlawful"—even while *enforcement* of § 13-3603 has been enjoined.

What's more, this Court should interpret the phrase "is currently unlawful" to include *when the court is construing the statute*. 2022 Ariz. Sess. Laws ch. 105, § 2(1) (2nd Reg. Sess.). "Words in the present tense include the future as well as the present." A.R.S. § 1-214(A). These words are in the act's "Construction" section. 2022 Ariz. Sess. Laws ch. 105, § 2(1) (2nd Reg. Sess.). And in context, the legislature is enacting concurrent schemes regulating abortion, expressly creating no right to abortion nor repealing § 13-3603. Intervenors/Appellees' Suppl. Br. 14. By saying Title 36 legalizes no "abortion that is currently unlawful," the legislature meant that Title 36 legalizes no abortion that is unlawful when the

statute is applied. Respondents accept that a similar Mississippi provision means this—suggesting Petitioners would be correct had the legislature said, "An abortion that complies with this section, but violates any other state law, is unlawful." AG Br. 17. So too here. No matter how Title 36 is construed, it cannot legalize abortions that § 13-3603 restricts.

Because Title 36 creates no right to abortion, makes no unlawful abortion lawful, and does not limit § 13-3603, it does not conflict with § 13-3603. It's that simple. *See* Intervenors/Appellees Suppl. Br. 6-9.

B. Title 36 allows nothing that A.R.S. § 13-3603 restricts.

Like Respondents, *amici* reject this logic—first by ignoring it. They say § 36-2322 expressly allows abortions restricted by § 13-3603. *See* Law Professors Br. 5-6; AG Br. 2-5; PP Br. 5-10. Because § 36-2322 regulates "physicians performing [non-emergency] abortions after fifteen weeks," *amici* say the statute "implies" other abortions are allowed. Law Professors Br. 11 (citing PP Br. 6-9). But that provision simply limits when § *36-2322's* penalties apply; it does not limit § 13-3603, nor could it, given the legislature's express directives. The legislature did not *imply* a repeal it *expressly* prohibited, nor did it create a right to abortion or make lawful any abortion that § 13-3603 makes unlawful. *See* 2022 Ariz. Sess. Laws ch. 105, § 2. These directives control Title 36 construction.

Amici read Title 36 construction directives exactly backward. They say these directives are "irrelevant" because Title 36 "explicitly …

permit[s]" abortions regulated by § 13-3603. Law Professors Br. 6-7. But courts do not interpret statutes inconsistent with legislative directives. *S. Ariz. Home Builders Ass'n*, 522 P.3d at 676–77 ¶ 31; *Tunkey*, 524 P.3d at 818 (Bolick, J., concurring). For example, if a statute forbids "parking a vehicle beside a road except in an emergency," and the legislature defines "vehicle" to mean "motorized conveyances," parking a bicycle beside the road is not prohibited no matter whether this statute otherwise appears to regulate bicycles. Now say the legislature also directed courts to construe this statute so as to "never take effect." Though unusual, and though critics would say it renders the statute "meaningless," this directive requires courts to punish *no one* for parking beside a road. Legislative directives define and limit a statute's plain meaning.

This logic shows why Respondents' parking and dishwashing analogies fails. Take parking first. Respondents juxtapose two Phoenix ordinances regulating physician parking at hospitals:

Ordinance No. 123 (adopted 1977)	Ordinance No. 456 (adopted 2022)
A person may not park a motorized vehicle of any kind on any public roadway located within 500 feet of a hospital unless they are operating an emergency vehicle. A person who violates this ordinance commits a class 1 misdemeanor.	A person may not part a motorized vehicle of any kind on any public roadway located within 500 feet of a hospital unless they are (1) operating an emergency vehicle or (2) a physician employed by the hospital parked there between 6:00 AM and 6:00 PM. A person who violates this ordinance commits a class 3 misdemeanor.

PP Br. 1. These ordinances are inapposite because they lack legislative directives limiting their interpretation. Imagine that, after Ordinance No. 123 was adopted, a new constitutional rule required physician parking on equal terms as emergency vehicles between 6:00 AM and 6:00 PM. Next, imagine Ordinance No. 456 was enacted while clarifying that "this ordinance creates no right to physician parking," "makes no unlawful parking lawful," and "does not repeal Ordinance No. 123." When a court later reverses the constitutional rule requiring physician parking, physicians can no longer park within 500 feet of a hospital. The full statutory context makes this clear.

Now turn to dishwashing. If a parent says, "You may not play video games unless you load the dishwasher," Respondents contend that "any child would understand that she *may* play video games once she loads the dishwasher." AG Br. 5. Again, this rule vastly differs from Title 36 because it lacks limiting directives. Imagine instead that this parent had previously said, "No video games, period." But after a new constitutional amendment required parents to allow children to play video games after loading the dishwasher, the parent issued the new rule while clarifying that said rule "creates no right to play video games," "makes no forbidden video game playing allowed," and "does not repeal my prior rule restricting video games." When the new constitutional amendment is later repealed, video games are no longer allowed. Respondents and *amici* both err by ignoring legislative directives that prohibit what they advance.

C. A.R.S. § 13-3603 applies alongside Title 36.

Like Respondents, *amici* say Petitioners' interpretation "would leave vast swathes of Arizona's abortion laws meaningless." Law Professors Br. 13 (citing AG Br. 9-15). Not so. Petitioners' interpretation construes Title 36 as the legislature directed, ensuring that concurrent schemes regulate Arizona abortions. Intervenors/Appellees' Suppl. Br. 14. *Amici*'s fears are unwarranted.

First, *amici* say Title 36 reporting requirements would be meaningless if "saving the life" of the mother "is the only legal reason to perform an abortion." Law Professors Br. 13 (citing § 36-2161(A)(12)). But § 36-2164 says, "This article does not establish or recognize a right to an abortion and does not make lawful an abortion that is otherwise unlawful." Again, the legislature did not *imply* that which it *expressly* prohibited. And those reporting rules retain meaning. Health data is a public concern. And government often uses reporting rules to aid primary enforcement. The Internal Revenue Service, for example, requires individuals to report income from "illegal activities" such as "dealing illegal drugs." *Publication 17* at 73, Internal Revenue Service (2022), https://tinyurl.com/24cmaah2. The reporting rules also allow facilities to list *any* reason for reportable abortions—lawful or unlawful. *E.g.* A.R.S. 36-2161(A)(12)(b)(v). The legislature can require reports on abortions without legalizing reportable abortions.

Second, *amici* say Title 36's informed consent rules would be meaningless if terminations to save a mother's life "qualify as 'a medical emergency.'" Law Professors Br. 13. But informed consent is required even when the mother's life is threatened and a medical emergency exists, *if the exigency allows*. *See* Parth Shah et al., *Informed Consent*, Nat'l Libr. of Med. (June 5, 2023), https://tinyurl.com/3pfcbmbm (excepting emergencies "with inadequate time to obtain consent"); A.R.S. § 36-2158(A) ("A person shall not perform or induce an abortion without first obtaining the voluntary and informed consent of the woman on whom the abortion is to be performed.").

To be sure, informed consent does not require in an "emergency" the notices in § 36-2158(1)-(3) or the 24-hour wait and ultrasound in § 36-2156(A)(1). But the abortion need not be legal for those rules to apply. And critically, the legislature also said these rules do "not establish or recognize a right to abortion" or "make lawful an abortion that is currently unlawful." 2011 Ariz. Sess. Laws ch. 10 (H.B. 2416); 2012 Ariz. Sess. Laws ch. 250 (H.B. 2036); 2021 Ariz. Sess. Laws ch. 286 (S.B. 1457). The legislature can protect women from illegal abortions by requiring their informed consent.

Third, *amici* say § 13-3603.02's prohibition on discriminatory abortions would be meaningless if terminations to save a mother's life "qualify as 'a medical emergency.'" Law Professors Br. 13. Again, not so. As in the provisions above, *amici* assume this provision cannot be violated because

no abortion it regulates is legal under § 13-3603. While that may decrease the likelihood of someone offending § 13-3603.02, it does not make offending that provision *impossible*. Government need not assume all physicians will obey § 13-3603. And government often regulates differently-motivated conduct differently. Section 13-3603.02 is not meaningless just because it is less likely to be violated when § 13-3603 applies—conflicts arise over impossibilities, not improbabilities. Besides, the legislature also said *this* law "does not establish or recognize a right to an abortion" or "make lawful an abortion that is currently unlawful." 2011 Ariz. Sess. Laws ch. 9, § 4 (H.B. 2443); 2021 Ariz. Sess. Laws ch. 286, § 17 (S.B. 1457). *Amici* repeatedly disregard key legislative directives.

Fourth, *amici* incorporate Respondents' contention that § 36-2152's judicial bypass rules would be meaningless if § 13-3603 restricted all non-life-threatening abortions. *See* Law Professors Br. 13 (citing AG Br. 9-15). But § 36-2152 does not allow courts to permit unlawful abortions. It allows courts to determine when minors may consent to lawful terminations without parental consent. And while this provision will unlikely be invoked while § 13-3603 applies, the legislature has repeatedly said it too "does not establish or recognize a right to an abortion" or "make lawful an abortion that is currently unlawful." 2011 Ariz. Sess. Laws ch. 10, § 8 (H.B. 2416); 2012 Ariz. Sess. Laws ch. 250, § 11 (H.B. 2036). To reiterate, the legislature doesn't *imply* an interpretation it *expressly* forbids. Like other Title 36 rules, § 36-2152 concurrently applies *alongside* § 13-3603.

In sum, *amici* mistake oddity for absurdity. But that which "may seem odd … is not absurd." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005). Text is absurd only if two conditions are met. First, the challenged text "must consist of a disposition that no reasonable person could intend." Scalia & Garner, *supra*, at 237. "To be able to find fault with a law is not to demonstrate its invalidity." *Metropolis Theater Co. v. City of Chi.*, 228 U.S. 61, 69 (1913). As Justice Story said, for a text's plain meaning to be disregarded, the "absurdity and injustice of applying" the text must be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." 1 Joseph Story, *Commentaries on the Constitution of the United States* § 427, at 303 (2d ed. 1858). That can't be said for upholding § 13-3603's plain meaning here.

Second, the remedy for purported absurdity requires correcting an obvious "technical or ministerial error." Scalia & Garner, *supra*, at 238; *accord* Michael S. Fried, *A Theory of Scrivener's Error*, 52 Rutgers L. Rev. 589, 607 (2000). "The doctrine does not include substantive errors" causing unusual effects. Scalia & Garner, *supra*, at 238. Here, there is no error. For one, the legislature had good reason to enact concurrent abortion regulations. The U.S. Supreme Court had "provided no clear answer" to many abortion questions. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2273 (2022). Its lines drew considerable "confusion and disagreement." *Id.* And they were nearly impossible for courts to apply

consistently. *See id.* at 2273-75. Given this instability, the legislature understandably covered its bases.

Also, the doctrine "is meant to correct obviously *unintended* dispositions, not to revise purposeful dispositions that, in light of other provisions of the applicable code, make little if any sense." Scalia & Garner, *supra*, at 239; *e.g., Chung Fook v. White*, 264 U.S. 443 (1924) (upholding immigration law exemption from detention for the wife and children of naturalized citizens, while denying it to those of native citizens). In other words, because *amici* show no "impossibility" of applying § 13-3603 beside Title 36, this Court should uphold its plain "meaning," no matter whether *amici* believe the legislature made "a [policy] mistake." *State Tax Comm'n v. Television Servs., Inc.*, 108 Ariz. 236, 239 (1972).

Rightly construed, Title 36 fully reaffirms § 13-3603. *Amici* reject this only because they reject Title 36 construction directives.

D. Other statutes support reaffirming A.R.S. § 13-3603.

This rejection shows why *amici*'s fears about *other* state laws are similarly misplaced. *Amici* assume Title 36 allows abortions because "everything which is not forbidden is allowed." AACJ Br. 7. But § 13-3603 restricts non-life-threatening abortions. And Title 36 does not allow abortions restricted by § 13-3603 because the legislature repeatedly directed courts to interpret its provisions *not* to do so. These directives distinguish

Title 36 from other statutes lacking such directives, including those regulating homicide, marijuana, and justification defenses.

Start with homicide. Per *amici*, second-degree murder and manslaughter share identical elements except manslaughter requires the homicide to be "committed in a heat of passion upon sudden provocation by the victim." *Id.* at 7-8. So they interpret manslaughter to limit second-degree murder. But the manslaughter rule vastly differs from Title 36. Imagine that after second-degree murder was prohibited, a new constitutional rule required an exception for homicides committed in a heat of passion upon sudden provocation of the victim. Then, the manslaughter statute was enacted stating, "this statute creates no right to manslaughter," "makes no unlawful homicide lawful," and does not limit second-degree murder. Later, when a court reverses the constitutional rule, individuals would know the manslaughter exception no longer applies. This additional statutory text and context makes all the difference.

Next, consider justification. *Amici* say that while "assault is prohibited," § 13-403(5) says the "use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal" when a "'duly licensed physician or a registered nurse or a person acting under his direction' provides medical care with consent or in emergency situations." AACJ Br. 8-9. But this text supports Petitioners, not *amici*. Title 36 vastly differs from § 13-403(5). Title 36 does not say "performing an abortion which would otherwise constitute an offense is

justifiable and not criminal" when a "duly licensed physician performs it in non-emergency cases after 15 weeks' gestation." It says the opposite—directing courts to construe Title 36 *not* to create a right to abortion, legalize unlawful abortions, or repeal § 13-3603. *E.g.*, 2022 Ariz. Sess. Laws ch. 105, § 2. If anything, § 13-403(5) shows the legislature knew how to make Title 36 trump § 13-3603 but chose not to do so.

Finally, marijuana statutes also differ from Title 36. Section 13-3405(A)(1) prohibits the possession or use of marijuana. After Arizonans enacted § 36-2852 allowing medical marijuana, § 13-3405(A)(1) remained unchanged but was understood to "broadly immunize[ ] qualified patients" from prosecution for certain marijuana offenses. *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, 122 ¶¶ 7-8 (2015). Again, this text supports Petitioners, not *amici*. Imagine that after § 13-3405(A)(1) was enacted, a new constitutional rule required allowing medical marijuana. Then, § 36-2852 was enacted, stating, "this law creates no right to medical marijuana," "makes no unlawful marijuana use lawful," and "does not repeal § 13-3405(A)(1)." When a court later reverses that constitutional rule, individuals would know medical marijuana is no longer legal. As in the examples above, the vastly different text leads to a different outcome.

Arizona abortion law is unique. Title 36 construction directives ensure that Title 36 legalizes no abortion that § 13-3603 restricts.

E. Harmonization is improper.

Because Title 36 reaffirms § 13-3603, harmonization is improper. 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) (citation omitted). *Amici* assume Title 36 conflicts with § 13-3603. *E.g.*, Law Professors Br. 6 (Title 36 and § 13-3603 "appear to conflict"); *accord* AACJ Br. 9; Amicus Curiae Br. of the Fam. & Juv. Law Ass'n, Univ. of Ariz., James E. Rogers Coll. of L. 12. But there's no conflict. 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.").

Amici say their interpretation—which creates a right to abortion, makes unlawful abortions lawful, and repeals § 13-3603—is compelled by canons requiring "harmonization" and preferring the more "recent" and "specific" statute. Law Professors Br. 5, 10; *accord* AACJ Br. 4. 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. Or, put another way, the legislature did not *imply* a repeal it *expressly* prohibited. *See S. Ariz. Home Builders Ass'n*, 522 P.3d at 676-77 ¶ 31; *Tunkey*, 524 P.3d at 818 (Bolick, J., concurring); *Schatz*, 198 P.3d

at 1119 (repeal occurs when new law limits even the scope of an earlier one); *Wood*, 41 U.S. at 362-63; *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007) (looking past labels).

And while the legislative history supports Petitioners' interpretation, *see* Intervenors/Appellees' Suppl. Br. 11-12, 19; this Court should not look beyond enacted text, *see Tunkey*, 524 P.3d at 817 (Bolick, J., concurring). Here, Title 36 construction directives define and limit Title 36. *E.g.*, 2022 Ariz. Sess. Laws ch. 105, § 2; *see S. Ariz. Home Builders Ass'n*, 522 P.3d at 676-77 ¶ 31. It doesn't matter what Title 36 would mean if the legislature had not provided those directives (Law Professors Br. 7), passed laws it didn't (AG Br. 17-18; Pima Cnty. Atty's Suppl. Br. 16), or used different text entirely. (AACJ Br. 7-10). Title 36's *actual* text reaffirms § 13-3603.

III. A.R.S. § 13-3603 satisfies due process.

Amici suggest that removing the injunction would violate due process because different prosecutors could make different enforcement decisions. AACJ Br. 11 (suggesting concurrent enforcement "would create a patchwork of differing enforcements and punishments depending on the caprice of any particular elected official"). But *amici* mistake uncertain enforcement for an uncertain law. The law is sufficiently definite: Title 36 reaffirms § 13-3603. §§ I-II, *supra*. So prosecutors may choose "which offense to charge" among those available, *State v. Lopez*, 174 Ariz.

131, 143 (1992), when they do not discriminate against a class of people, *State v. Montano*, 204 Ariz. 413, 428 ¶ 78 (2003).

Overlapping criminal prohibitions are common and constitutional. Pet. for Review 7-10. Physicians have no right to know in advance the charges they will face, only that their conduct is illegal. *See State v. Schmidt*, 220 Ariz. 563, 565 ¶5 (2009); *State v. Murphy*, 113 Ariz. 416, 418 (1976). No matter whether different prosecutors will enforce the law differently, AACJ Br. 12, prosecutors who refuse to enforce § 13-3603 cannot manufacture due-process concerns with an otherwise constitutional statute. In fact, derelict prosecutors risk violating the constitution themselves. *Cf. United States v. Texas*, 143 S. Ct. 1964, 1973 (2023) (distinguishing good-faith prosecutorial discretion from "wholly abandon[ing] … statutory responsibilities to … bring prosecutions"); *see* Br. of Amici Curiae Speaker of the Ariz. House of Representatives Ben Toma & President of the Ariz. Senate Warren Petersen 11-16.

The legislature was clear: Title 36 creates no right to abortion, legalizes no unlawful abortion, and does not repeal § 13-3603.

CONCLUSION

Section 13-3603 prohibits abortion, and in later enactments, the Legislature unambiguously directed courts not to construe those enactments as superseding § 13-3603. Accordingly, this Court should reverse and remove the injunction below.

Respectfully submitted this 18th day of October, 2023.

By: */s/ Jacob P. Warner*

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