ARIZONA SUPREME COURT

PLANNED PARENTHOOD ARIZONA, INC., et al., Plaintiffs/Appellants, v. KRISTIN K. 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, et al., Intervenors/Appellees.	No. CV-23-0005-PR Court of Appeals Division Two No. 2CA-CV-2022-0116 Pima County Superior Court No. C127867

PLANNED PARENTHOOD ARIZONA, INC.'S REPLY IN SUPPORT OF MOTION TO STAY ISSUANCE OF MANDATE

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INTRODUCTION

Inflammatory rhetoric and needless politicizing aside, Intervenors' Response to PPAZ's[1] Motion to Stay Issuance of Mandate ("Response") advances legal arguments that find no support in Arizona law and defy common sense. Their arguments fail for three main reasons.[2]

First, the preliminary injunction framework has nothing to do with this Court's inherent authority to stay its mandate. *Second*, just because the Legislature did not enact H.B. 2677 as an emergency measure doesn't mean that it wanted A.R.S. § 13-3603 to be enforceable for a temporary period. Not only is that interpretation absurd, but it also contravenes the principle that legislative silence is not an expression of legislative intent. *Third*, the court of appeals' stay precluding the enforcement of A.R.S. § 13-3603 is not "lifted pending further legal action" because this Court's decision lifting the stay is ineffective until this Court's mandate issues.

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[1] Any abbreviations are defined the same way as in PPAZ's Motion to Stay Issuance of Mandate ("Motion").

[2] PPAZ will not address the Intervenors' arguments in opposition to the Attorney General's Motion to Stay Issuance of Mandate, with which PPAZ was not involved. *See, e.g.*, Resp. at 9-11 (advancing arguments in opposition to Attorney General's Motion to Stay).

The Response largely sidesteps PPAZ's central argument – grounded in this Court's precedent – that when "the interests of justice outweigh the interest in bringing litigation to an end," this Court "should recall," or here, stay, "the mandate." *Lindus v. N. Ins. Co. of New York*, 103 Ariz. 160, 162 (1968); *see also* Mot. at 5-9. Taking this simple step reflects clear legislative intent, longstanding equitable principles, and other appellate decisions across the country. This Court should thus stay the issuance of its mandate until H.B. 2677's effective date.

ARGUMENT

A. The Preliminary Injunction Framework Does Not Apply to Deciding Whether to Stay the Mandate.

Intervenors begin [at 5-7] by arguing that PPAZ didn't satisfy the burden for requesting a stay pending appellate review under the preliminary injunction framework set out in *Smith v. Arizona Citizens Clean Elections Com'n*, 212 Ariz. 407, 410 (2006). But that framework doesn't apply here. *Smith* involved a petitioner's request, under Rule 7(c), Ariz. R. Civ. App. P., that this Court stay a court of appeals order to preserve the status quo *pending this Court's review of the case. Smith*, 212 Ariz. at 410; *see also* Ariz. R. Civ. App. P. 7(c) ("This Rule does not limit the power of an appellate court, or of an appellate judge or justice,

to stay proceedings *while an appeal is pending*.") (emphasis added). Of course, the preliminary injunction factors control in those cases; issuing a stay when petitioners don't have a strong likelihood of success on the merits would cause unnecessary delay, waste resources, and be unfair. But applying those factors here makes little sense because the Court has already issued its decision and no appeal is pending. The only question now is whether "the interests of justice outweigh the interest in bringing litigation to an end." *Lindus*, 103 Ariz. at 162. As PPAZ explained in its Motion [at 5-9], they do. This Court should thus stay the mandate.

B. The Court Cannot Divine Legislative Intent from the Fact that the Legislature Did Not Invoke the Emergency Clause.

Intervenors next urge this Court to read into H.B. 2677 an unspoken legislative desire to make A.R.S. § 13-3603 enforceable for some period. They say that the Legislature's failure to include an emergency clause in the legislation repealing A.R.S. § 13-3603—under which the legislation would take effect immediately—was "by design" and suggest that omission means "the [L]egislature has chosen to protect unborn life until § 13-3603's repeal later this year." Resp. at 1; *see also id.* at 5.

This Court should reject Intervenors' invitation to draw far-reaching conclusions about legislative intent based on what the Legislature *didn't* do or say. True, H.B. 2677 doesn't contain an emergency clause. But that says nothing about any potential limited period of enforcement against the backdrop of a statute that's been unenforceable for all but a few weeks out of the past 51 years. That's because "[s]ilence in and of itself, in the absence of any indication that the legislature has considered the interpretation, is not instructive. A rule of statutory construction that requires us to presume that such silence is an expression of legislative intent is somewhat artificial and arbitrary." *Lowing v. Allstate Ins.,* 176 Ariz. 101, 106 (1993). And especially when, as here, legislative inaction is involved, this Court "squarely reject[s] the idea that silence is an expression of legislative intent." *Sw. Paint & Varnish Co. v. Arizona Dep't of Env't Quality*, 194 Ariz. 22, 26, (1999).

C. The Court of Appeals' Stay is Effective Until the Mandate Issues.

Intervenors alternatively ask [at 12] this Court to "clarify that the stay on enforcing A.R.S. § 13-3603 is lifted pending further legal action." Intervenors imply that this Court's decision lifting the court of appeals'

stay on enforcement of § 13-3603 is somehow effective before this Court issues its mandate. *See id.* Nothing supports Intervenors' argument. *See, e.g.*, Ariz. R. Civ. App. P. 24(a) ("The mandate is the final order of the appellate court, which may command another appellate court, superior court or agency to take further proceedings or to enter a certain disposition of a case. An appellate court retains jurisdiction of an appeal until it issues the mandate."); *In re Marriage of Flores & Martinez*, 231 Ariz. 18, 21 (App. 2012) (trial court lacked jurisdiction to issue order where court of appeals had not issued mandate, because "an appellate proceeding . . . does not terminate until the appellate court's mandate issues."); *Borrow v. El Dorado Lodge, Inc.*, 75 Ariz. 218, 220 (1953) (appellate court's judgment or order becomes effective only on "the date of issuance of the mandate.").

D. Staying the Mandate Preserves the Status Quo and Avoids Unnecessary Chaos.

Issuing the mandate will lead to a needless disruption of the status quo that will ultimately force abortion care, which has consistently been available in Arizona for the past five decades, to temporarily grind to a halt—only to restart months later once H.B. 2677 takes effect. In the interim, health care providers will be understandably reluctant to

provide necessary medical care, and patients will suffer. These are precisely the kind of interests that "outweigh the interest in bringing litigation to an end." *Lindus*, 103 Ariz. at 162. The political branches have now swiftly rejected a reality in which a law from 1864 takes effect in modern-day Arizona, and this Court should afford those branches the deference they deserve. This Court should thus stay the issuance of the mandate until H.B. 2677's effective date.

RESPECTFULLY SUBMITTED this 9th day of May, 2024.

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