**SUPREME COURT OF ARIZONA**

| | |
|---|---|
| PLANNED PARENTHOOD ARIZONA, INC., et al.,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>KRISTIN K. MAYES, Attorney General of the State of Arizona, et al.,<br><br>Defendants/Appellees,<br><br>and<br><br>ERIC HAZELRIGG, M.D., as guardian ad litem of all Arizona unborn infants,<br><br>Intervenor/Appellee. | Supreme Court<br>No. CV-23-0005-PR<br><br>Court of Appeals<br>Division Two<br>No. 2 CA-CV 2022-0116<br><br>Pima County<br>Superior Court<br>No. C127867<br><br>[FILED WITH THE WRITTEN CONSENT OF ALL PARTIES] |

**BRIEF OF CENTER FOR ARIZONA POLICY AS *AMICUS CURIAE* IN SUPPORT OF INTERVENOR/APPELLEE'S PETITION FOR REVIEW**


Steven H. Aden*
**AMERICANS UNITED FOR LIFE**
1150 Connecticut Ave., NW, Suite 500
Washington, DC 20036
(202) 741-4917
steven.aden@aul.org

Samuel D. Green (No. 032586)
**REASON FOR LIFE**
P.O. Box 500040
Palmdale, CA 93550
(661) 524-5770
sgreen@reasonforlife.org

*Application for *pro hac vice* admission forthcoming

*Attorneys for Amicus Curiae Center for Arizona Policy*

## TABLE OF CONTENTS

## TABLE OF CITATIONS

**Cases**



**Statutes and Constitutional Provisions**

**Legislative Materials**



**Other Authorities**

## INTEREST OF *AMICUS CURIAE*

Center for Arizona Policy (CAP) is a pro-life, not-for-profit organization that engages in legal and public-policy efforts. CAP advocated for the adoption of certain laws at issue here and seeks to ensure that Arizona law is interpreted properly.

## INTRODUCTION

*Roe v. Wade* was an "abuse of judicial authority" and "egregiously wrong from the start." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022). For five decades, Arizona suffered *Roe*'s "damaging consequences." *Id.* It still is—because of the lower court's decision here.

To advance "the right to life," Arizona law has always existed to protect unborn children from abortion. *Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. App. 142, 144 (1973). Specifically, the law prohibits anyone from providing "a pregnant woman" with an elective abortion—i.e., one that is not "necessary to save her life"—at *any* stage of pregnancy. A.R.S. § 13-3603.[1] But that protective law became unenforceable under an injunction that rested on *Roe* alone. *Nelson*, 19 Ariz. App. at 152.

Rather than let the injunction cause unregulated abortion until the moment of birth, the legislature—though shackled by *Roe*—acted to decrease *Roe*'s harms.

[1] Arizona's abortion prohibition was found at A.R.S. § 13-211 before the legislature recodified it at § 13-3603. 1977 Ariz. Sess. Laws ch. 142, § 99 (1st Reg. Sess.).

Most recently, the legislature added protections for children after fifteen weeks' gestation while emphasizing that it was not repealing § 13-3603.

Now that *Roe* is finally gone, § 13-3603 should be fully enforceable again. Yet in a cruel twist, the lower court held that the legislative acts to save lives under *Roe* now prevent § 13-3603 from protecting children from conception.

That erroneous decision blinded itself to the context of the legislative acts under *Roe*, ignored a rule of statutory construction, disregarded plain language of legislative intent to protect children from conception, and gutted § 13-3603 in a judicial rewrite that defies common sense. Because of these errors, Arizona physicians are continuing to perform abortions through fifteen weeks' gestation—likely ending the lives of around 13,000 children *each year*.[2] Review is needed to correct this deadly injustice, restore legislative authority, and stop a faulty judicial opinion from perpetuating *Roe*'s harms.

## REASONS TO GRANT THE PETITION

After *Roe*, most states repealed their laws protecting unborn children from abortion.[3] Not Arizona. Instead, with "a legislative goal of protecting the fetus," the

[2] In Arizona, "[a]bout 94% [(13,072)] of abortions" performed on residents in 2021—the year before the fifteen-week law—occurred at "15 or fewer weeks." Ariz. Dep't of Health Servs., *Abortions in Arizona: 2021 Abortion Report* 17 (Dec. 31, 2022), https://bit.ly/3pxPFkf.

[3] *Compare Dobbs*, 142 S. Ct. at 2253 (noting that when *Roe* was decided, thirty states "prohibited abortion at all stages except to save the life of the mother"), *with*

legislature "continue[d] to re-enact statutes criminalizing abortion"—including § 13-3603. *See Summerfield v. Superior Ct.*, 144 Ariz. 467, 476 (1985). And just months before *Dobbs* overturned *Roe*, the legislature emphasized that it was *not* repealing § 13-3603 via its fifteen-week law. 2022 Ariz. Sess. Laws ch. 105, § 2 (2d Reg. Sess.).

But now that *Roe* no longer governs, the lower court insists that § 13-3603 remains unenforceable in almost all instances. Why? Because of the legislative efforts to mitigate *Roe*'s "damaging consequences." *Dobbs*, 142 S. Ct. at 2243.

Recall that the legislature had two choices under *Roe*: allow the abortion free-for-all that *Roe* created or seek to *limit* abortion. Eliminating elective abortion was not an option; Arizona's law doing precisely that was already enjoined. Even Arizona's modest attempt to prohibit most abortions after twenty weeks failed in court. *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013).

Rather than account for those realities, the lower court concluded that the "complex regulatory scheme" the legislature enacted while tiptoeing around *Roe* showed that the legislature's *intent* was "to restrict—but not to eliminate—elective abortions." *Planned Parenthood Ariz., Inc. v. Brnovich*, 254 Ariz. 401, ¶ 16 (App. 2022) ("Op."). But in reality, the regulatory scheme merely reflected the judicial

---

Paul Blumenthal, *These States Will Ban Abortion Now That Roe Is Overturned*, HUFFPOST (June 14, 2022), https://bit.ly/3I3jWOy ("Eight states have pre-*Roe* abortion bans still on their books . . . .").

decree binding the legislature: "the state may *regulate* . . . abortion prior to fetal viability," but "may not *proscribe*" it. *Isaacson*, 716 F.3d at 1217.

By wrongly equating the stop-gap measures necessitated by the unjust injunction of § 13-3603 with the legislature's long-term *intent*, the lower court reasoned that it could not allow § 13-3603 to have the effect it did before *Roe*. Op. ¶¶ 16-17. But this flawed reasoning overlooks overwhelming evidence establishing the legislature's intent to protect children *from conception* if permitted by the U.S. Supreme Court.

## I. The decision below violates § 1-219's requirement that Arizona law be interpreted to protect unborn children.

### A. The lower court ignored a binding rule of statutory construction.

In 2021, the legislature enacted A.R.S. § 1-219, "a rule of statutory construction . . . directing that all other provisions of Arizona law be interpreted to acknowledge the equal rights of the unborn." *Isaacson v. Brnovich*, 610 F. Supp. 3d 1243, 1248, 1251 (D. Ariz. 2022). Specifically, § 1-219 requires Arizona law to "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." § 1-219(A) (emphasis added).

This rule is "subject only" to the U.S. Constitution and "interpretations thereof by the United States Supreme Court." *Id.* Thus, with *Dobbs* declaring that "the Constitution does not confer a right to abortion," 142 S. Ct. at 2279, Arizona's

abortion laws must be interpreted to protect unborn children "at every stage of development," § 1-219(A).

But the lower court interpreted Arizona law to allow almost all elective abortions. Sanctioning this taking of innocent life contrary to the plain language of § 13-3603's abortion prohibition is the opposite of acknowledging that unborn children have the same "rights, privileges and immunities" that older children and adults enjoy. § 1-219(A); *see also* Ariz. Const. art. II, § 13 ("No law shall be enacted granting to any citizen . . . privileges or immunities which, upon the same terms, shall not equally belong to all citizens . . . .").

Although some may argue that the lower court could not look to § 1-219 because it is preliminarily enjoined, § 1-219 is fully applicable here. The federal district court that issued the preliminary injunction was aware of the dispute about § 13-3603 and noted that abortions necessary to save a mother's life would "remain lawful" even if § 13-3603 became fully enforceable. *See Isaacson v. Brnovich*, 610 F. Supp. 3d at 1254. Even as to those abortions, the court worried that § 1-219 denied abortion providers "fair notice" regarding whether they may face liability under *other* statutes, like those prohibiting "assault, child endangerment, and child abuse." *See id.* at 1254-55.

Given this concern, the court preliminarily enjoined the *defendants* from "enforcing A.R.S. § 1-219 *as applied* to abortion[s]" that are "*otherwise*

*permissible* under Arizona law." *Id.* at 1257 (emphasis added). It did not enjoin courts from following § 1-219's rule of construction when interpreting Arizona's abortion laws. *See id.* at 1248 (noting that the plaintiffs did *not* seek an injunction of § 1-219 "in all its applications").

If this Court grants review and relies on § 1-219 to hold that § 13-3603 prohibits elective abortion, physicians will be on notice. And if a plaintiff in *Isaacson* performs an abortion that is necessary to save a mother's life, the preliminary injunction will prevent prosecutors from using § 1-219 to argue that the plaintiff should be charged under any statute that does not govern abortion directly.

### B. Section 1-219 establishes the legislature's intent to protect unborn children at all gestational ages.

Beyond governing as a rule of statutory construction, § 1-219 also serves as evidence of the legislature's intent for Arizona law to protect unborn children at *all* stages of development. While deliberating about S.B. 1164 (the fifteen-week law) and its statement that it was not repealing § 13-3603, *see infra* Section II, the legislature was very aware of § 1-219—which was *not* preliminarily enjoined then. After all, the legislature had just adopted § 1-219 the prior year. *Cf. Est. of Hernandez v. Ariz. Bd. of Regents*, 177 Ariz. 244, 250 (1994) (noting that "[w]e do not assume so easily that the legislature was unaware of its own actions" in "just the previous year").

In fact, Senator Nancy Barto, the primary sponsor of both § 1-219 and S.B. 1164, reminded her colleagues of this rule of construction as they considered S.B. 1164. As she put it, "life is a human right, and Arizona law already requires state laws to be interpreted to value all human life." *Hearing on S.B. 1164 Before the Ariz. H. Comm. on Judiciary*, 55th Leg., 2d Reg. Sess., at 09:45 (Mar. 9, 2022), https://bit.ly/42Zl8Ku; *see also Hearing on S.B. 1164 Before the Ariz. S. Comm. on Judiciary*, 55th Leg., 2d Reg. Sess., at 02:53 (Feb. 3, 2022) [hereinafter *Hearing*] (statement of Sen. Barto), https://bit.ly/3MonmxN (similar).

Standing alone, § 1-219 establishes that the legislature intended § 13-3603 to resume its protection of unborn children *of all ages* once free of *Roe*'s constraints. Had the legislature instead wished for the outcome imposed by the lower court—the elective ending of children's lives through fifteen weeks' gestation, Op. ¶¶ 16, 26—it would not have adopted a rule designed to protect unborn children "at every stage of development," § 1-219(A). And had the legislature grown hostile to the plight of the youngest unborn children in the year since adopting § 1-219, Senator Barto's reminders regarding that rule of statutory construction would have prompted the legislature to explicitly modify or repeal § 13-3603 via S.B. 1164 or another bill. It did the opposite.

Review is needed to remedy the lower court's violation of § 1-219's rule of construction and statement of legislative intent.

## II. The lower court's decision to allow most elective abortions violates the legislative intent to protect life expressed in S.B. 1164 and § 13-3603.

While considering S.B. 1164 in early 2022, the legislature knew that the U.S. Supreme Court might soon overturn *Roe* entirely *or* decline to overturn *Roe* while still upholding a Mississippi law prohibiting most abortions after fifteen weeks.

If the Court fully overturned *Roe*, § 13-3603 was on the books to protect unborn children from conception just as it had before it was enjoined under *Roe*. But if the Court instead traveled a middle road—upholding Mississippi's fifteen-week law while declining to overturn *Roe*—all pre-viability abortions in Arizona would likely continue. *See* A.R.S. § 36-2301.01 (prohibiting most abortions after viability). So to avoid leaving children unprotected who could be saved under an intermediate decision, the legislature enacted S.B. 1164, prohibiting most abortions after fifteen weeks. A.R.S. §§ 36-2321 to -2326; *cf. Hearing*, *supra* at 40:30 (testimony of Cathi Herrod) (explaining that the Court might "uphold Mississippi [law] and not overturn *Roe v. Wade*," and "this law will ensure that . . . the lawmakers have taken the steps to protect human life after fifteen weeks . . . .").

### A. The legislature proclaimed its intent for § 13-3603 to return to full effect by naming it in S.B. 1164's statement of non-repeal.

The legislature could have passed S.B. 1164 without referencing § 13-3603 and still reasonably believed that § 13-3603 would resume its function of

protecting unborn children of all ages if *Roe* fell. After all, the sole reason for the injunction (*Roe*) would be absent, the legislature never repealed § 13-3603 (but instead recodified it), and "[t]he law does not favor construing a statute as repealing an earlier one by implication." *Est. of Hernandez*, 177 Ariz. at 249.

But with the potential overturning of *Roe* on the horizon, the legislature sought to avoid any doubt that it desired § 13-3603 to become fully enforceable again. Thus, S.B. 1164 went beyond simply saying that it was not repealing *any* "applicable state law regulating or restricting abortion." 2022 Ariz. Sess. Laws ch. 105, § 2 (2d Reg. Sess.). Its statement of non-repeal also referenced *one law* specifically—§ 13-3603. *Id.*

### B. While considering S.B. 1164, legislators were reminded that § 13-3603 would prohibit abortion from conception if *Roe* fell.

S.B. 1164's non-repeal clause and § 1-219's rule of construction show that the legislature expected § 13-3603 to prohibit physicians from performing elective abortions at all stages of pregnancy if *Roe* were overturned.[4] That is confirmed by what the legislators were told as they considered S.B. 1164.

[4] Some of the parties point to statements by former Governor Ducey to argue that § 13-3603 no longer prohibits all elective abortions. *See, e.g.*, Appellant Pima County Att'y's Resp. to Pet. for Review 6. But on the day Governor Ducey signed S.B. 1164, he explained that "there is immeasurable value in *every* life" and that Arizona would "continue to protect life *to the greatest extent possible*." Letter from Douglas A. Ducey, Ariz. Governor, to Katie Hobbs, Ariz. Sec'y of State (Mar. 30, 2022), https://bit.ly/41EVQAv (emphasis added). That day-of-signing statement

For example, Cathi Herrod, an attorney who serves as president of *Amicus Curiae* Center for Arizona Policy, testified before a Senate Committee that "if the Court overturns *Roe*, . . . our pre-*Roe* law outlawing abortion except to save the life of the mother *would go into effect*. But if the Court does not overturn *Roe*, then [S.B. 1164] will . . . protect human life after fifteen weeks . . . ." *Hearing*, *supra*, at 40:30. At that same hearing, Senator Barto also referred to § 13-3603, mentioning "our underlying bill that bans abortion." *Id.* at 38:59.

Senator Barto referenced § 13-3603 on the Senate floor as well. For instance, in replying to a question about the absence of an exception in S.B. 1164 for abortions in cases of rape or incest, Senator Barto explained that "[w]e have an underlying bill with that same policy, and so this just follows the state's protection and desire to protect all life . . . ." *Deb. on S.B. 1164 Before the Ariz. S.*, 55th Leg., 2d Reg. Sess., at 22:50 (Feb. 15, 2022), https://bit.ly/3Ibdh4V; *see also id.* at 01:06:48 (statement of Sen. Barto) (noting a 2021 change to "our pre-*Roe* underlying bill that is in effect now and would go into effect if *Roe* is overturned" that removed penalties for mothers who obtain abortions).

Even parties now supporting the lower court's erroneous decision once believed that *Roe*'s demise would result in § 13-3603 protecting children from conception. For example, Attorney General Mayes' campaign released "legal

---

aligns with the intent expressed in S.B. 1164 and § 1-219 to protect children from conception if possible.

analysis" that referenced Arizona's passage of S.B. 1164 and warned that "Arizona also has pre-*Roe* abortion bans that *would* penalize *doctors* for providing abortions."[5] And an article about S.B. 1164 noted Planned Parenthood Arizona's communications manager's view that "the only reason abortions are accessible in the state of Arizona is because of *Roe v. Wade*. . . . If it is overturned . . . then essentially [abortion] will become illegal again."[6]

Put simply, both the legislature and various abortion supporters believed that if *Roe* were overturned, § 13-3603 would prohibit physicians from performing elective abortions from conception. If the legislature did not desire that outcome, it would have acted to prevent it. It did not. To the contrary, the legislature declared its intent to preserve § 13-3603 even after being told that it would prohibit all elective abortions if *Roe* were overturned. That intent must be given effect.

## III. The lower court gutted § 13-3603, leaving it to prohibit only conduct that the legislature already prohibited under *Roe*.

Despite holding that § 13-3603's prohibition of *all* elective abortions cannot stop physicians from performing abortions through fifteen weeks—more than 90%

---

[5] Kris Mayes for Ariz., *Attorney General Candidate Kris Mayes' Plan for Protecting and Retaining Reproductive Rights—Including the Right to an Abortion—in Arizona After the Fall of Roe v. Wade*, https://bit.ly/41DyfAe (last visited May 22, 2023) (emphasis added) (a link to the document is also available at https://krismayes.com/reproductive-rights).

[6] Madison Thomas, *Bill Banning Most Abortions After 15 Weeks Passes Arizona Senate, Heads to the House*, CRONKITE NEWS (Feb. 24, 2022), https://bit.ly/43dBNuj.

of abortions in 2021—the lower court insisted that it was "not imposing an implied repeal" of § 13-3603. *See* Op. ¶¶ 23, 26; *supra* note 2. In its view, allowing § 13-3603 to govern non-physicians gave "vitality" to the statute. Op. ¶¶ 19, 23. But this problematic claim asks us to assume the absurd—that the legislature chose to maintain § 13-3603 *only* to do what the legislature had already done under *Roe*.

Recall that § 13-3603 was fully enjoined when the legislature took care to specify that S.B. 1164 was not repealing it. That must mean that the legislature hoped that a future change in precedent would allow § 13-3603 to accomplish *something* the legislature could not accomplish under *Roe*. That something was not punishing non-physicians for performing abortions. Indeed, Arizona law already bars non-physicians from providing abortions. A.R.S. §§ 36-2155(A), -2160(A).

In other instances of "judicial clarifications and divinations of legislative meaning," Arizona courts have "applied common sense to prevent absurdity." *Summerfield*, 144 Ariz. at 473 & n.3. But here, the lower court chose to rewrite § 13-3603 to do nothing more than forbid what the legislature could—and did—prohibit while *Roe* was in effect. Review is needed to correct this egregious error and give effect to § 13-3603's plain language and the legislative intent to protect children from conception. *See Kyle v. Daniels*, 198 Ariz. 304, 306 ¶ 7 (2000) ("We cannot amend a statute judicially, and we cannot read implausible meaning into express statutory language.").

## IV. Absent review, judicial fiat will replace legislative action, perpetuating *Roe*'s harms and costing the lives of thousands of children annually.

This case involves more than plain error on a matter of significant public importance. Under *Roe*'s unjust dictates, America endured "more than 63 million abortions," and now the tragedy continues in Arizona under the lower court's decision. *See Dobbs*, 142 S. Ct. at 2303 (Thomas, J., concurring).

Because the victims suffer their brutal demise while hidden within a womb, many overlook the gravity of the situation. We must not. To that end, it is helpful to consider facts about some of the children who will face death by abortion absent this Court's intervention.

When a child reaches a gestational age of twelve weeks—still three weeks away from receiving protection given the lower court's holding—he will look much like the child depicted in the illustration below. Mayo Clinic, *Fetal Development: The 1st Trimester* (June 3, 2022), https://mayocl.in/3nOucTU.

His digestive system has started to function, and he will curl his toes when something touches the bottom of his feet. Charlotte Lozier Inst., *12 Facts at 12 Weeks* (Apr. 25, 2023), https://bit.ly/3MuABgw. He yawns, stretches, and uses his fingers—which can each move separately—to explore his environment. *Id.* His favorite thumb-sucking hand is a strong indicator of whether he is right- or left-handed. *Id*. And his heart, which has already beat over 10 million times, pumps about 1.5 gallons of blood daily. *Id.*

The legislature recognized that this child—and younger and older children—deserve protection and all the "rights, privileges and immunities available to other . . . residents of this state." § 1-219(A). But the lower court ignored the legislature's directives and decided to deny countless unborn children the most basic right—the right to life.

In Arizona, before someone is deprived of the right to life for committing a heinous crime, this Court *will* review her case. A.R.S. §§ 13-755 to -756. And if she is pregnant, her execution will be postponed to preserve her unborn child's right to life. *See* A.R.S. §§ 13-4025 to -4026. The thousands of innocent children who will die each year at the hands of physicians because of the lower court's rejection of unambiguous statutory language and legislative intent deserve at least as much solicitude.

## CONCLUSION

As Attorney General Mayes acknowledges, this case involves a matter of "great public importance."[7] This Court should grant review and hold that § 13-3603 means what it says and is fully enforceable. Doing so will finally end fifty years of judicial decrees subverting Arizona laws protecting the most innocent and vulnerable. In contrast, if the lower court's exercise of "raw judicial power" goes unchecked, *Roe*'s harms will continue in Arizona at the cost of thousands of lives each year, the integrity of the judiciary, and the legislature's power to govern. *Dobbs*, 142 S. Ct. at 2265 (quotation omitted).

RESPECTFULLY SUBMITTED this 22nd day of May, 2023.

By: */s/ Samuel D. Green*

Steven H. Aden*
**AMERICANS UNITED FOR LIFE**
1150 Connecticut Ave., NW, Suite 500
Washington, DC 20036
(202) 741-4917
steven.aden@aul.org

Samuel D. Green (No. 032586)
**REASON FOR LIFE**
P.O. Box 500040
Palmdale, CA 93550
(661) 524-5770
sgreen@reasonforlife.org

*Application for *pro hac vice*
admission forthcoming

*Attorneys for Amicus Curiae Center for Arizona Policy*

[7] Att'y General's Resp. to Pet. for Review 13.