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

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

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*Application for pro hac vice admission granted

**Application for pro hac vice admission forthcoming

INTRODUCTION

The people of Arizona have consistently enacted laws to protect unborn human life to the greatest extent possible. Even after *Roe*, the Arizona Legislature reenacted A.R.S. § 13-3603 to retain the State's historic protection of unborn children from elective abortions. The people of Arizona passed even more protections last year—careful to say these changes created *no* abortion right and did *not* repeal § 13-3603.

Until recently, this lawsuit always included at least one law enforcement official as a party willing to defend and enforce § 13-3603. That eliminated the possibility and necessity for intervention of another. But that changed when Attorney General Mayes assumed office, announced her refusal to defend the law, and declined to appeal here. Dr. Hazelrigg is now the only existing party seeking to defend § 13-3603, but while he is an interested party, he is not an official authorized to enforce the law.

This Court should allow the Yavapai County Attorney to intervene. The County Attorney is entitled to intervention of right, and at a minimum, he satisfies the liberal requirements for permissive intervention. Manifest injustice would occur if the existing parties were to block his participation when no existing party represents his significant interests.

ARGUMENT

The County Attorney has an interest in enforcing valid state laws like § 13-3603. This interest was protected before Attorney General Mayes recently assumed office, but because she declined to appeal and refuses to 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. 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 opposition briefs primarily focus on the first two elements, disputing the County Attorney's timeliness and interest. The County Attorney satisfies these requirements.

A. The County Attorney's application is timely.

For timeliness, this Court may "consider 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).

But the "crucial date" for timeliness "is when proposed intervenors should have been aware that their interests would not be adequately protected." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

Only Planned Parenthood disputes the timeliness of the County Attorney's application. Pl.'s Br. 10–14.[1] But Planned Parenthood misunderstands the law and neglects the decisive fact: an existing government party was willing to defend A.R.S. § 13-3603 at all points in this lawsuit until just recently. Prior adequate representation by former attorneys general precluded the County Attorney's intervention until now. Simply put, the County Attorney was "in no position to intervene" before receiving "notice" that the Attorney General no longer defended the law or "intend[ed] to prosecute the appeal." *John F. Long Homes, Inc. v. Holohan*, 97 Ariz. 31, 34–35 (1964).

While media statements and campaign materials alerted Arizonans that Attorney General Mayes would likely fail to defend their law, the pivotal date was March 1, 2023, when Attorney General Mayes removed all doubt and actually declined to appeal. The County Attorney sought intervention *the very next day*.

Even earlier, when Attorney General Mayes merely threatened not to defend the law, the County Attorney promptly took steps to engage

[1] The Pima County Attorney's brief mentions timeliness in a single footnote, but the substance of the argument relates to the County Attorney's cognizable interest. *See* Pima Cnty. Att'y Br. 5 n.1.

counsel and prepared to intervene as soon as possible. *Holohan*, 97 Ariz. at 34–35; *Heritage*, 246 Ariz. at 571. Planned Parenthood complains that approximately two months elapsed between Attorney General Mayes' announcement of non-enforcement and the County Attorney's application. Pl.'s Br. 12–13. But the Attorney General could have changed her position before the appeal deadline, and in any event, Arizona courts have held that intervention is timely under these circumstances. *See Heritage*, 246 Ariz. at 571. The cases that Planned Parenthood cites do not support denying intervention for such a short timeframe, especially when no litigation deadlines transpired during the brief period between notice of non-enforcement and the intervention application.

Finally, no prejudice will result from the County Attorney's intervention. The briefing schedule and timeline for resolving this appeal remain the same. The County Attorney has unique interests but has agreed to join in the Petition that Dr. Hazelrigg already filed. If anything, the County Attorney's intervention will *eliminate* prejudice to the people of Arizona, who deserve to have their validly enacted laws enforced and defended in court. The County Attorney's application should be granted as timely.

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

The Arizona Constitution directly creates the office of county attorney. ARIZ. CONST. art. XII, § 3. Under the Arizona Constitution, "the county attorney is a constitutional officer charged with the responsibility of enforcing the public laws" within their jurisdictions. *State ex rel. Berger v. Myers*, 108 Ariz. 248, 249 (1972). Consistent with this constitutional mandate, an Arizona statute provides that the "county attorney is the public prosecutor of the county" and requires that county attorneys "shall" prosecute "public offenses when [he] has information that" crimes "have been committed." A.R.S. § 11-532(A)(2). Indeed, 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).

Thus, the County Attorney bears the primary responsibility for enforcing § 13-3603 in Yavapai County. *E.g. State v. Boozer*, 80 Ariz. 8, 10 (1955) (noting defendant "charged by the county attorney" with violating § 13-3603's statutory predecessor); *Heritage*, 246 Ariz. at 571 (finding an interest arising from a right to enforce the law). Hoping to avoid the adversity that would result from including a governmental party willing to enforce § 13-3603, the law's opponents argue that the County Attorney lacks *any* interest in enforcing the challenged law as written. All of these arguments fail.

First, Appellees urge that the Attorney General is the State's *chief* legal officer, and thus has broader law enforcement authority than county attorneys, both in terms of geography and subject matter. *See* Att'y Gen. Br. 4–5. But nowhere do the opposition briefs establish that the Attorney General is the *only* legal officer authorized to advocate in these circumstances, to the exclusion of county attorneys who are *also* authorized to enforce valid laws within their jurisdictions. Attorney General Mayes concedes that county attorneys are "created by the state for the purposes of government," *Haupt v. Maricopa Cnty.*, 8 Ariz. 102, 105 (1902), and thus conduct prosecutions "on behalf of the state," A.R.S. § 11-532(A)(1); *see also Associated Dairy Prods. Co. v. Page*, 68 Ariz. 393, 396 (1949).

The County Attorney thus has an interest in enforcing § 13-3603 *even if* the Attorney General also has overlapping—and even broader—powers. Indeed, the Pima County Attorney is included in this lawsuit due to that officer's independent enforcement authority, notwithstanding her recent refusal to defend valid Arizona laws. Of course, Arizona law allows the Attorney General to represent the State in this Court, A.R.S. § 41-193, but that doesn't prevent others from also doing so, and this Court allows intervention when—as here—the Attorney General fails to represent another government official's interests. A.R.C.P. 24(a); *see Saunders v. Super. Ct. In & For Maricopa Cnty.*, 109 Ariz. 424, 426 (1973) (finding that the Attorney General did not adequately represent proposed

intervenors' interests). In any event, the Attorney General's general law enforcement power means very little when she refuses to enforce the law.

Second, the law's opponents stretch the Attorney General's "supervisory powers," A.R.S. § 41-193(A)(4),[2] beyond their breaking point, suggesting that supervision allows the Attorney General to prevent a county attorney from discharging his *own* distinct constitutional and legal duty to defend valid laws when the Attorney General refuses. Not so. The very

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[2] Although unnecessary for this Court's determination in this matter, the County Attorney asserts that A.R.S. § 41-193(A)(4) is unconstitutional. Had the Arizona Constitution intended the legislature to have authority to create a supervisory role between constitutionally created executive offices, then the Constitution would have specifically granted that power to the legislature. Consider the pertinent parts of the following constitutional provisions: ARIZ. CONST. art. VI, § 3 (granting administrative supervision to the supreme court over all courts in the state); ARIZ. CONST. art. XI, § 2 (granting supervision of the public school system to a state school board and certain executive officers); ARIZ. CONST. art. XV, § 5 (granting supervision of domestic and foreign insurers to the department of insurance); ARIZ. CONST. art. XV, § 3 (granting supervision of certain public service corporations to incorporated cities and towns); ARIZ. CONST. art. VI, § 11 (granting administrative supervision of a county's superior court to the presiding judge). To hold otherwise would violate the separation of powers provision of Article 3 of the Arizona Constitution. The interpretation that allows the legislature to assign supervisory roles within the executive branch based upon the general constitutional language allowing the legislature to assign executive officers their "powers and duties" (see ARIZ. CONST. art. V, § 9 and art. XII, §§ 3 & 4) could result in such awkward outcomes as sheriffs in charge of county attorneys, or vice versa. It could even lead to sheriffs or county attorneys overseeing the attorney general, or even more absurd results. These absurd results were not authorized by the State's founding document but would be permissible under the Attorney General's theory.

same statute recognizes that county attorneys discharge independent duties and requires the Attorney General to assist county attorneys when necessary. *Id.* § 41-193(A)(5).

The cases applying A.R.S. § 41-193 do not contemplate an Attorney General completely usurping a county attorney's constitutionally granted powers, but rather, offering assistance and resolving disputes with other county officials. *See Romley v. Daughton*, 225 Ariz. 521, 524–25 n.5 (App. 2010) (citing supervisory authority to resolve dispute between county attorney and Board). Indeed, it may well violate the separation of powers for the Legislature—through § 41-193—to place one constitutional executive officer in a supervisory role over another. If that were allowed, the Legislature could also turn the tables and place the Attorney General under the supervision of a county attorney.

The County Attorney does not wish to "step into the Attorney General's shoes." Att'y Gen. Br. 7. He simply seeks to discharge his own constitutional and statutory duties within his own jurisdiction. It is the Attorney General who oversteps by seeking to deprive the County Attorney of his constitutional power, and all in an attempt to *prevent* the defense of a valid State law. The County Attorney has a cognizable interest.

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

To the extent that the opposition briefs address impairment, they argue that the County Attorney is not impaired because he lacks an interest to begin with. *See* Att'y Gen. Br. 12. But as explained above, the County Attorney has an independent interest in enforcing § 13-3603. This interest "may be impaired" if intervention is denied. *Heritage*, 246 Ariz. at 573. Unless this Court reverses the judgment below, the County Attorney cannot enforce § 13-3603 as written, but would instead be forced to apply a judicially manufactured exception for physicians that violates the plain language of the law and—contrary to the people's express intent—implicitly repeals the law in most of its applications. 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. *Holohan*, 97 Ariz. at 33.

This Court "liberally construe[s]" its intervention rules to promote "justice." *Bechtel v. Rose ex rel. Ariz. Dep't of Econ. Sec.*, 150 Ariz. 68, 72 (1986) (quoting *Mitchell v. City of Nogales*, 83 Ariz. 328, 333 (1958)). Currently, the only state officials here will not defend the law. The Attorney General's refusal to defend and uphold state law directly threatens the County Attorney's interest in enforcing § 13-3603. While Attorney General Mayes may exercise lawful prosecutorial discretion, her litigation position should not singlehandedly dictate whether § 13-3603 is declared

constitutional or void. That position impairs the County Attorney's interest.

D. 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.

As detailed in the County Attorney's motion, no existing governmental party adequately represents the Yavapai County Attorney's interest. The Attorney General has changed positions and will now side with Planned Parenthood. And the Pima County Attorney has long sided with Planned Parenthood.

The opposition briefs suggest that Dr. Hazelrigg adequately represents the County Attorney's interest in defending § 13-3603. *See* Att'y Gen. Br. 12. But Dr. Hazelrigg is not a state actor and represents entirely distinct interests unrelated to enforcement authority. So while Dr. Hazelrigg seeks to protect unborn children, the County Attorney's legally cognizable interest flows not from a responsibility to represent interests of the unborn but from his elected office and his responsibility to enforce laws 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).[3]

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 (3d ed. Supp. 2022)). 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 different, the County Attorney is entitled to intervene.

II. The Court should grant 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 several factors when evaluating

[3] Because the law's opponents argued that Dr. Hazelrigg adequately represents the interests of the County Attorney—a constitutional law enforcement officer—they are estopped from later arguing that the absence of a state actor deprives this Court of jurisdiction if the County Attorney's application to intervene is denied. *See State v. Towery*, 186 Ariz. 168, 182 (1996) (judicial estoppel prevents undermining judicial integrity by advancing inconsistent arguments); *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000) (judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase").

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).

In opposing permissive intervention, the opposition briefs largely recycle their arguments opposing intervention of right. But as detailed above, the County Attorney has a cognizable interest in enforcing § 13-3603. And his intervention will prejudice no one. 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. And the County Attorney's interest in enforcing § 13-3603 as written differs from Respondents and (now) the Attorney General. He has standing to defend this interest because he is charged with enforcing § 13-3603. 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 20th day of April, 2023.

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