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IN THE SUPREME COURT

STATE OF ARIZONA

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 2 No.
2 CA-CV 2022-0116
Pima County Superior Court No.
C127867
**APPELLANT LAURA
CONOVER, PIMA COUNTY
ATTORNEY’S RESPONSE TO
DENNIS MCGRANE, YAVAPAI
COUNTY ATTORNEY’S
MOTION TO INTERVENE AND
JOIN PETITION FOR REVIEW
OF INTERVENOR/APPELLEE
ERIC HAZELRIGG, M.D.**

BACKGROUND

In 1864, Arizona’s Territorial Legislature enacted a law criminalizing
abortion as part of the Howell Code, an act to provide a temporary government

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for the Arizona territory. The law evolved slightly over the next century and has most recently been recodified as A.R.S. § 13-3603.

The present case was commenced in July 1971 with the filing of a complaint requesting, among other things, that the Superior Court declare the precursor statute to A.R.S. § 13-3603 unconstitutional under the United States and Arizona Constitutions and enter a permanent injunction enjoining defendants Arizona Attorney General and Pima County Attorney from enforcing it. The original plaintiffs have now been succeeded by Planned Parenthood of Arizona, Inc. (“Planned Parenthood”).

The Superior Court found for the plaintiffs but was initially reversed by the Court of Appeals in *Nelson v. Planned Parenthood Ctr. of Tucson Inc.*, 19 Ariz. App. 142 (1973). A few weeks later, the United States Supreme Court issued its decision in *Roe v. Wade*, 410 U.S. 113 (1973). On rehearing, the Court of Appeals vacated its opinion based on the constitutional right to abortion care articulated in *Roe*. The Superior Court thereafter entered judgment in March 1973 declaring the statute unconstitutional and permanently enjoined defendants from enforcing it.

Over the following fifty years, Arizona passed a multitude of laws regulating abortions in Arizona. Adding to this statutory scheme, in the spring of 2022, the Arizona Legislature passed Senate Bill 1164, which imposed

1 criminal and civil penalties on physicians performing abortions where the
2 gestational age of the fetus is greater than fifteen weeks.

3 The United States Supreme Court overruled *Roe* in *Dobbs v. Jackson*
4 *Women’s Health Org.*, 142 S. Ct. 2228 (2022) in June 2022, eliminating the
5 federal constitutional right to abortion. The Attorney General subsequently
6 sought to lift the 1973 injunction on § 13-3603 through a motion for relief
7 pursuant to Rule 60(b)(5), Ariz. R. Civ. P. He also moved to substitute Dr.
8 Eric Hazelrigg for a party joined in 1971 “as intervenor and guardian ad litem
9 for all unborn children.” Planned Parenthood, joined by the Pima County
10 Attorney, moved to modify the injunction to reconcile § 13-3603 with five
11 decades of Arizona law regulating abortion, including the recently enacted
12 fifteen-week law.

13 The Superior Court granted the Arizona Attorney General’s motions and
14 ordered that the 1973 injunction no longer had any prospective application as
15 to § 13-3603. However, Planned Parenthood and the Pima County Attorney
16 prevailed on appeal, with the Court of Appeals finding that, given the overall
17 statutory scheme, it was not the intent of the legislature that licensed
18 physicians should face criminal prosecution under § 13-3603 for providing
19 elective abortions up to fifteen weeks of gestation. *Planned Parenthood*
20 *Arizona, Inc. v. Brnovich*, 524 P.3d 262 (Ariz. Ct. App. 2022).

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ARGUMENT

1. The Yavapai County Attorney lacks the necessary interest to intervene as of right under Rule 24(a)(2).

To intervene as of right under Rule 24(a)(2), Ariz. R. Civ. P., a person must “claim[] an interest relating to the subject of the action, and [be] so situated that disposing of the action in the person’s absence may as a practical matter impair or impede the person’s ability to protect that interest, unless existing parties adequately represent that interest.” Here, the “interest” that the Yavapai County Attorney purports to represent is a political opinion about the substance of §13-3603 that is unrelated to his legitimate interest in effectively fulfilling his statutory duties.

The Yavapai County Attorney, like his peers throughout the state, has a duty to “conduct, on behalf of the state, all prosecutions for public offenses.” A.R.S. § 11-532. Like other public officials concerned with law enforcement, he therefore has an interest in ensuring that the law is clear, unambiguous, and applied fairly. But the Pima County Attorney and Attorney General share that interest and are already parties by virtue of being named defendants in the original action. The Yavapai County Attorney provides no support for the proposition that the election of a new Attorney General affected the adequacy of the representation of that interest, nor that such an interest is sufficient to

1 support the intervention of a county attorney under the facts of this case.¹ In
2 any event, the Court of Appeals decision gives clear guidance as to how
3 Arizona’s abortion laws, including § 13-3603, should be interpreted and
4 applied. *Planned Parenthood Arizona, Inc. v. Brnovich*, 524 P.3d 262 (Ariz.
5 Ct. App. 2022). There is thus no basis for the Yavapai County Attorney to
6 intervene on this ground.
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9 Nonetheless, the Yavapai County Attorney asserts a purported “interest”
10 grounded in his belief that he has a “right to enforce” the law as he would like
11 it to be as opposed to a duty to enforce the law as passed by the legislature and
12 as interpreted by the courts. [Motion to Intervene and Join Petition for Review
13 of Intervenor/Appellee Dennis McGrane, Yavapai County Attorney, “MI,” at
14 6]. But he provides no support for his repeated assertion that such a right
15 exists. “[A] prospective intervenor must have such an interest in the case that
16 the judgment would have a direct legal effect upon his or her rights and not
17 merely a possible or contingent effect.” *Dowling v. Stapley*, 221 Ariz. 251,
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23 ¹ Because the Yavapai County Attorney’s interest continues to be
24 represented, he cannot show that this post-judgment, post-appeal effort to
25 intervene is timely. “[T]imeliness must be measured from the stage in the
26 proceedings at which [a party] no longer represented Movant’s interests.”
Heritage Vill. II Homeowners Ass’n v. Norman, 246 Ariz. 567, 571, ¶ 15
(App. 2019), as amended (May 22, 2019). The Yavapai County Attorney
can identify no legitimate interest that is unrepresented, so there is no
reason to permit such a late entry into the litigation.

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270, ¶ 58 (App. 2009). Because the Yavapai County Attorney has not established that he has any such right, and he has not demonstrated that he has the required interest in the case, his motion necessarily fails.

Recognizing an interest by every law enforcement official in their particular interpretation of the criminal statutes would generate “a proliferation of motions to intervene [that] may be a cause for concern” *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2196 (2022). Fourteen other county attorneys, fifteen county sheriffs, and more than seventy-five municipal police departments have the same interest in enforcing the law as the Yavapai County Attorney. According to the Yavapai County Attorney’s logic, each should have the right to intervene in any case where they hold a different opinion from the existing parties on the interpretation of a statute they enforce.

Moreover, although the Yavapai County Attorney argues that his putative interest in this matter is not adequately represented by the existing parties, by his own admission he “does not even seek to file a separate petition but joins in the Petition that Dr. Hazelrigg has already filed.” [MI at 9] His intervention would therefore not serve to further any distinct interest, even if he were able to demonstrate that it was a legitimate interest.

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2. **There is no statute that gives the Yavapai County Attorney a right to intervene to advance a particular interpretation of Arizona’s body of statutes regulating abortion.**

The Yavapai County Attorney asserts he is “a duly authorized state agent seek[ing] to intervene to defend a state law.” [MI at 8] However, he can cite no statutory source for any such “authorization,” because there is none. And his failure to identify such a statute precludes his intervention as a right under Rule 24(a)(1), Ariz. R. Civ. P. *See Dowling*, 221 Ariz. at 270, ¶ 59.

The Yavapai County Attorney instead relies on the United States Supreme Court’s recent decision in *Berger*, 142 S. Ct. 2191, which found that the speaker of the North Carolina House of Representatives and the president pro tempore of the State Senate could intervene in a federal case challenging the constitutionality of a North Carolina law. That decision was grounded in a North Carolina statute that “expressly authorized the legislative leaders to defend the State’s practical interests in litigation of this sort.” *Id.* at 2202, citing N. C. Gen. Stat. Ann. § 1-72.2(b). Arizona has an analogous statute, which provides that “[t]he attorney general, the speaker of the house of representatives or the president of the senate, in the party’s discretion, may intervene as a party . . . in a proceeding” that challenges the constitutionality of an Arizona statute. A.R.S. § 12-1841. And the Arizona Attorney General and

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the Department of Law are charged generally with prosecuting and defending proceedings in which the State is a party or has an interest. A.R.S. § 41-193.

The present case is not a federal matter that needs relying on *Berger* for the proposition that a federal court should respect “a State’s chosen representatives.” 142 S. Ct. at 2205. It is a state law action, and the Yavapai County Attorney is not one of the representatives Arizona has chosen. *See* A.R.S. § 12-1841, § 41-193. Moreover, the constitutionality of § 13-3603 is no longer at issue in this case. Although this lawsuit originated as a constitutional challenge, the Court of Appeals decision is grounded in ordinary statutory interpretation principles. The Yavapai County Attorney may wish that Attorney General Mayes shared his opinion that Arizona’s statutory scheme denies Arizonans the freedom to make fundamental decisions about their own reproductive health. However, there is no statutory or other authority for the Yavapai County Attorney to press his alternative interpretation as an intervenor in this case.

Even if the “defense” of § 13-3603 were still relevant, the Yavapai County Attorney is not authorized by § 12-1841 to intervene in an action challenging a statute’s constitutionality. In Arizona, even the legislator who sponsored subsequently challenged legislation does not have the type of “legislative interest” here asserted by the Yavapai County Attorney to confer a

1 right to intervene.² Arizona law simply does not allow the Yavapai County
2 Attorney to “fill the void created by General Mayes’ change of position.” [MI
3 at 1]
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5 **3. The Yavapai County Attorney has failed to establish a basis**
6 **for permissive intervention under Rule 24(b)(1)(B).**

7 “On timely motion, the court may permit anyone to intervene who . . .
8 has a claim or defense that shares with the main action a common question of
9 law or fact.” Rule 24(b)(1)(B), Ariz. R. Civ. P. In determining whether to
10 permit intervention, courts consider such factors “as the nature and extent of
11 the intervenor’s interest, his or her standing to raise relevant issues, legal
12 positions the proposed intervenor seeks to raise, and those positions’ probable
13 relation to the merits of the case.” *Dowling*, 221 Ariz. at 272, ¶ 68.
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16 The Yavapai County Attorney’s argument for permissive intervention
17 has the same fundamental flaws as his argument for mandatory intervention.
18 Again, his purported “interest” is predicated on a non-existent right to
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22 ² See *Planned Parenthood Arizona, Inc. v. Am. Ass’n of Pro-Life*
23 *Obstetricians & Gynecologists*, 227 Ariz. 262, 280, ¶ 64 (App. 2011)
24 (denying state legislators motion to intervene by finding that “[o]utside the
25 narrow scope of legislative procedure, no authority has been cited for the
26 proposition that legislators have a protectable interest in upholding or
challenging the constitutionality of legislation,” and citing A.R.S. § 12-
1841 as expressing “the intent of the legislature that the Speaker of the
House and the President of the Senate perform that function on behalf of
their respective bodies.”).

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determine the substance of the laws he has a duty to enforce. And rather than articulating an argument for why this Court should permit him to intervene, the Yavapai County Attorney merely provides a series of conclusory statements. He states, for example, that he has a “defense that shares with the main action a common question of law or fact” without identifying what that defense is.³ [MI at 10] This Court can therefore only speculate as to his legal positions and their probable relation to the merits of the case. He further asserts that he represents “the interests of all people” in his jurisdiction, without explaining the relevance of such a claim and, without making any argument or citing any authority, that he has standing “because he is charged with enforcing the [sic] § 13-3603.” [MI at 11] He has therefore failed to provide any basis for this Court to grant permissive intervention. *See Id.*

³ Notably, the Yavapai County Attorney failed to accompany his motion with the “mandatory” “pleading setting forth the claim or defense for which intervention is sought.” *Lebrecht v. O’Hagan*, 96 Ariz. 288, 289 (1964), quoting Rule 24(c), Ariz. R. Civ. P. (affirming order denying motion to intervene that lacked required pleading).

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CONCLUSION

The Yavapai County Attorney has failed to demonstrate that he meets the requirements for either mandatory or permissive intervention in this case. For the reasons stated above, this Court should deny his motion to intervene and join Dr. Hazelrigg’s petition for review.

RESPECTFULLY SUBMITTED this 30th day of March, 2023.

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