**ARIZONA SUPREME COURT**

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| PLANNED PARENTHOOD ARIZONA, INC., et al.,<br><br>Plaintiffs-Appellants<br><br>v.<br><br>KRISTIN MAYES, Attorney General of the State of Arizona, et al.,<br><br>Defendants-Appellees<br><br>and<br><br>ERIC HAZELRIGG, M.D., as guardian ad litem of all Arizona unborn infants,<br><br>Intervenor-Appellee | )<br>) Supreme Court No.<br>) CV-23-0005-PR<br>)<br>) Court of Appeals, Division<br>) Two No. 2 CA-CV-2022-0116<br>)<br>) Pima County Superior Court<br>) No. C127867<br>)<br>)<br>)<br>)<br>) |

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**RESPONDENT PLANNED PARENTHOOD ARIZONA, INC.'S RESPONSE TO DENNIS MCGRANE, YAVAPAI COUNTY ATTORNEY'S MOTION TO INTERVENE AND JOIN PETITION FOR REVIEW OF INTERVENOR/APPELLEE ERIC HAZELRIGG, M.D.**

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D. Andrew Gaona (028414)
agaona@cblawyers.com
Austin C. Yost (034602)
ayost@cblawyers.com
COPPERSMITH BROCKELMAN PLC
2800 N. Central Avenue, Suite 1900
Phoenix, Arizona 85004
T: (602) 381-5486

Diana O. Salgado*
diana.salgado@ppfa.org
PLANNED PARENTHOOD FEDERATION OF AMERICA
1110 Vermont Ave. NW, Suite 300
Washington, D.C. 20005
T: (212) 261-4399

Sarah Mac Dougall*
sarah.macdougall@ppfa.org

PLANNED PARENTHOOD
FEDERATION OF
AMERICA
123 William St., 9th Floor
New York, New York 10038
T: (212) 261-4529
* *Pro Hac Vice Forthcoming*

*Attorneys for Respondent Planned Parenthood Arizona, Inc.*

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Yavapai County Attorney Dennis McGrane seeks to intervene in this action under Arizona Rule of Civil Procedure 24 and join intervenor and Guardian Ad Litem Dr. Eric Hazelrigg's petition for review of the court of appeals' December 30, 2022 decision. The Court should deny this request because County Attorney McGrane fails to carry his burden under Rule 24.

## I. BACKGROUND

Five decades after the original resolution of this case, Defendant Attorney General Mark Brnovich moved under Rule 60(b)(5), Ariz. R. Civ. P., to vacate the 1973 injunction of the State's near total ban on abortion—originally enacted in 1864 in territorial days—A.R.S. § 13-3603. At the same time, AG Brnovich sought, over Plaintiff Planned Parenthood Arizona, Inc.'s ("PPAZ") opposition, to substitute Dr. Hazelrigg in place of Cliffton E. Bloom, who entered the case in 1971 as "intervenor and Guardian Ad Litem of unborn infants" but died in 2014. In the alternative, Dr. Hazelrigg also moved to intervene under Rule 24 should the substitution request be denied. The trial court granted the AG's motion to substitute Dr. Hazelrigg in the place of

Mr. Bloom. *See* Appendix to Intervenor/Appellee Eric Hazelrigg, M.D.'s Petition for Review ("App.") at 72–73.

The trial court also granted AG Brnovich's motion to lift the 1973 injunction in its entirety as to A.R.S. § 13-3603 and rejected PPAZ's argument that it had a duty to harmonize A.R.S. § 13-3603 with other laws regulating abortion enacted by the Legislature after 1973. App. at 74–75. PPAZ appealed, and the court of appeals reversed in part, holding that abortions performed through fifteen weeks of gestational age as authorized under Title 36 are not subject to prosecution under A.R.S. § 13-3603. App. at 86–87.

Though Dr. Hazelrigg was the only party to seek this Court's review of that decision, newly elected Attorney General Kristin Mayes and Pima County Attorney Laura Conover remain parties. County Attorney McGrane now seeks to intervene in the case for the sole purpose of joining Dr. Hazelrigg's petition for review.

## II. LEGAL STANDARD

Under Rule 24(a)(2), a proposed intervenor may intervene as of right only if (1) the intervention motion is timely, (2) the proposed intervenor asserts an interest relating to the subject of the action, (3) the

disposition of the action may impair or impede their ability to protect that interest, and (4) the other parties would not adequately represent their interests. *Woodbridge Structured Funding, LLC v. Ariz. Lottery*, 235 Ariz. 25, 28 ¶ 13 (App. 2014).

"A putative intervenor has the burden of establishing all four requirements[.]" *Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.*, 54 F.4th 1078, 1086 (9th Cir. 2022); *Morris v. Sw. Sav. & Loan Ass'n*, 9 Ariz. App. 65, 68 (1969) ("Persons who do not demonstrate their right to intervene are not entitled to intervene.").

Alternatively, the Court may permit intervention under Rule 24(b) "[o]n timely motion" if the proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact," and if intervention will not "unduly delay or prejudice the adjudication of the original parties' rights."

## III. ARGUMENT

The Court should deny County Attorney McGrane's Motion to Intervene because he fails to meet the requirements of Rule 24(a) and (b). His interests are adequately represented by existing parties, his motion is untimely, and he also fails to demonstrate a sufficient interest that

would allow him to permissively intervene and join Dr. Hazelrigg's petition.[1]

### A. County Attorney McGrane cannot intervene as of right.

County Attorney McGrane fails to satisfy at least two of Rule 24(a)'s four conditions.

#### 1. County Attorney McGrane does not identify any legitimate, unprotected interests in this action.

In assessing adequacy of representation, courts consider (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments, (2) whether the present party is capable and willing to make such arguments, and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect. *Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 952 (9th Cir. 2009).[2] If a proposed intervenor's interest is "identical to that of one of the present parties, a *compelling*

[1] While PPAZ opposes County Attorney McGrane's request to intervene, it does not oppose his filing an *amicus* brief at this stage, as authorized by the rules, nor does PPAZ object to him filing an *amicus* brief if the Court ultimately grants the petition for review.

[2] Because the requirements of Arizona Rule 24(a) and (b) are nearly "identical" to those of Federal Rule of Civil Procedure 24, Arizona courts "give great weight to federal court interpretations of the rules of procedure." *Estate of Page v. Litzenburg*, 177 Ariz. 84, 93 (App. 1993).

*showing* should be required to demonstrate inadequate representation." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (emphasis added).

Here, County Attorney McGrane seeks the same relief and shares an identical interest (as well as identical counsel) with Dr. Hazelrigg, who is already a party to this action. He cannot make the required "compelling showing" because any legitimate interest he identifies in this action is already fully represented by existing parties, who are capable and willing to make the arguments County Attorney McGrane would make.

County Attorney McGrane claims that his interest in this action relates to his responsibility, as a county attorney, to prosecute "public offenses when [he] has information that" crimes "have been committed." Mot. at 6, citing A.R.S. § 11-532(A)(2). But this is true of all Arizona's county attorneys and other officials with enforcement powers, including Pima County Attorney Laura Conover and AG Mayes, who are already parties to this action. Like County Attorney McGrane, they have an interest in the Court's decision because they need to be clear as to what constitutes criminal action under Arizona's laws, including Title 36 and

A.R.S. § 13-3603, and is therefore subject to prosecution. *See* ROA 29 at 2 (County Attorney Conover citing the same law as County Attorney McGrane (A.R.S. § 11-532(A)) and seeking clarity regarding A.R.S. § 13-3603 so that she may "effective[ly] execut[e] her prosecutorial duties" and conduct "prosecutions for public offenses").[3] This purported interest of County Attorney McGrane is thus adequately represented by—indeed, it is identical to that of—the Pima County Attorney and AG Mayes.

What's more, County Attorney McGrane's suggestion that the interests of the people of Yavapai County are not represented in this action is incorrect. Mot. at 8. The Arizona Attorney General acts as the chief legal officer of the State on behalf of all Arizonans, including the people of Yavapai County. AG Mayes maintains an interest in a final determination from the courts regarding the State's abortion laws to ensure the law is clear.

If County Attorney McGrane contends that his interest diverges from County Attorney Conover's and AG Mayes's, it is only because he

[3] Contrary to County Attorney McGrane's characterization, the Pima County Attorney did not say that she would never prosecute violators of § 13-3603, once the courts clarify what legal standards should apply. *See* ROA 76 at 2, n.1.

confuses his purported desire to "fully enforce" *this particular law* according to his interpretation of it with his statutory obligation to know what constitutes criminal action and enforce the law accordingly. County Attorney McGrane's problem, though, is that his enthusiasm for enforcing A.R.S. § 13-3603 as written is not a *legitimate* interest and is therefore not enough to distinguish his interest in the case from County Attorney Conover's and AG Mayes's.

But even if County Attorney McGrane had a legitimate interest, distinct from County Attorney Conover's and AG Mayes's, in seeking to "fully enforce § 13-3603 as written," Mot. at 5–6, that interest is already adequately represented by Dr. Hazelrigg. Dr. Hazelrigg petitioned this Court "to clarify that A.R.S. § 13-3603 forbids all people, including physicians, from performing abortions except to save a mother's life, and that Title 36 did not repeal or otherwise limit § 13-3603," Petition at 6, which is also what he argued to the trial court and court of appeals. *See* ROA 41 at 8–10; App. at 9 (Dr. Hazelrigg joining AG Brnovich's Rule 60(b)(5) motion); Answering Brief of Intervenor-Appellee Dr. Eric Hazelrigg, Nov. 8, 2022 at 22–24.

County Attorney McGrane tries to characterize his interest as different from that of Dr. Hazelrigg based on his position as the Yavapai County Attorney, but at bottom they are fully aligned in seeking to have A.R.S. § 13-3603 override dozens of Arizona abortion laws to allow for a near total ban on abortion to take effect. "Simply adding more voices arguing essentially the same position isn't enough to warrant intervention." *Oregon Nat. Res. Council v. Allen*, No. CV 03-888-PA, 2003 WL 27386127, at *2 (D. Or. Nov. 4, 2003). The mutuality of interest between Dr. Hazelrigg and County Attorney McGrane is only emphasized by the fact that Mr. McGrane has not filed his own proposed petition for review or put forth any unique arguments—instead, he wants only to join Dr. Hazelrigg's. *See* *Guetzko v. KeyBank Nat. Ass'n*, No. C08-2067, 2009 WL 482130, at *4 (N.D. Iowa Feb. 25, 2009) (finding interests adequately represented and denying a motion to intervene as of right because "[t]he facts upon which [proposed intervenor] relies are already contained in [p]laintiffs' petition" and "[t]he relief sought by [proposed intervenor] is identical to that sought by the individual [p]laintiffs").

Further, County Attorney McGrane's contention that his interests are not adequately represented in this action is questionable because he

and Dr. Hazelrigg are represented by *the same legal counsel* (indeed, the first four pages of County Attorney McGrane's motion are almost word-for-word identical to Dr. Hazelrigg's petition for review). Many courts have found that when a potential intervenor and an existing party have the same legal counsel, there is a strong presumption that the intervenor's interests are adequately represented. *See, e.g.*, *Beasley v. Bethlehem Steel Corp.*, 30 Fed. R. Serv. 2d 747, *3 (D. Md. 1979) (*citing United States v. IBM Corp.*, 62 F.R.D. 530, 535 (S.D.N.Y. 1974), *cert. denied,* 416 U.S. 995 (1974); *Carroll v. Am. Fed'n of Musicians of the U.S. and Can.*, 33 F.R.D. 353 (S.D.N.Y. 1953), *reh'g denied,* 393 U.S. 902 (1968)); *see also In re Weingarten*, 492 F. App'x 754, 756 (9th Cir. 2012) (parties represented by same counsel are "capable and willing to make" the same arguments that the proposed intervenors would make) (*citing U.S. v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002)); *Union Cent. Life Ins. Co. v. Hamilton Steel Prod. Inc.*, 374 F.2d 820, 823 (7th Cir. 1967) ("Inadequate representation can hardly be claimed where the same attorneys represent the Union's class representatives and the proposed intervenor.").

### 2. County Attorney McGrane's request to intervene is untimely.

A motion to intervene can be granted only when it is timely, and County Attorney McGrane's does not satisfy this requirement. Arizona courts consider several factors when making timeliness determinations "including the stage to which the lawsuit has progressed" and, "[b]ecause granting a post-judgment motion to intervene is especially likely to prejudice the parties, such motions are disfavored, and should be granted *only in the most exceptional circumstances*." *State ex rel. Napolitano v. Brown & Williamson Tobacco Corp.*, 196 Ariz. 382, 384 ¶ 5 (2000) (emphasis added) (citations omitted); *see also Planned Parenthood of the Heartland v. Heineman*, No. 4:10-CV-3122, 2010 WL 4609299, at *2–3 (D. Neb. Nov. 4, 2010), *aff'd,* 664 F.3d 716 (8th Cir. 2011), *cert. denied,* 568 U.S. 929 (2012) (denying pregnancy center's motion to intervene as untimely where court had entered judgment less than one month earlier).

This is not such an exceptional circumstance. The Yavapai County Attorney had every opportunity to attempt intervention in this case at an earlier stage. Even setting aside the fact that it has been more than fifty years since the original Planned Parenthood entity first filed suit and the subsequent trial, appellate decision, and final judgment entered, it has

been over nine months since the U.S. Supreme Court overruled *Roe v. Wade*, after which AG Brnovich immediately claimed that Arizona's 15-Week Law would take effect in subsequent months. Confusion then ensued about the status of Arizona's abortion laws until AG Brnovich reversed course and moved to lift the injunction against Arizona's Civil-War-era abortion ban, A.R.S. § 13-3603. Notably, during this time the Yavapai County Attorney[4] made no attempt of her own to (nor public statements claiming that she would move to) lift the injunction against A.R.S. § 13-3603. It has now been over seven months since AG Brnovich filed the Rule 60(b)(5) motion, which the Yavapai County Attorney did not seek to join. And it has been another four-plus months since PPAZ filed an appeal and over two months since the court of appeals' decision on the Rule 60(b)(5) motion.

County Attorney McGrane now seeks to get involved for the first time at the petition for review stage, not only after final judgment, but also after a motion to vacate that judgment has been decided and the

[4] Although Mr. McGrane succeeded Sheila Polk as Yavapai County Attorney in late December 2022, the timeliness of the County Attorney's request to intervene should be evaluated regardless of the individual holding that position.

appeal of that decision has already been ruled on by the court of appeals. If the Yavapai County Attorney *actually* had distinct interests from those who are already parties to this action, that office should have sought to intervene when this action was resurrected by AG Brnovich. County Attorney McGrane's delayed involvement at this late stage thus appears to be little more than an attention-grabbing political stunt.

County Attorney McGrane argues that "late intervention is proper" here because he was "in no position to intervene" before receiving "notice" that the Attorney General no longer intended to prosecute the appeal. Mot. at 9. But even if the Court accepts this argument, County Attorney McGrane's motion is *still* untimely. AG Mayes was declared the next Arizona Attorney General on December 29, 2022. As early as January 3, 2023, AG Mayes publicly announced that she did not intend to pursue an appeal of the court of appeals' decision.[5] Despite knowing the AG's

[5] *See, e.g.*, Greg Hahne, *Arizona Attorney General Kris Mayes Will Not Challenge Appellate Ruling on Territorial Abortion Law*, KJZZ (Tempe, AZ), January 3, 2023, *available at* https://kjzz.org/content/1835062/arizona-attorney-general-kris-mayes-will-not-challenge-appellate-ruling-territorial; Colleen Sikora, *New Arizona Attorney General Kris Mayes Outlines Priorities*, KPNX (Phoenix, AZ), January 4, 2023, *available at* https://www.12news.com/article/news/local/arizona/new-arizona-

intentions in early January, County Attorney McGrane waited almost *two months* to submit his motion on March 2, 2023.

While County Attorney McGrane lauds himself for moving to intervene "at the earliest time," Mot. at 9, Arizona courts have found similar delays untimely. *See, e.g.*, *Brown & Williamson Tobacco*, 196 Ariz. at 384 ¶¶ 5–9 (denying motion to intervene as untimely where intervenors sought to intervene 2.5 years after suit was filed, 28 days after settlement was reached and fifteen days after judgment was entered); *Lincoln–Mercury–Phoenix, Inc. v. Base*, 84 Ariz. 9, 13 (1958) (denying motion to intervene filed three days after judgment); *Weaver v. Synthes, Ltd. (U.S.A.)*, 162 Ariz. 442, 446 (App. 1989) (upholding denial of motion to intervene on timeliness grounds where "[t]he prospective intervenors waited until two months after judgment and four months after they knew of the default to attempt intervention").

The cases County Attorney McGrane cites are distinguishable because they either found the at-issue motion to intervene timely when made in a significantly shorter timeframe or found it untimely

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altogether. *See* *John F. Long Homes, Inc. v. Holohan*, 97 Ariz. 31, 35 (1964) (motion to intervene was timely when made "*within three hours* after the first time an application could be entertained" (emphasis added)); *Heritage Vill. II Homeowners Ass'n v. Norman*, 246 Ariz. 567, 572 ¶ 17 (App. 2019), *as amended* (May 22, 2019) (finding a motion to intervene timely when made *only five days after* intervenors were on notice that their interests were no longer represented); *Smith v. Marsh*, 194 F.3d 1045, 1052–53 (9th Cir. 1999) (district court did not abuse its discretion in denying the motion to intervene as untimely when it was made fifteen months after commencement of litigation). What's more, County Attorney McGrane offers no explanation for his two-month delay. *See* *Orange Cnty. v. Air California*, 799 F.2d 535, 538 (9th Cir. 1986) (a proposed intervenor must "convincingly explain its delay in filing its motion to intervene"); *Key Bank of Puget Sound v. Alaskan Harvester*, 738 F. Supp. 398, 405 (W.D. Wash. 1989) (denying motion to intervene because of applicant's "failure to present any evidence explaining its tardy prosecution of its claim").

### B. The Court should also deny the motion for permissive intervention.

In evaluating a motion for permissive intervention under Rule 24(b), courts consider factors including "the nature and extent of the intervenor's interest, his or her standing to raise relevant issues, legal positions the proposed intervenor seeks to raise, and those positions' probable relation to the merits of the case." *Dowling v. Stapley*, 221 Ariz. 251, 272 ¶ 68 (App. 2009). The motion must also be timely and must not cause undue delay or prejudice to existing parties.

Whether to grant or deny a motion for permissive intervention is directed to the sound discretion of the court. *San Jose Mercury News, Inc. v. U.S. Dist. Ct. – N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999); *see also Weaver*, 162 Ariz. at 448. Thus, even if the threshold requirements of permissive intervention are met, a court may still exercise its discretion to deny the motion. *Canatella v. California*, 404 F.3d 1106, 1117 (9th Cir. 2005).

As discussed above, County Attorney McGrane's motion is untimely, *see* Section III.A.2, and his interests in this litigation are already represented by existing parties: Dr. Hazelrigg, the Arizona Attorney General, and the Pima County Attorney, *see* Section III.A.1.

This Court should thus deny his request for permissive intervention on these same grounds alone. *See* *Isaacson v. Brnovich*, No. CV-21-01417-PHX, 2021 WL 5449086, at *2 (D. Ariz. Nov. 22, 2021) (denying permissive intervention where there was adequate representation); *Bechtel v. Rose ex rel. Maricopa Cnty.*, 150 Ariz. 68, 72 (1986) (courts may consider relevant factors including "whether the intervenors' interests are adequately represented by other parties" (citation omitted)).

In addition, granting County Attorney McGrane's motion when his interests are already adequately represented will prejudice the parties by creating duplicative and unnecessary work, wasting resources, and taking up additional time. *See* *LaSalle Grp., Inc. v. Veterans Enter. Tech. Servs., LLC*, No. 11-CV-03517, 2012 WL 1113320, at *5 (W.D. Mo. Apr. 2, 2012) ("Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief *amicus curiae* and not by

intervention.") (*quoting* *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943)).

## IV. CONCLUSION

This Court should deny County Attorney McGrane's Motion to Intervene because he fails to meet the requirements of both Rule 24(a) and Rule 24(b).

RESPECTFULLY SUBMITTED this 30th day of March, 2023.

**COPPERSMITH BROCKELMAN PLC**

By: /s/ D. Andrew Gaona
D. Andrew Gaona
Austin C. Yost

**PLANNED PARENTHOOD FEDERATION OF AMERICA**
Diana O. Salgado*
Sarah Mac Dougall*
* *Pro Hac Vice Forthcoming*

*Attorneys for Respondent Planned Parenthood Arizona, Inc.*