Case No. C127867
HON. KELLIE JOHNSON

Kevin H. Theriot (No. 030446)
Catie B. Kelley (No. 037066)
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
ktheriot@adflegal.org
ckelley@adflegal.org

Attorneys for Eric Hazelrigg, M.D., Proposed Successor-in-Interest to Cliffton E. Bloom, as guardian ad litem of unborn child of Plaintiff Jane Roe and all other unborn infants similarly situated and Proposed Intervenor, and Choices Pregnancy Center, Proposed Intervenor

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

PLANNED PARENTHOOD ARIZONA, INC., et al.,

Plaintiffs,

v.

MARK BRNOVICH, Attorney General of the State of Arizona, et al.,

Defendants,

and

CLIFFTON E. BLOOM, as guardian ad litem of the unborn child of plaintiff Jane Roe and all other unborn infants similarly situated,

Intervenor.

Case No.: C127867

DR. ERIC HAZELRIGG'S REPLY IN SUPPORT OF ATTORNEY GENERAL'S MOTION TO SUBSTITUTE DR. ERIC HAZELRIGG AS GUARDIAN AD LITEM AND ALTERNATIVE MOTION TO INTERVENE OF DR. HAZELRIGG AND CHOICES PREGNANCY CENTER ON BEHALF OF UNBORN INFANTS AND THEMSELVES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Dr. Eric Hazelrigg joins the Attorney General's motion asking this Court to substitute him as guardian ad litem for all unborn children in Arizona. This Court has discretion to do so and substitution would simply maintain the status quo of the parties from the original proceedings in this case.

Mr. Cliffton Bloom was a separate party with his own private counsel acting as guardian ad litem on behalf of the interests of unborn children in Arizona. At some point this Court also designated Mr. Bloom as an intervenor, referring to him in the March 27, 1973, Order enjoining A.R.S. § 13-3603 as "the intervenor Cliffton E. Bloom, as guardian ad litem of the unborn child of the plaintiff Jane Roe and all other unborn infants similarly situated." Second Am. Declaratory J. and Inj. at 1-2. In doing so, this Court determined he satisfied the requirements to serve as both guardian ad litem and intervenor. The Attorney General's briefing demonstrates Dr. Hazelrigg meets the requirements to substitute as guardian ad litem. But Dr. Hazelrigg and Choices Pregnancy Center, where he serves as medical director, also satisfy the requirements for intervention under Rule 24. They, therefore, respectfully ask this Court to grant them intervention should the Court deny the Attorney General's Rule 25 motion to substitute.[1]

This motion is timely. And as a practicing obstetrician in Arizona and Choices' medical director, Dr. Hazelrigg has an interest in the health and protection of unborn children in Arizona. As a nonprofit organization that provides pregnant women and their children with support, information, and services before and after the birth, Choices also has an interest and experience in protecting the rights of the unborn in Arizona. Decl. of Marc Burmich at ¶ 3, attached. This Court's decision to modify or vacate the prior injunction of

[1] Should the Court grant the Attorney General's Rule 25 motion to substitute, Dr. Hazelrigg's request for intervention will be rendered moot and Choices will withdraw its request for intervention.

A.R.S. § 13-3603 may impede or impair these interests. The Attorney General and Pima County Defendants do not adequately represent these interests because the State must also represent the competing interests of other citizens and the Pima County attorney has joined Planned Parenthood's brief and made no attempt to represent the interests of the unborn in this case.

LEGAL STANDARDS

Under Rule 24, "the superior court must permit intervention when four conditions are satisfied:

(1) the motion is timely;

(2) the movants claim an interest relating to the subject matter of the action;

(3) the movants show that disposition of the action may, as a practical matter, impair or impede their ability to protect their interests; and

(4) the movants show that the existing parties do not adequately represent their interests."

See Heritage Village II Homeowners Ass'n v. Norman, 246 Ariz. 567, 570 (Ariz. App. 2019).

In the alternative, a court may grant permissive intervention to anyone who: "(A) has a conditional right to intervene under a statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Ariz. R. Civ. P. 24(b)(1)(A)–(B).

ARGUMENT

Dr. Hazelrigg joins the Attorney General's motion and related briefing asking this Court to substitute him as guardian ad litem to represent and protect the interests of all unborn children in Arizona. Substitution is appropriate here because this Court's previously appointed guardian ad litem passed away and Dr. Hazelrigg's extensive

experience caring for the medical needs of unborn children makes him particularly qualified to take his place.

If this Court denies the Attorney General's motion, Dr. Hazelrigg and Choices move to intervene on behalf of themselves and unborn children in Arizona to protect their interests. The Court should grant the motion.

I. Dr. Hazelrigg and Choices satisfy Rule 24's intervention as of right requirements.

Intervention as of right is appropriate because (1) the motion is timely; (2) Dr. Hazelrigg is an obstetrician and Choices is an organization dedicated to protecting pregnant women and their babies, and claim an interest in protecting unborn children in Arizona relating to the subject matter of the action; (3) this Court's decision may impair those interests; and (4) the existing parties do not adequately represent their interests.

A. A motion to intervene is timely.

"Timeliness hinges on two discrete questions: 'the stage at which the action has progressed, . . . and whether the applicant was in a position to seek intervention at an earlier stage of the proceedings.'" *Heritage Village II*, 246 Ariz. at 571. This action has only just started. The Attorney General moved for relief on July 13, 2022, and Planned Parenthood responded on July 20, 2022. The parties agree that the Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2288 (2022) is cause for this Court to modify this Court's prior order enjoining A.R.S. § 13-3603 under Rule 60(b). *See* Def. AG's Mot. for Relief from J. at 7–11, and Pl.'s Resp. Br. at 2.

Counsel for Dr. Hazelrigg and Choices participated in the Court's July 22, 2022, Status Conference and will comply with all briefing deadlines and participate in the argument scheduled for August 19, 2022. Intervention will not cause delay or prejudice to the parties.

B. Dr. Hazelrigg and Choices have an interest in protecting unborn children in Arizona relating to the subject matter of the action.

This Court acknowledged unborn children in Arizona have an interest in the subject matter of laws governing abortion when it appointed Mr. Bloom as guardian ad litem to represent their interests. As an obstetrician, Dr. Hazelrigg is ideally situated to protect the unborn's interests in this Court's decision modifying or vacating the prior judgment enjoining A.R.S. § 13-3603. The same is true of Choices where he serves as medical director furthering Choices' mission of assisting pregnant women and their children with prenatal and post-birth services—from prenatal vitamins and parenting classes to mentoring and providing free diapers. Burmich Decl. ¶ 13.

The subject matter of this action implicates the interests of unborn children in Arizona because the Court of Appeals has already determined in this case that one cannot deny "an embryonic or fetal organism is 'life,'" and "[o]nce begun, the inevitable result is a human being." *Nelson v. Planned Parenthood Ctr. of Tucson*, 19 Ariz. App. 142, 148 (1973).

The Court of Appeals even said, "here there is an embryo or fetus incapable of protecting itself," confirming the need to protect their interests. *Id.* It found that "[t]he state's power to protect children is a well-established constitutional maxim . . . That this power should be used to protect a fertilized egg or embryo or fetus during the period of gestation embodies no logical infirmity." *Id.* at 149. Scientific advancements in the last five decades have only confirmed what the Court of Appeals recognized in 1973: embryotic and fetal organisms are human life, and abortion destroys that human life. *See* Dr. Eric Hazelrigg and Choices Pregnancy Center's Proposed Reply in Supp. of AG's Mot. for Relief from J. at 5–7 ("Proposed Reply in Supp. of Mot. for Relief from J.").

Arizona courts and the legislature have likewise recognized the interests of unborn children in other contexts. In *Summerfield*, the Arizona Supreme Court interpreted a statute

authorizing wrongful death actions to permit action by parents on behalf of a fetus—citing Arizona statutes making it a felony to cause the death of an unborn child, making the death of an unborn child an aggravating circumstance for sentencing purposes, and imposing a duty on physicians to take reasonable steps to preserve the life and health of unborn children. *Summerfield v. Super. Ct. In and For Maricopa Cnty.*, 144 Ariz. 467, 476–79 (Ariz. 1985); see also A.R.S. § 14-3951 (providing that approval agreements involving trusts and other interests are binding on all parties, including those "unborn.").

The interests of unborn children in Arizona in laws governing abortion are strong and justify Dr. Hazelrigg's participation as substitute guardian ad litem or intervenor along with Choices to represent and protect those interests. The Court of Appeals correctly recognized: (1) the unborn constitute unique human life, (2) the unborn cannot protect themselves, and (3) the unborn merit protection and representation of their interests by a third party even where the state has the power to protect them.

Dr. Hazelrigg and Choices will represent and protect these recognized interests on behalf of unborn children in Arizona. They also will protect Choices' interest in preserving its limited resources so it can focus on pre-natal care and parenting classes. If Planned Parenthood's reading of the law prevails, Choices will have to spend more resources assisting women suffering from post-abortion regret instead of other programs.[2] Burmich Decl. ¶ 19. These interests relate to this Court's consideration of the Attorney General's motion for this Court to vacate the prior judgment enjoining enforcement of A.R.S. § 13-3603. Dr. Hazelrigg and Choices satisfy the second requirement for intervention as of right.

C. This Court's modification or vacatur of the injunction may impair or impede Dr. Hazelrigg's and Choices' interests in protecting unborn children in Arizona.

[2] See Proposed Reply in Supp. of Mot. for Relief from J. at 6 (describing the psychological and mental health risks to women caused by abortion).

Under Rule 24, proposed intervenors need only show "that an interest 'may' be impaired or impeded." *Heritage Village II*, 246 Ariz. at 573. This is a "minimal burden" and "should be liberally construed with the view of assisting parties in obtaining justice and protecting their rights." *Id.* So, the "would-be intervenor must show only that impairment of its substantial legal interest *is possible* if intervention is denied." *Id.* at 572.

Dr. Hazelrigg and Choices satisfy this minimal burden because unborn children cannot protect themselves and Arizona courts regularly appoint or allow third parties to represent or intervene on behalf of children's interests even where the state has acted to protect children. *See Roberto F. v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 45, 52–53 (2013) (affirming decision of trial court granting permissive intervention by foster parents in state-initiated dependency proceedings because intervention was in the child's best interests and the court found that the foster parents desired to protect the children); *J.W. v. Dep't of Child Safety*, 252 Ariz. 184, 342–43 (2021) (recognizing the right of the child to have counsel and a separate guardian ad litem appointed to protect his interests after the Department of Child Safety took custody of him to protect him from parents' domestic violence and substance abuse); *Castro v. Hochuli*, 236 Ariz. 587, 588 (2015) (court appointed guardian ad litem and counsel when Department of Child Safety initiated dependency proceedings).

The Court of Appeals explained repeatedly that A.R.S. § 13-3603 affects the interests of unborn children because it prohibits the elective destruction of human life. *Nelson*, 19 Ariz. App. at 148–49 (reasoning, "[o]ne cannot gainsay a legislative determination that an embryotic or fetal organism is 'life.' Once begun, the inevitable result is a human being," rejecting Plaintiff's contention that "the fundamental right to privacy" "include[s] a fundamental right to destroy life," and concluding, "here there is an embryo or fetus incapable of protecting itself."). *See also Dobbs*, 142 S. Ct. at 2258 ("What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and

Casey rely is something that both those decisions acknowledged: *Abortion destroys what those decisions call 'potential life'*" (emphasis added)).

The interests of unborn children in Arizona that proposed intervenors represent will be impeded by Planned Parenthood's suggested reading of A.R.S. § 13-3603 to only prohibit abortions by non-licensed physicians and Planned Parenthood's unfounded[3] arguments that the Arizona Legislature actually intended to authorize abortion up to 15 weeks' gestation—not restrict it in order to protect unborn children as much as possible.[4] *See* Pl.'s Resp. Br. at 11–16. Planned Parenthood's suggested reading may also impair Choices' interest in preserving its limited resources to support women by providing pre-natal care and parenting. If Planned Parenthood's reading of the law prevails, Choices will have to spend more resources assisting women suffering from post-abortion regret.[5]

Even though *Roe* and *Casey* mandated elective abortion until viability, most abortions under that regime took place in the first trimester, or 12 weeks' gestation.[6] According to the CDC, 92.7% of United States abortions occurred in the first trimester.[7] And in Arizona, 95% of abortions (13,186) occurred at 15 weeks' gestation or sooner in

---

[3] Proposed Intervenor addresses these contentions in its Proposed Rule 60(b) Reply Brief and joins the Attorney General's Reply Brief explaining why Planned Parenthood's reading of the Arizona statutes is wrong.

[4] *See* S.B. 1164, 55th Leg., 2nd Reg. Sess. (Ariz. 2022) at 3-4, available at https://www.azleg.gov/legtext/55leg/2R/bills/sb1164p.pdf (explaining that the 15-week's gestation limit does not create or recognize a right to abortion, emphasizing the development of the unborn child and that by 12 weeks' gestation, "the unborn human being has taken on 'the human form' in all relevant respects," and noting the state's "important and legitimate" "interest in protecting the life of the unborn,"); A.R.S. § 36-2153 (requiring information on the gestational age and probable anatomical and physiological characteristics of the unborn child to satisfy informed consent before performing an abortion); A.R.S. § 36-2156 (requiring an ultrasound and the image of the unborn child offered to the woman seeking an abortion); A.R.S. § 35-196.02 (prohibiting the use of public funds for elective abortions); A.R.S. § 36-2157 (prohibiting abortion because of the sex, race, or potential genetic abnormality of the unborn child).

[5] See *supra*, n. 2.

[6] CDC, *Abortion Surveillance – United States 2019* https://bit.ly/3vGMUgS (last visited Aug. 3, 2022) (attached as Exhibit A).

[7] *Id.*

2020.[8] Because most abortions take place in the first trimester, there are still thousands of unborn children whose interests may be impaired if this Court adopts Planned Parenthood's proposed modification of the prior injunction. Planned Parenthood's contention that there are no unborn children left for the guardian ad litem to protect is wrong. *See* Planned Parenthood's Opp'n to Mot. to Substitute Dr. Hazelrigg as Intervenor and Guardian ad Litem of Unborn Infants at 4. The vast majority of unborn children in Arizona who cannot protect themselves from abortion will be affected by this Court's decision on A.R.S. § 13-3603 because it prohibits the elective destruction of human life in the first trimester.

D. The existing parties do not adequately represent Dr. Hazelrigg's and Choices' interests on behalf of unborn children in Arizona.

Dr. Hazelrigg and Choices also satisfy the requirement that the existing parties do not adequately represent or protect the interests of unborn children in Arizona that they advocate for. That the State *may choose* to exercise its legitimate interest in protecting unborn life does not mean that the State *has chosen* to adequately represent that interest in court.

As the Attorney General explains, his primary duty is to the State of Arizona and remedying the harm that the State is incurring from being "depriv[ed] of the ability to enforce its laws" because of the continued injunction of A.R.S. § 13-3603. Def. AG's Br. at 11. He also states that the unborn are a represented party to this case, but that the guardian ad litem, not the Attorney General, represents them. *Id.* at 11. This is evident in the Attorney General's focus on how the continuing injunction "affects the substantial rights of the State" "to enforce its sovereign interests in carrying out its criminal laws," *id.*, not the narrower interests of unborn children themselves, whose lives are at stake. *See Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184,

[8] *Abortions in Arizona: 202 Abortion Report*, ARIZ. DEP'T OF HEALTH SERV., 16 (Sept. 21, 2021), https://bit.ly/3d7wkAt.

1190 (9th Cir. 1998) (government representation may be inadequate where an applicant's interests are "potentially more narrow and parochial than the interests of the public at large.").

The Attorney General's obligation to represent the broad interests of the State warranted the Arizona Court of Appeals' rejection of Planned Parenthood's argument against intervention in *Planned Parenthood Ariz. Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 279 (2011) (*AAPLOG*) (challenge to Arizona's abortion regulations). "The state must represent the interests of all people in Arizona, some of whom might be adversely affected by these applicants' exercise of the rights protected by the provision. As a result, the state might not give these applicants' interests 'the kind of primacy' that these applicants would." *Id.* And the Court found, "Because it cannot be said that the state necessarily represents these applicants, they should have been permitted to intervene." *Id.*

So too here. The Attorney General did not represent Mr. Bloom as guardian ad litem for the unborn in the original proceedings for this case. *See Nelson*, 19 Ariz. App. at 142 (listing private attorneys for "cross-appellee Bloom."). And the Attorney General has made it clear that he is primarily acting for the State now. This warrants a finding that the Attorney General cannot adequately represent the interests of the unborn in this case.

And the only other named Defendant joined with Planned Parenthood in asking this Court to interpret Arizona's laws to allow licensed physicians to perform abortions up to 15 weeks' gestation. *See* Pima Cnty. Attorney's Joinder in Pl. Planned Parenthood's Resp. to Def. AG's Mot. for Relief from J. at 4 ("the Pima County Attorney joins . . . Planned Parenthood of Arizona in seeking a modified injunction and requests that the Attorney General's Motion for Relief from Judgment be granted in part and denied in part as described in . . . Planned Parenthood's Proposed Order.").

Finally, as an obstetrician and an organization dedicated to protecting the unborn, Dr. Hazelrigg and Choices will offer "necessary elements to the proceeding that other parties would neglect" by providing critical evidence and arguments unavailable to the State. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). For example, Dr. Hazelrigg can provide evidence of the pain dismemberment abortions cause to unborn children at 15 weeks' gestation and the advanced development of unborn children before 15 weeks' gestation. *See* Proposed Reply in Supp. of Mot. for Relief from J. at 2, 4–5. And Choices' 39 years of experience providing support to unborn children and their mothers allows it to demonstrate how knowledge of the details of human development affect the way expectant mothers view their unborn children and protect the babies' interests. Burmich Decl. ¶ 3–9.

As in *AAPLOG*, the Defendants have shown they will not give the unborn's interests "the kind of primacy" that Dr. Hazelrigg and Choices will. 227 Ariz. at 279. Proposed intervenors satisfy the Rule 24 requirement that the existing parties will not adequately represent their interests in protecting unborn children in this matter. They therefore satisfy the fourth requirement for intervention as of right.

Because Dr. Hazelrigg and Choices satisfy each requirement for intervention as of right, this Court should grant intervention if this Court chooses to deny the Attorney General's motion to substitute Dr. Hazelrigg as guardian ad litem for Mr. Bloom.

II. Dr. Hazelrigg and Choices satisfy the Rule 24 requirements for permissive intervention if this Court denies the motion to substitute and declines to grant them intervention as of right.

In the alternative, Dr. Hazelrigg and Choices satisfy the Rule 24 requirements for permissive intervention because they have a "defense that shares with the main action a common question of law or fact." Ariz. R. Civ. P. 24(b)(1)(B). Courts "consider a number of 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 interests"; (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 (2009).

First, intervention would not unduly delay or prejudice the rights of the original parties because (a) this matter has just recently begun, and (b) an original party to the prior proceeding (Mr. Bloom) represented the interests of the unborn as guardian ad litem, such that intervention will not alter the interests represented or nature of the parties. Second, unborn children's interests proposed intervenors represent, as well as Choices' non-profit mission to advocate for unborn children and serve women in Arizona through supporting them during and after pregnancy, will be directly implicated by this Court's decision to modify or vacate the prior injunction blocking A.R.S. § 13-3603.

Abortion destroys unborn human life, unborn children in Arizona cannot protect themselves, and their interest in being protected from elective abortion merits protection by a third party. *See Nelson*, 19 Ariz. App. at 148–49. And as explained more fully above, 95% of abortions (13,186 abortions) in Arizona occurred at 15 weeks' gestation or sooner in 2020.[9] This Court's decision to vacate or modify the prior injunction on A.R.S. § 13-3603 will affect thousands of unborn children each year.

These factors weigh in favor of granting Dr. Hazelrigg and Choices permissive intervention if this Court denies the Attorney General's motion to substitute Dr. Hazelrigg as guardian ad litem.

CONCLUSION

[9] ARIZ. DEP'T OF HEALTH SERVICES, *supra* n. 5 at 16.

This Court should grant the Attorney General's motion to substitute Dr. Hazelrigg as guardian ad litem for unborn children in Arizona. If the Court denies that motion, it should allow Dr. Hazelrigg and Choices to intervene on behalf of the unborn and themselves because they satisfy Rule 24's requirements.

RESPECTFULLY SUBMITTED this 4th day of August, 2022.

By: */s/ Kevin H. Theriot*
Kevin H. Theriot (AZ Bar No. 030446)
Catie B. Kelley (AZ Bar No. 037066)
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
ktheriot@adflegal.org
ckelley@adflegal.org

Attorneys for Eric Hazelrigg, M.D., Proposed Successor-in-Interest to Cliffton E Bloom, as guardian ad litem of unborn child of Plaintiff Jane Roe and all other unborn infants similarly situated and Proposed Intervenor, and Choices Pregnancy Center, Proposed Intervenor

CERTIFICATE OF SERVICE

I certify that on August 4, 2022, the original of the foregoing was electronically filed with the Clerk of the Court for Pima County Superior Court via TurboCourt, and electronically delivered to:

Stanley Feldman
Miller Pitt Feldman & McAnally PLC
One S. Church Ave, Ste. 1000
Tucson, AZ 85701-1620
Office/Firm: (520) 792-3836
sfeldman@mpfmlaw.com

Attorney for Plaintiffs

David Andrew Gaona
Coppersmith Brockelman PLC
2800 N. Central Ave., Ste. 1900
Phoenix, AZ 85004
Office/Firm: (602) 224-0999
agaona@cblawyers.com

Attorney for Planned Parenthood Arizona, Inc., successor-in-interest to Plaintiff Planned Parenthood Center of Tucson, Inc.

Samuel E. Brown
Chief Civil Deputy
Pima County Attorney's Office
32 N. Stone Ave., Ste. 2100
Tucson, AZ 85701
Office/Firm: (520) 724-5600
sam.brown@pcao.pima.gov

Attorney for Defendant Laura Conover, County Attorney of Pima County, Arizona

//

//

//

Mark Brnovich
Attorney General
Brunn (Beau) W. Roysden III
Michael S. Catlett
Kate B. Sawyer
Katlyn J. Divis
Assistant Attorneys General
Office of the Arizona Attorney General
2005 N. Central Ave.
Phoenix, AZ 85004
Office/Firm: (602) 542-3333
beau.roysden@azag.gov
acl@azag.gov

Attorneys for Defendant Mark Brnovich, Attorney General of the State of Arizona

I certify that a copy of the foregoing was mailed via U.S. Mail to:

Damon Raphael
2151 W. Desert Serenity Place
Vail, AZ 85641

Plaintiff pro se

Nathaniel Bloomfield
6300 East Speedway Apt. #1124
Tucson, AZ 85710

Plaintiff pro se

Stuart Edelberg

Plaintiff pro se

By: */s/ Kevin H. Theriot*
Kevin H. Theriot

Attorneys for Eric Hazelrigg, M.D., Proposed Successor-in-Interest to Cliffton E Bloom, as guardian ad litem of unborn child of Plaintiff Jane Roe and all other unborn infants similarly situated and Proposed Intervenor, and Choices Pregnancy Center, Proposed Intervenor