No. CV-23-0005-PR

In the Supreme Court of Arizona

PLANNED PARENTHOOD ARIZONA, INC., et al.,
Plaintiffs/Appellants,
v.
KRISTIN MAYES, Attorney General of the State of Arizona, et al.,
Defendants/Appellees,
and
ERIC HAZELRIGG, M.D., as guardian ad litem of all Arizona unborn infants,
Intervenor/Appellee.

On Petition for Review from
the Arizona Court of Appeals, Division Two
No. 2 CA-CV 2022-0116

BRIEF OF *AMICUS CURIAE* CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS IN SUPPORT OF INTERVENOR/APPELLEE

Pursuant to Arizona Rule of Civil Appellate Procedure 16, amicus certifies that no counsel for a party wrote any portion of this brief, and that no party provided any compensation for this brief. Amicus received written consent from all parties (with the exception of Pima County) to file this brief.

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STATEMENT OF IDENTITY AND INTEREST

The Christian Medical & Dental Associations ("CMDA") is a non-profit, non-partisan 501(c)(3) organization that provides resources, education, and services with the purpose of "changing hearts in healthcare." To that end, CMDA advances positions and policies on healthcare issues, and distributes educational and inspirational resources through publications and multi-media programs. In so doing, CMDA gives a public voice to its current membership of more than 13,000 Christian healthcare professionals. CMDA's philosophy and work can be viewed at its website: https://cmda.org/.

CMDA has a longstanding interest in advocating for the dignity of the medical profession and the protection of all human life, which is rooted in its fundamental belief that all humans are made in the image of God. As questions regarding the respect for life and the integrity of the medical profession resurface before this Court, CMDA offers the following amicus curiae brief to aid the Court as it considers the present petition for review.

SUMMARY OF THE ARGUMENT

This Court should grant Intervenor/Appellee's Petition for Review because the Court of Appeals' interpretation of A.R.S. § 13-3603 directly

contradicts the plain language of the statute, as well as Arizona's deep-rooted and well-documented interests in protecting human life and upholding the integrity of the medical profession.

By reading § 13-3603 to permit invasive and harmful early-stage abortions, the Court of Appeals ignored the Legislature's decades-old desire to preserve human life at all stages of development. In doing so, it applied the statute in a manner that undermines the basic premise that human life begins at conception and deserves protection under law.

Likewise, the Court of Appeals' reading of § 13-3603 undermines the Legislature's interest in upholding the integrity of the medical profession. Doctors are held to the ethical requirement of doing no harm. But the destructive abortion procedures that would be permitted under the Court of Appeals' interpretation of § 13-3603 would allow those professionals to practice outside of the confines of their ethical duty.

ARGUMENT

I. A.R.S. § 13-3603 CANNOT BE READ TO CONTRAVENE ARIZONA'S ENDURING INTEREST IN PROTECTING PRE-BORN LIFE.

Since at least 1901, Arizona has passionately protected pre-born life. That year, the Legislature passed a law prohibiting any "person" from providing a pregnant woman "any medicine, drugs or substance," or using "any instrument or other means," to intentionally "procure [a] miscarriage"—unless doing so would be "necessary to save her life." A.R.S. § 13-3603. After the U.S. Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), the law was enjoined and lay dormant. *See Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. 142, 152 (App. 1973). However, it was never struck down, and the Legislature re-enacted it in 1977. *See* 1977 Ariz. Sess. Laws, ch. 142, § 99 (1st Reg. Sess.). Indeed, when the Legislature passed SB 1164 in 2022 (the law banning abortions at fifteen weeks' gestation), it reaffirmed that the legislation "does not … [r]epeal" § 13-3603. 2022 Ariz. Sess. Laws, ch. 105, § 2 (2d Reg. Sess.).

As Intervenor/Appellee highlights, this history indicates a clear intent to protect life at all stages of pregnancy. *See* Petition for Review at 10–12. Under § 13-3603, it is a criminal offense for *anyone* to perform an elective

abortion *at any stage* of fetal development. Separate violations may occur if: (1) a person is a physician and performs a prohibited abortion after fifteen weeks' gestation (A.R.S. § 36-2322(A)), or (2) if the person is not a physician yet performs a surgical abortion (A.R.S. § 36-2155) or provides abortion drugs (A.R.S. § 36-2160). These provisions are meant to overlap with the blanket abortion ban because of Arizona's longstanding policy of protecting all human life from harm. *See, e.g.*, A.R.S. § 8-201(25)(c)–(f) (classifying intentional exposure of pre-born children to harmful substances as punishable neglect); *Summerfield v. Superior Ct.*, 144 Ariz. 467, 477–78 (1985) (defining pre-born children as "person[s]" for Arizona's wrongful death statute).

In a recent decision, however, the Court of Appeals adopted a reading of § 13-3603 that thwarted Arizona's deep-rooted interest in protecting prenatal life. *See Planned Parenthood Ariz., Inc. v. Brnovich*, 524 P.3d 262 (Ariz. App. 2022). Specifically, it held that by enacting SB 1164 to restrict physician-performed abortions at 15-weeks' gestation, the Legislature implicitly amended § 13-3603 to *allow* physician-performed abortions before the 15-week mark. *Id.* at 266 ¶ 13. This Court should grant review of the present Petition to correct the Court of Appeals' interpretive error.

A. Section 13-3603's ban on all abortions accounts for the scientifically-sound premise that life, and therefore personhood, begins at conception.

Modern embryology supports the Legislature's longstanding policy of protecting unborn children under § 13-3603. *See* ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 27–28 (Doubleday 2008); BRUCE M. CARLSON, HUMAN EMBRYOLOGY & DEVELOPMENTAL BIOLOGY (6th ed. 2019). The literature confirms that, at the moment of fertilization, a life genetically distinct from the mother comes into existence and starts developing through independent biological processes. Therefore there is no need to seek the opinion of a philosopher or theologian to determine when life (and the protection of the law) begins. *See Nghia Hugh Vo v. Superior Ct.*, 172 Ariz. 195, 202 (App. 1992) ("[T]he time has come to reexamine the protections afforded unborn children under Arizona's criminal law in light of scientific advances in the areas of obstetrics and forensics.").

The moment of conception triggers complex and well-documented biological and chemical processes. *See* CARLSON, *supra* at 27–32 (describing fertilization); GARY C. SCHOENWOLF ET AL., LARSEN'S HUMAN EMBRYOLOGY 32 (5th ed. 2015). Fertilization occurs when "the male gamete (a sperm cell)

penetrates the female gamete (an egg, or oocyte)," and "the two parts . . . [transform] into a single entity, the human embryo." GEORGE & TOLLEFSEN, *supra* at 28, 37; *see also* RONALD M. GREEN, THE HUMAN EMBRYO RESEARCH DEBATES: BIOETHICS IN THE VORTEX OF CONTROVERSY (2001). At this point, the intersection between embryology and genetics takes on special prominence. *See* Richard M. Burian & Denis Thieffry, *From Embryology to Developmental Biology*, 22 HIST. & PHIL. LIFE SCIS. 313, 317–18 (2000).

Most healthy humans have 46 chromosomes, which house the genetic information necessary for human development. *See* GEORGE & TOLLEFSEN, *supra* at 30. When the sperm and egg meet, the part of each gamete that houses the 23 chromosomes fuses together. *Id.* at 30–31. These newly united chromosomes form a zygote—with a all 46 chromosomes—defining a new, "genetically unique" individual. *Id.*

Three points emerge from this biological process. The first is that "the embryo is from the start distinct from any cell of the mother or of the father." GEORGE & TOLLEFSEN, *supra* at 50; *see also* RONAN O'RAHILLY & FABIOLA MÜLLER, HUMAN EMBRYOLOGY AND TERATOLOGY 8 (3d ed. 2001). The second is that because the embryo "has the genetic makeup characteristic of human beings, the embryo is human." GEORGE & TOLLEFSEN, *supra* at 50. And the

third is that the embryo "is a complete or whole organism." *Id.*; *see also* LARRY R. COCHARD, NETTER'S ATLAS OF HUMAN EMBRYOLOGY 1 (2012).

Thus, from the moment of fertilization, the embryo (1) "is fully programed" as a human life; (2) "has the active disposition" to "develop himself or herself to the mature stage of a human being"; and (3) will continue maturing "unless prevented by disease or violence." GEORGE & TOLLEFSEN, *supra* at 50. The embryo is a new individual that actively develops itself towards maturity. *See* Nicanor Pier Giorgio Austriaco, *On Static Eggs and Dynamic Embryos: A Systems Perspective*, 2 NAT'L CATH. BIOETHICS Q. 659, 666–67 (2002).

This reality animates the broad protections that § 13-3603 affords pre-born children, and any application obfuscating that understanding stands askew of the Legislature's command. *See Vo*, 172 Ariz. at 206 (explaining "the state's interest in defining the criminal penalties for those who would harm the unborn can only be asserted by the legislature," not the judiciary); *State v. Cotton*, 197 Ariz. 584, 591 ¶ 26 (App. 2000) (adopting this position).

B. In enacting and re-enacting § 13-3603, the Legislature showed a clear interest in protecting the pre-born from pain and suffering.

The U.S. Supreme Court has acknowledged states have "a legitimate and substantial interest in preserving and promoting fetal life." *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007). By enacting and re-enacting § 13-3603, the Legislature used its voice "to show its profound respect for the life within the woman." *Id.* at 157. Fundamentally, the statute does this by preventing the killing of a pre-born child at any stage—but especially when he or she has taken the human form. *Id.* at 157, 160. The statute also does this by "drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned." *Id.* at 158.

Even a cursory review of prenatal development justifies these protections. An embryo's heart begins developing at just three weeks' gestation, and a heartbeat begins by the end of week four. Oriana Valenti, *Fetal Cardiac Function During the First Trimester of Pregnancy*, 5 J. PRENATAL MED. 59–62 (July 2011).[1] Around week six, the nervous system develops, and—as early as week eight—the child exhibits reflex movement during invasive procedures. *See* Mary F. Donovan & Marco Cascella, *Embryology,*

[1]Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3279166/.

Weeks 6-8 (last updated Oct. 16, 2020).[2] Scientists have observed fetal reactions to painful stimuli as early as 7.5 weeks. *See* Aida Salihagić Kadić, *Fetal Neurophysiology According to Gestational Age*, SEMINARS IN FETAL & NEONATAL MED. 17, no. 5 at 256-60 (2012).

There is growing scientific consensus that an unborn child can feel actual pain by twelve weeks' gestation. *See* Stuart WG Derbyshire & John C Bockmann, *Reconsidering Fetal Pain*, 46 J. MED. ETHICS 3 (2020).[3] This has led some in the medical community to believe "abortion is inherently violent and may subject the fetus to unnecessary pain and distress after the first trimester." *Id.* at 5. Moreover, studies have found that—because a fetus's body has not sufficiently developed pain inhibitors by week fifteen—the intensity of the pain felt by the fetus is more "diffuse" and felt more acutely. Slobodan Sekulic et al., *Appearance of Fetal Pain Could Be Associated with Maturation of the Mesodiencephalic Structures*, 9 J. PAIN RSCH. 1031 (2016).[4]

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[2] Available at https://www.ncbi.nlm.nih.gov/books/NBK563181/.

[3] Available at https://jme.bmj.com/content/medethics/46/1/3.full.pdf.

[4] Available at https://pubmed.ncbi.nlm.nih.gov/27881927/.

By banning all abortion procedures, § 13-3603 aims to shield unborn children from intense physical suffering. This is consistent with how courts in Arizona safeguard prenatal life in other contexts. *See, e.g.*, *Cotton*, 197 Ariz. at 591 ¶ 25 ("One who recklessly kills a fetus before birth ... could be convicted of fetal manslaughter."); *State v. Lockwood*, 222 Ariz. 551, 554 ¶ 9 (App. 2009) (noting death certification requirements for some pre-born children); *Ridgell v. Ariz. Dep't of Child Safety*, 508 P.3d 1143, 1144 ¶ 1 (Ariz. App. 2022) (explaining how Arizona's Department of Child Services places those who expose pre-born children to harmful substances on "a repository of substantiated instances of child abuse and neglect").

C. The Court of Appeals' reading of § 13-3603 would permit brutal and invasive procedures to end pre-born life.

Notwithstanding the Legislature's clear policy of safeguarding prenatal life and health, the Court of Appeals accepted a construction of § 13-3603 that would *permit* physicians to harm pre-born children in graphic and disturbing ways. Specifically, it would permit dilation and evacuation (D&E)—the most common abortion method from about 12–20 weeks' gestation. *Stenberg v. Carhart*, 530 U.S. 914, 924 (2000); *Gonzales*, 550 U.S. at 134; Derbyshire & Bockmann, *supra* at 3.

In D&E procedures, the doctor dilates the cervix to "insert surgical instruments into the uterus and to maneuver them to evacuate the fetus." *Gonzales*, 550 U.S. at 135 (citation omitted). The dilation process begins by inserting osmotic dilators. *Id.* The "length of time doctors employs osmotic dilators varies," with some keeping dilators "in the cervix for two days, while others use dilators for a day or less." *Id.*

Once there is sufficient dilation, the abortion commences. The mother is placed under general anesthesia, or a paracervical block is used with conscious sedation. *Id.* Next, the doctor "inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus." *Id.* The doctor then "grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix." *Id.* This friction "causes the fetus to tear apart," allowing the doctor to pull it limb from limb "until it has been completely removed." *Id.* at 136. In most cases, the child bleeds to death as its body is ripped asunder. *Stenberg*, 530 U.S. at 958–59 (Kennedy, J., dissenting).

Typically, a doctor takes ten to fifteen passes through the cervix and vagina to pull pieces of the baby out of its mother. *Gonzales*, 550 U.S. at 136. As the doctor conducts these, the child often remains alive. *Stenberg*, 530 U.S.

at 959 (Kennedy, J., dissenting); Derbyshire & Bockmann, *supra* at 3. Then, the "placenta and any remaining fetal material are suctioned or scraped out of the uterus." *Gonzales*, 550 U.S. at 136. Finally, the doctor surveys the baby's body parts "to ensure the entire fetal body has been removed." *Id.*; *Stenberg*, 530 U.S. at 959.

Any interpretation of § 13-3603 that permits such gruesome practices is in manifest conflict with Arizona's interest in protecting prenatal life. This reality alone is fatal to the Court of Appeals' conclusion below. In Arizona, courts must apply the law to comport with—rather than contradict—legislative purpose. *See, e.g.*, *Glazer v. State*, 244 Ariz. 612, 614 ¶ 9 (2018) (noting that Arizona courts interpret statutes "to give effect to the Legislature's intent") (citation omitted).

Moreover, "[t]he best indicator of [legislative] intent is the statute's plain language . . . and when that language is unambiguous, [courts] apply it without resorting to secondary statutory interpretation principles." *Id.* (quoting *SolarCity Corp. v. Ariz. Dep't of Revenue*, 243 Ariz. 477, 480 ¶ 8, 413 P.3d 678 (2018)). Here, the plain and unambiguous language of § 13-3603 prohibits elective abortion, and the appellate court's use of secondary

interpretation principles to contravene that interpretation is patent legal error. Review should be granted to reverse this error of law.

II. A.R.S. § 13-3603 CANNOT BE APPLIED IN A WAY THAT UNDERCUTS ARIZONA'S INTEREST IN SAFEGAURDING THE INTEGRITY OF THE MEDICAL PROFESSION.

In enacting and re-enacting § 13-3603, the Legislature sought not only to protect innocent human life, but also to uphold the ethic and integrity of the medical profession. This purpose is evident from the statute's plain language, which applies to all "person[s]" (i.e., all human beings, including medical professionals). *See* A.R.S. § 13-105(30); *State v. Leal*, 248 Ariz. 1, 4 ¶11 (App. 2019) (applying a broad conception of the term "person"). Indeed, physicians have long been subject to prosecution under § 13-3603. *See, e.g.*, *State v. Boozer*, 80 Ariz. 8 (1955); *Hightower v. State*, 62 Ariz. 351 (1945).

Despite this, the Court of Appeals held that, since other portions of Title 36 forbid physician-performed abortions after fifteen weeks' gestation, § 13-3603 cannot outlaw physician-performed abortions before then. This holding is contrary to the Legislature's will because it would enable doctors (who swear an oath to inflict no harm) to perform harmful procedures without consequence. This Court has a duty to correct a conclusion of law—such as the one at bar—which is so plainly at odds with the social and ethical

priorities of Arizonans. *See Glazer*, 244 Ariz. at 614; *Lewis v. Debord*, 238 Ariz. 28, 31–32 ¶ 11 (2015) ("It is not the function of the courts to rewrite statutes."); *Orca Commc'ns v. Noder*, 236 Ariz. 180, 182 ¶ 11 (2014) ("[T]he court may not substitute its judgment for that of the Legislature.").

A. Section 13-3603's broad application to all "persons," including doctors, ensures that medical professionals abide by their ethical duty to do no harm.

Hippocrates of Kos (c. 460 – c. 370 B.C.) is regarded as the "Father of Medicine" largely because of the Oath he penned for his profession. Across the ages, the Hippocratic Oath has set forth a physician's ethical duty to do no harm to his or her patients. And while its language has changed over time, the version frequently cited as the original includes a pledge that physicians will not participate in euthanasia and abortion. *See* Howard Markel, *'I Swear by Apollo' – On Taking the Hippocratic Oath*, 350 NEW ENG. J. MED. 2026 (2004). Subsequent versions of the Oath—even into the twentieth century—have similarly restricted euthanasia and abortion procedures. *See* T.A. CAVANAUGH, HIPPOCRATES' OATH AND ASCLEPIUS' SNAKE: THE BIRTH OF THE MEDICAL PROFESSION 122 (2018).

That the Oath has long included admonitions against life-ending medical practices merits this Court's attention as it evaluates the proper

construction of § 13-3603. This is an important consideration, given that Arizona is constitutionally justified in upholding a physician's duty "to preserve and promote life" by preventing doctors from acting "directly against the physical life of a child." *See Gonzales*, 550 U.S. at 157; *Barsky v. Board of Regents of Univ. of N.Y.*, 347 U.S. 442, 451 (1954) (indicating the State has "legitimate concern for maintaining high standards of professional conduct" in medicine).

B. By prohibiting invasive and violent abortion procedures, § 13-3603 prevents doctors from harming (rather than helping) pre-born children.

As discussed, *supra* Sec. I, § 13-3603 was written to prevent doctors from performing inhumane procedures like the D&E method. *See* CMDA, *Standards4Life – Abortion* at 2–4 (describing how D&E crushes the baby's head if it cannot pass through the cervix).[5] Likewise, § 13-3603 prohibits "saline abortion," wherein a doctor replaces amniotic fluid with a concentrated solution of poisonous salt. *Id.* at 3. The salt burns the baby's skin as it draws water from its body. *Id.* The baby dies within hours, often

[5] Available at https://cmda.org/standards-4-life/.

after violent movements, and within days, the mother delivers her shriveled baby. *Id.*

Section 13-3603 outlaws these procedures because they dehumanize the medical profession and corrode its reputation. Such disturbing actions against unborn children undermine the physician's duty to "preserve and promote life." *Gonzales*, 550 U.S. at 157. A construction that would permit these horrific practices is blatantly erroneous and conflicts with the Legislature's command to protect medical integrity. *See Walker by Pizano v. Mart*, 164 Ariz. 37, 41 (1990) ("A physician rendering prenatal care has a duty of due care to both the mother and the developing fetus.").

C. Examples of abortion survivors nationwide counsel against a reading of § 13-3603 that would allow doctors to inflict physical and mental suffering.

To gauge the impropriety of reading § 13-3603 to allow doctors to inflict physical and mental suffering on pre-born children, one need not look further than the stories of abortion survivors nationwide. Take Sarah Smith, who survived an abortion attempt in 1970 and "was born with bilateral, congenital dislocated hips and many other physical handicaps." *See* Life

Institute, Learning Centre, *Survivor #4: Sarah Smith.*[6] Then there is Melissa Ohden, who grew up being told by her adoptive parents that she was born prematurely, only to later discover that she was an abortion survivor. Adam Eley & Jo Adnitt, *The Failed Abortion Survivor Whose Mum Thought She Was Dead*, BBC (June 5, 2018).[7] This revelation took a tremendous toll on Melissa's mental health; she developed an eating disorder and suffered from alcohol abuse for years. *Id.*

There is also the heart-wrenching story of Sarah Brown, who survived a doctor's attempt to abort her with a shot of potassium chloride to the heart. Instead of hitting her heart, however, the poisonous needle punctured her brain. *See* Life Institute, Learning Centre, S*urvivor #11: Sarah Brown*.[8] Sarah survived and was born two days later with visible puncture wounds in her face and skull, which led to brain injuries that rapidly progressed. *Id.* Tragically, the toxin caused her to be born blind and suffer a stroke at six

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[6] Available at https://thelifeinstitute.net/learning-centre/abortion-facts/survivors/sarah-smith.

[7] Available at https://www.bbc.com/news/health-44357373.

[8] Available at https://thelifeinstitute.net/learning-centre/abortion-facts/survivors/sarah-brown.

months old, from which she never recovered. She eventually passed away from kidney failure at just the age of five. *Id.*

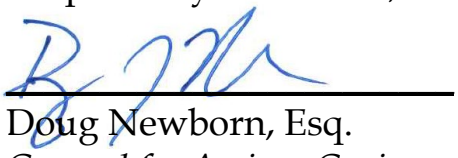
These examples cast light on the disturbing abortion practices carried out by physicians. Indeed, they bring into sharp contrast the distinction between the ethical dictates of the Hippocratic Oath and the physical pain and emotional suffering inflicted by abortion-performing physicians. This Court should uphold Arizona's interest in safeguarding the integrity of the medical profession and reject a reading of § 13-3603 that would empower physicians to neglect their centuries-old obligation to do no harm.

CONCLUSION

For the forgoing reasons, the Court should grant Intervenor/Appellee's Petition for Review and correct the Court of Appeals' interpretive errors.

May 22, 2023

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 22, 2023, the *amicus curiae* brief to which this Certificate is attached was filed with the Arizona Supreme Court through the Court's AZ TurboCourt e-filing system. The undersigned further certifies that copies of the *amicus curiae* brief to which this Certificate is attached were e-served on all counsel of record on May 22, 2023, via AZ TurboCourt and email.

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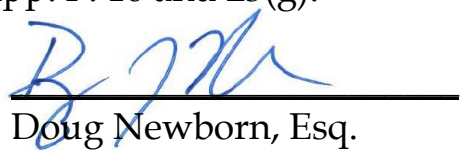
CERTIFICATE OF COMPLIANCE

This certificate of compliance concerns an *amicus curiae* brief, and is submitted under Ariz. R. Civ. App. P. 16(d)(1). The undersigned certifies that the *amicus curiae* brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains approximately 3,452 words in compliance with Ariz. R. Civ. App. P. 16 and 23(g).



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