ARIZONA SUPREME COURT

PLANNED PARENTHOOD ARIZONA INC., 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.	Supreme Court No. CV-23-0005-PR Court of Appeals Division Two No. 2 CA-CV 2022-0116 Pima County Superior Court No. C127867

BRIEF OF AMICUS CURIAE JILL NORGAARD, FORMER REPRESENTATIVE OF THE ARIZONA HOUSE OF REPRESENTATIVES, DISTICT 18
FILED WITH THE WRITTEN CONSENT OF ALL PARTIES

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INTRODUCTION

Only a few short months ago, a majority of this Court highlighted the need for courts to "cogently and consistently apply a plain meaning approach to statutory interpretation going forward"—not rely on legislative intent. *State ex rel Arizona Department of Revenue v. Tunkey,* 254 Ariz. 432, ¶ 24 (2023) (Bolick, J., concurring) The Petition presents an opportunity for this Court to further clarify plain meaning as the primary interpretative tool when Arizona courts are called to interpret statutes and address lower courts' misplaced reliance upon "amorphous" or "illusory" legislative intent. *See id.* ¶ 27. Because the Court of Appeals largely focused on the "legislative intent" behind A.R.S. § 36-2322, this Court should accept review, clarify the preeminence of plain language as governing statutory interpretation, and then apply the plain language analysis to the statutes at issue.

INTERESTS OF AMICUS CURIAE

From 2014 to 2018, Jill Norgaard was a member of the Arizona House of Representatives, representing District 18. During her time in the legislature, she co-sponsored SB1367, which amended A.R.S. § 36-449.03 (addressing abortion clinic requirements); § 36-2161 (clarifying and expanding mandatory abortion reporting requirements); and § 36-2301 (requiring that, in the case of a child born alive during an abortion, that the physician performing the abortion take all means available to promote, preserve, and maintain the life of the child).

Mrs. Norgaard offers this brief in support of the Petition because during her time in the legislature, she worked to pass laws to restrict abortions wherever possible, and to the maximum extent permissible under then-imposed constitutional limits. Because the issue presented by the Petition requires an overarching analysis of Arizona's overall legislative structure for restricting abortion, and Mrs. Norgaard participated in the creation of those restrictions, she has an interest in how the Court interprets these statutes.

No person or entity made a monetary contribution for the preparation or submission of this Brief.

ARGUMENT

I. A majority of this Court has opined upon the need to clarify plain language analysis as the primary statutory interpretative tool.

In *Tunkey*, this Court accepted review to interpret A.R.S. § 42-1104 and the Department of Revenue's obligations in assessing Arizona's transaction privilege tax. 254 Ariz. 432, 434, ¶ 9 (2023). In his concurring opinion, Justice Bolick (joined by Justices Beene, Montgomery, and King) wrote separately to note that two methodologies of statutory interpretation—plain language and legislative intent—"can produce different outcomes and underscore why we should cogently and consistently apply a plain meaning approach to statutory interpretation going forward." *Id.* at ¶ 24 (Bolick, J., concurring). The concurring opinion stressed the need, when appropriate, to clarify lower courts' inconsistent applications of these interpretative tools. *Id.* at ¶ 32 ("We owe it to the parties and advocates who come before us to tell them what we are looking for when interpreting a statute . . . .") (Bolick, J., concurring).

In emphasizing Arizona's historic preference for plain language interpretation, Justice Bolick cited misplaced analysis taken in previous

decisions wherein the Court sought to divine legislative intent. This included comparing statutory provisions which were not analogous, and relying upon the "interpretation of similar statutes from different states." *Id.* at ¶ 33.

II. The Court of Appeals' Opinion relies on legislative intent and comparative state statutes as its primary analytical tools, rather than plain language.

Below, the Court of Appeals did not base its holding or analysis on a plain reading of the language of A.R.S. §§ 13-3603 or 36-2322. Instead, it found that there was "unambiguous legislative intent to regulate, but not eliminate elective abortions". *Planned Parenthood Arizona, Inc. v. Brnovich*, No. 2 CA-CV 2022-0116, 2022 WL 18015858, at ¶ 17 (App. Dec. 30, 2022) (the "Opinion"). The special concurrence underscores that divining legislative intent, not analyzing the language of the statute, formed the cornerstone of the Opinion: "By this process, we show our strictest fidelity to legislative intent." Opinion at ¶ 34 (Eckerstrom J., specially concurring).

Compounding its analytical problems, the Court of Appeals also relied upon comparing other state laws to support its holding. Opinion at

¶ 24 (contrasting Arizona's 15-week abortion ban with Mississippi's 15-week abortion ban).

In other words, the analytical issues specifically identified by the concurrence in *Tunkey* were critical to the Court of Appeals holding that A.R.S. § 36-2322 conflicts with A.R.S. § 13-3603, and therefore physicians performing abortions on unborn children under 15 weeks of age are immune from the criminal prosecutions required by § 13-3603. The Court of Appeals' reliance upon legislative intent and comparison of another state's statutes to divine said intent, rather than rely upon words of the statute, underscore the need for this Court to accept review of the Petition, clarify Arizona law as to statutory interpretation, and to correct the lower court's misinterpretation of the plain language of the statute.

III. A plain reading of the statute leads is inconsistent with the Court of Appeals' holding.

A. Interpreting the plain language of A.R.S. § 36-2322 requires a review of Arizona's abortion statutes and their collective purpose.

In analyzing the plain language of a statute, context is key. This

Court may permissibly look to other statues which are *in pari materia.*[1] As this Court previously explained, "[*i*]*n pari materia* is a rule of statutory construction whereby the meaning and application of a specific statute or portion of a statute is determined by looking to statutes which relate to the same person or thing and which have a purpose similar to that of the statute being construed." *Collins v. Stockwell*, 137 Ariz. 416, 419 (1983).

At the core of the Court of Appeals ruling is the implication that there is a recognized right to abortion in Arizona. *See* Opinion at ¶ 13 ("The statutes, read together, make clear that physicians are permitted to perform abortions as regulated by Title 36 regardless of § 13-3603); ¶ 19, fn. 8 ("The 15 -week law prohibits abortions ***except those it allows***") (emphasis added). Indeed, one cannot regulate an activity if there is no right of a person to engage in said activity. And yet there is no such right

[1] "Though [the *in pari materia*] canon is often presented as effectuating the legislative 'intent,' the related-statute canon is not, to tell the truth, based upon a realistic assessment of what the legislature actually meant. . . The canon is, however, based upon a realistic assessment of what the legislature ought to have meant. It rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts within the permissible meanings of the text, to make it so." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012).

recognized by Arizona law. The legislature's adoption of laws regulating abortion was because abortion was imposed upon the state by a misreading of the US Constitution, not because anyone—the legislature, the governor, nor the citizens—enacted a law recognizing abortion as a right. *See Roe v. Wade*, 410 U.S. 113 (1973) *overruled by Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

When all the state abortion statutes are considered in light of a federally mandated "right" to abortion, it is clear that the purpose of the "regulation" of abortion was to limit, minimize, and restrict abortion to the maximum extent possible under the then-recognized constitutional framework. And when reviewing the language of the statutes as a whole, the numerous restrictions found in Title 13 and Title 36 evidence the legislature's intent to limit, restrict, and prohibit abortion. *See, e.g.*, A.R.S. §§ 13-3603.01 (1997, amended 2009) (civil and criminal liability for partial birth abortions); 13-3603.02 (2011, amended 2021) (prohibiting abortions procured for sex or race-based reasons); 13-3605 (1901, renumbered in 1977) (criminal liability for advertising abortion).[2]

[2] The Court of Appeals did not consider § 13-3603.01, -3603.02, and 3605 relevant to its analysis, despite these statutes clearly being *in pari materia*. *See* Opinion, ¶ 4, n.3.

36-2160 (2021) (abortion-inducing drugs cannot be sent through the mail or via courier); 36-2153(l) (2009, amended most recently in 2021) (prohibiting contractual requirements requiring a woman to have an abortion or otherwise as a condition of employment); 36-2164 (2010) ("This articles does not establish or recognize a right to an abortion and does not make lawful an abortion that is currently unlawful."); 36-2301 (2017) (requiring that, in the case of a child born alive during an abortion, that the physician performing the abortion take all means available to promote, preserve, and maintain the life of the child).

The context and purpose of these statutes is made even clearer if this Court considers the additional protections and restrictions the Arizona legislature passed, but which were held unenforceable. *See, e.g.*, A.R.S. § 1-219 (2021) (granting unborn children "all rights, privileges and immunities available to other persons, citizens and resident of this state") *enjoined by Isaacson v. Brnovich*, 610 F.Supp.3d 1243 (Dist. Ariz. 2022); A.R.S. § 36-2159 (2012) (prohibiting abortions past 20 weeks of pregnancy, except in the case of medical emergency) *held unconstitutional by Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013); A.R.S. § 35-196.05(B) (2012) (prohibiting federal tax dollars from passing

through the state and going to abortion providers) *held unenforceable by Planned Parenthood Ariz. v. Betlach*, 727 F.3d 960 (9th Cir. 2013).

That some of these statutes (such as A.R.S. §§ 13-3603 and -3605) are over 100 years old is irrelevant. They are still *in pari materia*. *Garner & Scalia* 254 (referencing, with approval, *State v. French*, 460 N.W.2d 2 (Minn. 1990) where a statute in "disuse" was nevertheless treated as *in pari materia*) and 336 ("If 10, 20, 100, or even 200 years pass without any known cases applying the statute, no matter: The statute is on the books and continues to be enforceable until its repeal.")

For well over a century, Arizona's abortion statutes have restricted abortion to the maximum extent possible under then applicable constitutional precedents. These statutes were often challenged. But the purpose of Arizona's abortion statutes—to limit, restrict, and prohibit abortion to the maximum extent possible—is unquestionable.

B. The plain language of A.R.S. § 13-3603 and 36-2322 are to restrict abortion to the maximum extent permissible under the law.

It is within this context—derived from the plain language of Arizona's comprehensive efforts to limit, restrict, and ban abortion—that

this Court should consider the language and interplay between A.R.S. § 13-3603 and A.R.S. § 36-2322.

A.R.S. § 13-3603 is straightforward, and reads:

> A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life, shall be punished by imprisonment in the state prison for not less than two years nor more than five years.

There is no apparent dispute as to the meaning of § 13-3603. All abortions are banned except in the case where it is necessary to save the mother's life. The question is whether, through the additions of A.R.S. § 36-2321 – 36-2326 the language of the text amends, modifies, or otherwise repeals § 13-3603. They do not.

Nowhere in A.R.S. § 36-2321–36-2326 does the legislature expressly recognize a right to abortion. Just the opposite: § 36-2322 *restricts* and *limits* abortion, as the legislature has done for decades. To infer a purpose to create a right to abortion out of a statute limiting abortion—as the Court of Appeals did—is analytically unsound. *Scalia & Garner* 63 (explaining the presumption against ineffectiveness canon that when "language is susceptible of two constructions, one of which will

carry out and the other defeat its manifest object, the statute should receive the former construction") (quoting *Citizens Bank of Bryan v. First State Bank*, 580 S.W.2d 344, 348 (Tex. 1979)).

In the absence of any language creating a right to abortion, the conclusion is clear: the Court of Appeals improperly inferred legislative intent to manufacture a right to abortion not found in the statutory text.

The Court of Appeals' error is confirmed if this Court considers the legislative history of § 36-2322 (as a secondary tool of interpretation). *See Tunkey,* 254 Ariz. at ¶ 27 (Bolick, J., concurring). The legislature took pains to note the context in which it passed the § 36-2322, stating the act does not:

> 1. Create or recognize a right to abortion or alter generally accepted medical standards. The Legislature does not intend this act to make lawful an abortion that is currently unlawful. [or]
> 2. Repeal, by implication or otherwise, section 13-3603.

2022 Ariz. Sess. Laws ch. 105, § 2. *See also id.* § 3 ("This Legislature intends . . . to *restrict* the practice of nontherapeutic or elective abortion to the period up to fifteen weeks of gestation.") (emphasis added).

The Court of Appeals ignored the clearly stated guidance from the legislature, by ignoring the first sentence that "no right to abortion" is

created, and instead focused on the word "unlawful" in the second. *See* Opinion at ¶ 19, fn. 8. But the plain language is clear: there is no right to abortion under Arizona law. A.R.S. § 36-2321–36-2326 does not create a right to abortion, and no other forms of abortions previously prohibited are somehow made lawful for unborn children. *See, e.g.*, A.R.S. §§ 13-3603.01 (imposing criminal penalties on physicians who perform partial-birth abortion); 13-3603.02 (imposing criminal penalties on abortions sought based on sex, race, or genetic abnormality).

Nowhere does A.R.S. §§ 36-2321–36-2326 repeal, amend, or otherwise modify A.R.S. § 13-3603. The Court of Appeals' Opinion is divorced from the text of statutes, and upon review of Arizona's overall statutes addressing abortion, inconsistent with the statutes' clear purpose.

CONCLUSION AND REQUESTED ACTION

Amicus Curiae Norgaard respectfully requests this Court accept review of the Petition, grant relief by vacating the opinion of the Court of Appeals, interpret the statutes in light of their plain language, and hold A.R.S. § 13-3603 enforceable as written.

DATED this 22nd day of May, 2023.

MAY, POTENZA, BARAN & GILLESPIE, P.C.

By /s/ *Andrew S. Lishko*
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