SUPREME COURT OF ARIZONA

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, Intervenor/Appellee.	Arizona Supreme Court No. CV-23-0005-PR Court of Appeals Division Two No. 2 CA-CV 22-0116 Pima County Superior Court No. C127867

THE STATE'S OPPOSITION TO YAVAPAI COUNTY ATTORNEY DENNIS MCGRANE'S MOTION TO INTERVENE

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INTRODUCTION

Attorney General Kristin K. Mayes is the duly elected chief law enforcement officer for the State. Among other prescribed authority, she issues legal opinions about the meaning and application of state law, speaks for the State in this Court, and, notably, has supervisory power over county attorneys.

County Attorney Dennis McGrane serves Yavapai County, home to approximately 3.3% of Arizona's population. Because he disagrees with the Attorney General's decision not to petition for review in this matter, the County Attorney wishes to "fill" a perceived "void" and intervene to "defend[] the State's interest."

The State's interest is already spoken for. The County Attorney has no statutory right to override the Attorney General's determination and pursue more expansive relief on behalf of the State than the Attorney General seeks. And the County Attorney has no cognizable interest in urging the broadest possible interpretation of A.R.S. § 13-3603 simply because he wants to secure greater prosecutorial power for himself. In short, the Yavapai County Attorney asserts interests that do not belong to him. The Court should deny his unwarranted motion to intervene.

ARGUMENT

I. The Yavapai County Attorney cannot intervene as of right.

To intervene as of right, the County Attorney must show that (1) he has "an interest relating to the subject of the action," (2) he is "so situated that disposing of the action [without him] may as a practical matter impair or impede" his "ability to protect that interest," (3) the interest is not already "adequately" represented by existing parties, and (4) that he "timely" sought intervention. Ariz. R. Civ. P. 24(a)(2).

Put differently, the County Attorney must establish a legally cognizable interest such that "the judgment would have a *direct* legal effect upon [his] *rights*." *Woodbridge Structured Funding, LLC v. Ariz. Lottery*, 235 Ariz. 25, 28 ¶ 15 (App. 2014) (second emphasis added). He cannot do so.

A. The Yavapai County Attorney has no cognizable interest in seeking more expansive prosecutorial power for himself.

According to the County Attorney, his interest "flows … from his elected office and his responsibility to represent 'the interests of all people' in his jurisdiction." Motion to Intervene ("Mot.") at 8. But he does not confine his purported interest to Yavapai County; he expresses a broader concern about "the State's position," saying that "no government official [is] defending the State's interest in enforcing § 13-3603" and therefore he "seeks

to fill the void." *Id.* at 1, 5, 7. The County Attorney also claims an individual prosecutorial "interest in enforcing valid state laws like § 13-3603." *Id.* at 5, 6. He even argues that he has a right to "fully" enforce the law—meaning, the law as he personally interprets it. *Id.* at 2, 5-6.

At bottom, however he frames it, the County Attorney claims an interest in securing for himself the broadest power possible to prosecute under § 13-3603, and therefore a right to urge in this Court a more expansive interpretation of the law than the Attorney General has determined is reasonable or appropriate. This proffered interest fails to satisfy Rule 24 for three primary reasons.

1. No statute authorizes the County Attorney's intervention.

First, the County Attorney's bold pursuit to "fill the void" for the State is inconsistent with the statutory relationship between the Attorney General and county attorneys.

Attorney General Mayes is the State's "chief legal officer." A.R.S. § 41-192(A). She has "supervisory powers over county attorneys," *id.* § 41-193(A)(4), and is "responsible for handling appeals of criminal cases originally tried by county attorneys," *Crosby-Garbotz v. Fell in & for Cnty. of*

Pima, 246 Ariz. 54, 60 ¶ 24 (2019) (citations omitted). If "deemed necessary by the attorney general," she can also step in for a county attorney at an earlier stage to "prosecute and defend any proceeding in a state court other than the supreme court" or to "assist … in the discharge of the county attorney's duties." A.R.S. § 41-193(A)(2), (5). And, importantly, the Attorney General represents the State in this Court when "this state or an officer of this state … is a party." *Id.* § 41-193(A)(1).

A county attorney's domain is necessarily more limited. A county is "created by the state for the purposes of government," *Haupt v. Maricopa County*, 8 Ariz. 102, 105 (1902), and therefore county attorneys 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) (stating that "counties are created … for the purpose of exercising a certain portion of the general powers of the [state]"). A "county's powers are entirely derivative." *Transamerica Title Ins. Co. v. Cochise County*, 26 Ariz. App. 323, 328 (App. 1976). Thus, counties and their officers can exercise only the authority that the legislature has "expressly delegated" to them. *Vangilder v. Ariz. Dep't of Revenue*, 252 Ariz. 481, 492 ¶ 45 (2022) (citation omitted).

Here, Attorney General Mayes evaluated this case and the court of appeals' decision and decided not to petition for review. *Cf. Fappani v. Bratton*, 243 Ariz. 302, 311 ¶ 15 (App. 2017) (noting prosecutor's "discretion to prosecute such cases as he or she deems appropriate"). That determination was well within the lawful exercise of her judgment, as even the County Attorney reluctantly acknowledges. Mot. at 7; *see State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 594 ¶ 19 (2017) (observing that "the Attorney General routinely and permissibly" issues legal opinions and makes legal determinations).

Nonetheless, the County Attorney now claims he has an interest in prosecuting as many individuals as possible under § 13-3603, and further, that he has the right to urge his expansive interpretation of the law to this Court, despite the Attorney General's position. He is incorrect. The County Attorney cannot have a cognizable interest in an outcome which he has no authority to seek. He has the burden to identify authority "that permits the conduct in question," and he lacks any such authority here. *See State v. Payne*, 223 Ariz. 555, 561 ¶ 15 (App. 2009) (cleaned up).

Especially given the Attorney General's "supervisory powers" over county attorneys and her role on behalf of the State in this Court, *see* A.R.S.

§§ 41-192, -193, the County Attorney must identify specific support for the extraordinary intervention he seeks. But he cites "no statutory right created to allow [a] county attorney" to step into the Attorney General's shoes in order to pursue more relief than the State's chief legal officer determines is lawful and appropriate. *Cf. Star Publ'g Co. v. Pima Cnty. Att'y's Office*, 181 Ariz. 432, 434 (App. 1994); *see Thiel Detective Serv. Co. v. Yavapai County*, 21 Ariz. 169, 170 (1919) (stating that statutory scheme "fully defines the duties and authority of county attorneys, and … d[id] not include the [specific] authority" at issue).

More general support is lacking, too. County attorneys can "provide civil legal services to another county or other political subdivision." A.R.S. § 11-532(E). But that statute does not authorize county attorneys to defend and interpret laws in an appellate court on behalf of the State, let alone in conflict with the State's position. *See generally id.* (listing powers and duties of county attorneys). And the County Attorney cites no support for a free-floating "protectable interest" in advancing the most expansive interpretation of a law. *Cf. Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 280 ¶ 64 (App. 2011).

The legislature knows how to grant county attorneys the power to bring certain kinds of actions "in the name of the state." *E.g.*, A.R.S. § 12-2042 (authorizing county attorneys to bring quo warranto actions). Likewise, the legislature knows how to grant a right of intervention to specific parties. *See id.* § 12-1841; *cf. also Roberto F. v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 45, 50-51 ¶ 24 (App. 2013) ("[I]f the legislature had desired to create a right to intervene for foster parents, it would have done so."). But the legislature has simply not authorized what the County Attorney wishes to do here. To the contrary, the relevant statutes reflect the opposite intent. *See Hounshell v. White*, 220 Ariz. 1, 6 ¶ 22 (App. 2008).

In sum, the County Attorney asserts an interest that is not his to raise and seeks to vindicate that interest with authority he does not have.

2. The County Attorney's prosecutorial duty does not give rise to a cognizable interest.

The County Attorney's delegated power to "conduct, on behalf of the state, all prosecutions for public offenses," A.R.S. § 11-532(A)(1), also does not give him a right to advocate for the most aggressive interpretation of § 13-3603 possible. *See* Mot. at 6; *Dowling v. Stapley*, 221 Ariz. 251, 270 ¶ 60 (App. 2009) (focusing "on [proposed intervenor's] interests in [her official]

capacity"). The discretionary authority to prosecute offenses on behalf of the State—subject to the Attorney General's supervision and subsequent oversight on appeal—is quite different from the authority to override the Attorney General about how to interpret the meaning and scope of those offenses and the extent of relief to seek in this Court. County attorneys have an interest in enforcing the law as it is, not in advocating against the State about what the law should be.

Further, county attorneys do not have a legal interest in bringing as many prosecutions as factually or legally possible. *Cf. State v. Bible*, 175 Ariz. 549, 600 (1993) (stating a prosecutor's interest "is not that it shall win a case, but that justice shall be done" (citation omitted)). To the contrary, county attorneys have a duty to "intelligently weigh the chances" of a successful prosecution, consider "the relative importance" of the "prosecutions [they] might initiate," and exercise "sound discretion" about whether to pursue "a certain policy of enforcement." *State ex rel. Ronan v. Stevens*, 93 Ariz. 375, 379 (1963) (citation omitted). Their "broad discretion in determining what charges, if any, are to be filed" means they are "not obligated to select the more serious charge." *State ex rel. Baumert v. Municipal Ct. of City of Phx.*, 120 Ariz. 341, 343 (App. 1978).

Fundamentally, the County Attorney is not obligated to enforce the law as maximally and punitively as possible; indeed, he has a duty not to unthinkingly do so. As such, he has no legal interest in speaking over the State and construing a state law to provide him with as much prosecutorial power as possible, simply for the sake of "fully" exhausting it.

3. The County Attorney's mere disagreement with the Attorney General is not a cognizable interest.

Finally, the County Attorney does not have an interest in this case just because the State no longer advances *his* view of the law. Contrary to the County Attorney's suggestions (*see* Mot. at 8, 10), the Attorney General continues to represent the State's interest in enforcement of the law—even if not how the County Attorney prefers—and that interest belongs to the State alone. There is no "void" to fill. *See* Mot. at 1.

The County Attorney has no legal interest in urging his personal interpretation of the law, nor the authority to do so, and therefore his mere disagreement with the Attorney General's decision not to petition for review is not "a *direct* legal effect" on his rights under Rule 24. *Woodbridge*, 235 Ariz. at 28 ¶ 15; *see Weaver v. Synthes, Ltd. (U.S.A.)*, 162 Ariz. 442, 447-48 (App. 1989) (The "interest required to satisfy Rule 24(a) 'must be based on a right

which belongs to the proposed intervenor rather than to an existing party.'" (citation omitted)).

Were it otherwise, the Yavapai County Attorney would, presumably, share his generalized "interest" with any other county attorney who agrees with his opinion here, or who might disagree with the Attorney General in a future case. The State's fifteen county attorneys may always have a wide range of views on a host of important issues. But intervention is not permissible simply because a county attorney would make a different decision than the State's chief legal officer. A contrary ruling will open the door to new intervention motions and procedural chaos in a number of cases in which the State is a party, and will functionally undermine, if not eviscerate, the plain text and purpose of A.R.S. § 41-193(A)(1).[1]

Further, granting intervention under these circumstances threatens to turn any amicus curiae into a proposed intervenor—a meaningful distinction in terms of a participant's rights (and responsibilities) in an

[1] Nor does the fact that the Pima County Attorney is a party support the Yavapai County Attorney's intervention. Plaintiffs named the Pima County Attorney as a defendant; she never affirmatively sought to become a party based on a purported interest in "fully" enforcing State law.

action. Blurring the line between an intervenor with a *true legal interest* at stake, and an amicus who is just *interested in* the legal issues, will make bad law under Rule 24. The State has no objection to the County Attorney's participation as an amicus to express his personal views of the law, but he is not entitled to the extraordinary step of intervention on such thin grounds.

B. The County Attorney's absence will not impair or impede any cognizable interest.

With no cognizable interest under Rule 24, the County Attorney's absence is irrelevant. Whether the Court denies the petition or affirms the decision below, the only consequence for the County Attorney is to limit the class of people he can prosecute.

Further, the County Attorney's participation will, as he admits, add nothing new. Mot. at 10. Although he distinguishes his interest from Intervenor Dr. Eric Hazelrigg's, the County Attorney "does not even seek to file a separate petition." *Id.* at 8, 9-10. Dr. Hazelrigg already makes the arguments the County Attorney wants the Court to consider—unsurprisingly, as they are represented by the exact same counsel—and he offers nothing beyond that. *See id.* at 9-10.

To be clear, Dr. Hazelrigg's presence is not the reason the County Attorney cannot intervene. That the County Attorney seeks only to join the petition underscores his lack of any real interest other than his personal disagreement with the Attorney General, but he lacks a cognizable interest in all events. Regardless of Dr. Hazelrigg's presence or absence, the County Attorney has no right to undercut the Attorney General's representation of the State and urge his preferred interpretation of § 13-3603.

II. The Court should not grant permissive intervention.

The Court "may permit" intervention when the proposed intervenor "has a claim or defense" with "a common question of law or fact." Ariz. R. Civ. P. 24(b)(1)(B). The relevant factors weigh against granting permissive intervention here. *See Dowling*, 221 Ariz. at 272 ¶ 68 (listing factors).

For the reasons above, the "nature and extent" of the County Attorney's asserted interest does not support intervention—he has no legitimate interest here. *Id.* ¶¶ 68-69. His generalized disagreement about the meaning of state law, with no actual harm or effect on his rights, means he lacks "standing to raise relevant issues." *Id.* ¶ 68. And the same "positions [he] seeks to raise" are already represented by the same counsel

on behalf of Dr. Hazelrigg, further undermining his assertedly unique (but still invalid) interest. *Id.*

Granting even permissive intervention will empower a county officer without statutory authorization, override a determination by the State's duly elected chief legal officer, and will make bad law under Rule 24, with significant implications for other cases. That result is unwarranted, unwise, and—given that the County Attorney can simply (and more appropriately) participate as an amicus—entirely unnecessary.

CONCLUSION

The Court should deny the Yavapai County Attorney's motion.

RESPECTFULLY SUBMITTED this 30th day of March, 2023.

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