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, 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

MOTION TO INTERVENE AND JOIN PETITION FOR REVIEW OF INTERVENOR/APPELLEE DENNIS MCGRANE, YAVAPAI COUNTY ATTORNEY

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INTRODUCTION

Arizona has protected unborn human life longer than it has been a state. Since 1901, 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. *Roe* temporarily kept officials from fully enforcing § 13-211. But even then, the Legislature reenacted § 13-211 as § 13-3603 and passed more protections—careful to say these changes created *no* abortion right, made *no* unlawful abortion legal, and did *not* repeal § 13-3603. Not one of those laws allowed abortion. Only *Roe* did that.

Then federal law changed. Last year, the U.S. Supreme Court held that States could once again fully protect unborn life. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022). That revived § 13-3603, but a decades-old injunction kept it buried. The Attorney General sought to lift that injunction below, but after an adverse judgment on appeal and new Attorney General Kristin Mayes assumed office, the State reversed its position and did not appeal. While Petitioner Eric Hazelrigg, M.D., as guardian ad litem of all Arizona unborn infants, has petitioned for review, General Mayes' changed position leaves no government official defending the State's interest in enforcing § 13-3603.

Proposed Intervenor Yavapai County Attorney Dennis McGrane seeks to fill the void created by General Mayes' change of position. He seeks to join Dr. Hazelrigg's Petition seeking reversal of the appeals

courts and lifting of the injunction so that he may fully enforce § 13-3603 as it was written. He deserves to intervene as a matter of right, or at minimum, this Court should allow him to permissively intervene. Under A.R.C.A.P. 6, the Yavapai County Attorney moves to intervene and to join Dr. Eric Hazelrigg's Petition for Review.

BACKGROUND

For over 120 years, Arizona has vigorously protected unborn human life—forbidding abortion except to save the mother's life. This pro-life legacy began when Arizona was just a territory. In 1901, the Territorial Legislature passed A.R.S. § 13-211, which prohibited any "person" from providing "any medicine, drugs or substance" or using "any instrument or other means … with intent … to procure [a] miscarriage" unless "necessary to save [the mother's] life."[1] This law was consistently enforced until 1973. *E.g.*, *State v. Wahlrab*, 19 Ariz. 552 (App. 1973); *State v. Keever*, 10 Ariz. 354 (App. 1969); *State v. Boozer*, 80 Ariz. 8 (1955); *Hightower v. State*, 62 Ariz. 351 (1945); *Kinsey v. State*, 49 Ariz. 201 (1937).

In 1971, Planned Parenthood of Tucson, Inc. challenged § 13-211, suing both the Arizona Attorney General and the Pima County Attorney and arguing the law was unconstitutional. App.24–31. The trial court allowed a Guardian ad Litem to intervene on behalf of unborn Arizona

[1] Miscarriage means abortion. *Abortion*, Black's Law Dictionary (11th ed. 2019); *accord Dobbs*, 142 S. Ct. 2228, App.

children. App.18–19. After a trial, the suit was dismissed, and Planned Parenthood appealed. On remand, the trial court entered a declaratory judgment and injunction for Planned Parenthood, declaring § 13-211 unconstitutional. *Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 19 Ariz. 142, 143 (App. 1973). State officials appealed, and the court reversed, upholding § 13-211—but only for a few weeks. *Id.* at 142-50.

Roe v. Wade, 410 U.S. 113 (1973) was issued three weeks later, holding that states could no longer fully restrict abortion. Bound by this new rule, the appeals court vacated its prior decision *solely because of Roe*. *Nelson*, 19 Ariz. at 152. Then the trial court entered judgment, enjoining officials from enforcing § 13-211. App.18–22.

The Legislature was unmoved. In fact, it doubled down—reenacting former § 13-211 as § 13-3603 a few years later. *See* 1977 Ariz. Sess. Laws ch. 142, § 99 (1st Reg. Sess.). After passing a series of other restrictions, in 2021, the Legislature repealed § 13-3604 but did not repeal neighboring § 13-3603—showing its intent to keep § 13-3603 and to protect mothers from prosecution. 2021 Ariz. Sess. Laws ch. 286, § 3 (1st Reg. Sess.). Then, in 2022, even as the Legislature enacted SB 1164 forbidding abortion at 15 weeks' gestation, it said this law "does not … [r]epeal" § 13-3603. 2022 Ariz. Sess. Laws ch. 105, § 2 (2d Reg. Sess.).[2]

[2] SB 1164 was codified at §§ 36-2321–2326. The court below often used "Title 36" when referencing § 36-2322 and related statutes.

Then came *Dobbs*—which held "that the Constitution does not confer a right to abortion." 142 S. Ct. at 2279. This decision overruled *Roe* and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and returned to the states "the authority to regulate abortion"—including the power to fully protect unborn life "at all stages." 142 S. Ct. at 2279, 2284.

After this, former Attorney General Mark Brnovich, joined by Substitute Guardian ad Litem Eric Hazelrigg, moved under Rule 60(b) to set aside the injunction on § 13-211 (now § 13-3603), because retaining it is no longer just. App.1, 55, 69. All parties agreed the full injunction was no longer proper, but Planned Parenthood of Arizona (successor to Planned Parenthood Center of Tucson) and the Pima County Attorney argued a partial injunction should remain as to physicians because Title 36 forbids physician-performed abortions only after 15-weeks' gestation. App.38.

Last fall, the trial court entered an order granting the Rule 60(b) motion, fully lifting the injunction against § 13-3603. App.69–75. Planned Parenthood and the Pima County Attorney appealed. The appeals court reversed, holding that by prohibiting physician-performed abortions at 15-weeks' gestation, Title 36 *permits* physician-performed "abortions under certain circumstances"—including those illegal under § 13-3603. *Planned Parenthood Arizona, Inc. v. Brnovich*, No. 2 CA-CV 2022-0116, 2022 WL 18015858, at *1 (Ariz. Ct. App. Dec. 30, 2022) ("App.") (App.79).

Since that ruling, Arizona elected a new attorney general—Kristin Mayes. She did not appeal the judgment below. Proposed Intervenor

Dennis McGrane, Yavapai County Attorney, seeks to fully enforce § 13-3603 as written. That law is a valid exercise of state power. His constituents are Arizona voters, and he wants to ensure their voice is heard and a valid law is defended. He moves to intervene in this appeal and to join Dr. Eric Hazelrigg's Petition for Review.

ARGUMENT

The Yavapai County Attorney has an interest in enforcing valid state laws like § 13-3603. This interest was protected before General Mayes did not appeal, but because she will no longer defend § 13-3603, no existing party protects this interest. The County Attorney may intervene as of right, or at least permissively, to defend it.

I. The Yavapai County Attorney may intervene as of right.

To intervene as of right, the Yavapai County Attorney need only show that (1) his motion is timely; (2) he has an interest in the subject matter; (3) the disposition may impair his ability to protect that interest; and (4) existing parties do not adequately represent his interest. A.R.C.P. 24(a)(2); *Heritage Vill. II Homeowners Ass'n v. Norman*, 246 Ariz. 567, 570 (App. 2019). The County Attorney satisfies this standard.

A. The County Attorney has an interest in enforcing A.R.S. § 13-3603.

As state law requires, the County Attorney "shall" prosecute "public offenses when [he] has information that" crimes "have been committed." A.R.S. § 11-532(A)(2). Indeed, because the County Attorney bears "the primary responsibility for prosecuting criminal actions," *Smith v. Super. Ct. In & For Cochise Cnty.*, 101 Ariz. 559, 560 (1967) (per curiam); *accord State v. Murphy*, 113 Ariz. 416, 418 (1976); *State ex rel. Berger v. Myers*, 108 Ariz. 248 (1972), he is mainly responsible for enforcing § 13-3603, *e.g. State v. Boozer*, 80 Ariz. 8, 10 (1955) (noting defendant "charged by the county attorney" with violating § 13-3603's statutory predecessor).

Because the County Attorney has a "right to enforce" § 13-3603, he has a substantial interest in this case. *Heritage*, 246 Ariz. at 571.

B. The order below impairs the County Attorney's interest in enforcing A.R.S. § 13-3603.

The County Attorney seeks to fully enforce § 13-3603. This interest "may be impaired" if intervention is denied. *Heritage*, 246 Ariz. at 573. Indeed, this interest sits in grave jeopardy now. Unless this Court reverses the judgment below, the County Attorney cannot fully enforce § 13-3603. And no state official will defend the law. The County Attorney risks being "bound by a judgment" enjoining a valid state law just because the Attorney General chooses not to defend it. *John F. Long Homes, Inc. v. Holohan*, 97 Ariz. 31, 33 (1964). That's not just.

This Court "liberally construe[s]" its intervention rules to promote "justice." *Bechtel v. Rose ex rel. Dep't of Econ. Sec.*, 150 Ariz. 68, 72 (1986) (quoting *Mitchell v. City of Nogales*, 83 Ariz. 328, 333 (1958)). As it stands, the only state officials here will not defend the law. The Pima County Attorney has sided with Planned Parenthood. And while the Attorney General defended § 13-3603 below, that was before General Mayes assumed office. She has changed the State's position and will not defend it, as shown by her decision not to appeal the decision below.

The Attorney General's refusal to defend and uphold state law directly threatens the Yavapai County Attorney's interest in enforcing § 13-3603. While General Mayes may exercise lawful prosecutorial discretion, her litigation position should not alone decide whether § 13-3603 is declared constitutional or void. That position undeniably impairs the County Attorney's interest.

C. The existing parties do not adequately represent the County Attorney's interest.

Proposed intervenors need only show that representation of their interests "'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (quoting 3B J. Moore, Federal Practice 24.09–1(4) (1969)). The County Attorney satisfies that minimal burden here.

As detailed above, no existing party adequately represents the Yavapai County Attorney's interest. The Attorney General has changed positions and, as shown by her decision not to appeal, will side with Planned Parenthood. The Pima County Attorney has long sided with Planned Parenthood. And while Dr. Hazelrigg seeks to fully defend § 13-3603, he is not a state actor and cannot criminally prosecute offenders. So while Dr. Hazelrigg seeks to protect unborn children, the County Attorney's legally cognizable interest flows not from the unborn but from his elected office and his responsibility to represent "the interests of all people" in his jurisdiction. *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 279 (App. 2011).

When a proposed intervenor's "'interest is similar to, but not identical with, that of one of the parties,'" courts reject any "presumption of adequate representation." *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2204 (2022) (quoting 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1909)). Indeed, such a presumption is wholly "inappropriate when a duly authorized state agent seeks to intervene to defend a state law," *id.*, as is the case here. Because the interests of the County Attorney and those of Dr. Hazelrigg are demonstrably different, the County Attorney is entitled to intervene.

D. The County Attorney's motion is timely.

The Yavapai County Attorney timely moves to intervene. For timeliness, this Court "consider[s] several factors," including the lawsuit's "stage," whether the movant "could have … intervene[d]" sooner, and whether existing parties will be prejudiced. *State ex rel. Napolitano v. Brown & Williamson Tobacco Corp.*, 196 Ariz. 382, 384 (2000). These factors show that the County Attorney's intervention is warranted.

While this suit is at a late stage, this is an obvious case "where [late] intervention is proper." *Matter of One Cessna 206 Aircraft, FAA Registry No. N-72308, License No. U-206-1361*, 118 Ariz. 399, 401 (1978). The County Attorney was "in no position to intervene" before receiving "notice" that the Attorney General no longer "intend[ed] to prosecute the appeal." *Holohan*, 97 Ariz. at 34-35. When General Mayes did not appeal, the County Attorney became aware that his interest would no longer be adequately protected. Section I.B *supra*. He then moved to intervene at the earliest time. *Holohan*, 97 Ariz. at 34-35; *Heritage*, 246 Ariz. at 571; *accord Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("The crucial date for … timeliness … is when proposed intervenors should have been aware that their interests would not be adequately protected….").

The County Attorney's intervention will prejudice no one. The briefing schedule and timeline for resolving this appeal remain the same. The County Attorney does not even seek to file a separate petition but joins in the Petition that Dr. Hazelrigg has already filed. Additionally, the

County Attorney's legal arguments will be the same in kind as those of the predecessor Attorney General in the trial court and appellate court. There will be no surprises. Indeed, Planned Parenthood and the Pima County Attorney had to expect that this suit would reach the Arizona Supreme Court—whether because they were appealing or someone else. And the Attorney General should expect opposition when she reverses the State's position, imperiling the enforcement of a duly enacted and valid state law. If anything, the County Attorney's intervention will *eliminate* prejudice to Arizona voters, who deserve to have their validly enacted laws enforced and to be represented in court.

II. Alternatively, the Yavapai County Attorney satisfies the requirements for permissive intervention.

At minimum, the Yavapai County Attorney satisfies the requirements for permissive intervention because he has a "defense that shares with the main action a common question of law or fact." A.R.C.P. 24(b)(1)(B). This Court considers many factors when asked to grant permissive intervention, including: (1) "whether intervention would unduly delay or prejudice the adjudication of the rights of the original parties"; (2) "the nature and extent of the intervenor's interest[s]"; (3) "his or her standing to raise relevant issues"; (4) "legal positions the proposed intervenor seeks to raise," and (5) "those positions' probable relation to the merits of the case." *Dowling v. Stapley*, 221 Ariz. 251, 272 (App. 2009).

As detailed above, the County Attorney's intervention will prejudice no one. Section I.D, *supra*. He represents the "the interests of all people" in his jurisdiction and seeks to uphold and defend a validly enacted law, interests that are broader and different in kind than Dr. Hazelrigg's interest in protecting unborn children. *Planned Parenthood*, 227 Ariz. at 279; Section I.C, *supra*. And the County Attorney's interest in fully enforcing § 13-3603 differs dramatically from Respondents and (now) the Attorney General. Section I.B, *supra*. He has standing to defend this interest because he is charged with enforcing the § 13-3603. Section I.A, *supra*. This Court should at least allow the County Attorney to permissively intervene.

CONCLUSION

This Court should grant the Yavapai County Attorney's motion to intervene and to join Dr. Hazelrigg's Petition for Review.

RESPECTFULLY SUBMITTED this 2nd day of March, 2023.

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