Arizona Supreme Court

Civil Election Appeal

CV-24-0167-AP/EL — ARIZONA FOR ABORTION ACCESS v TOMA et al

Appellate Case Information

Case Filed: 30-Jul-2024

Case Closed:

Dept/Composition

Side 1. ARIZONA FOR ABORTION ACCESS, Plaintiff/Appellee

(Litigant Group) ARIZONA FOR ABORTION ACCESS

- **Arizona for Abortion Access, Defendant/Appellee**

Attorneys for: Defendant/Appellee
D Andrew Gaona, Esq. (AZ Bar No. 28414)
Austin C Yost, Esq. (AZ Bar No. 34602)
Andrew Fox, Esq. (AZ Bar No. 34581)
Malvika A Sinha, Esq. (AZ Bar No. 38046)

Side 2. BEN TOMA, et al., Defendant/Appellant

(Litigant Group) BEN TOMA, et al.

- **Ben Toma, Plaintiff/Appellant**
- **Warren Petersen, Plaintiff/Appellant**
- **Shawnna Bolick, Plaintiff/Appellant**
- **Sonny Borrelli, Plaintiff/Appellant**
- **Sine Kerr, Plaintiff/Appellant**
- **Travis Grantham, Plaintiff/Appellant**
- **Teresa Martinez, Plaintiff/Appellant**
- **Quang Nguyen, Plaintiff/Appellant**

Attorneys for: Plaintiff/Appellant
Kory A Langhofer, Esq. (AZ Bar No. 24722)
Thomas J Basile, Esq. (AZ Bar No. 31150)

(Litigant Group) NANCY GUTIERREZ, et al.

- **Nancy Gutierrez, Plaintiff/Appellant** — PRO SE
- **Lupe Contreras, Plaintiff/Appellant**
- **Stephanie Stahl Hamilton, Plaintiff/Appellant**

Attorneys for: Plaintiff/Appellant
Rhonda L Barnes, Esq. (AZ Bar No. 23068)

(Litigant Group) ADRIAN FONTES

- **Adrian P Fontes, Plaintiff/Appellant**
  AZ Bar No. 22162
  [Current Member]

Attorneys for: Plaintiff/Appellant
Kara Karlson, Esq. (AZ Bar No. 29407)
Karen J Hartman-Tellez, Esq. (AZ Bar No. 21121)
Kyle R Cummings, Esq. (AZ Bar No. 32228)

(Litigant Group) BRIAN FERNANDEZ, et al.

- **Brian Fernandez, Plaintiff/Appellant**
- **Juan Mendez, Plaintiff/Appellant**
- **Mitzi Epstein, Plaintiff/Appellant**

Attorneys for: Plaintiff/Appellant
Elizabeth Higgins, Esq. (AZ Bar No. 28273)

Side 3. DAVID REDKEY, Amicus Curiae

(Litigant Group) DAVID REDKEY

- **David Wayne Redkey** — PRO SE

Side 4. KRISTIN MAYES, Amicus Curiae

(Litigant Group) KRISTIN MAYES

- **Kristin K Mayes**
  AZ Bar No. 22584
  Admitted 1/10/05

Attorneys for: Amicus Curiae
Joshua D Bendor, Esq. (AZ Bar No. 31908)
Alexander W Samuels, Esq. (AZ Bar No. 28926)
Luci Danielle Davis, Esq. (AZ Bar No. 35347)
Kristin K Mayes, Esq. (AZ Bar No. 22584)

Arizona Supreme Court

Civil Election Appeal

CV-24-0167-AP/EL ARIZONA FOR ABORTION ACCESS v TOMA et al

Side 5. SARA BENATAR, STEVE GALLARDO, ALMA HERNANDEZ, CHERLY MANGO-PAGET, REGINA ROMERO, DEBRA STARK (ELECTED OFFICIALS), Amicus Curiae

(Litigant Group) SARA BENATAR, STEVE GALLARDO, ALMA HERNANDEZ, CONSUELO HERNANDEZ, CHERYL MANGO-PAGET, REGINA ROMERO, DEBRA STARK (ELECTED OFFICIALS)

- **Sara Benatar**
- **Steve Gallardo**
- **Alma Hernandez**
- **Consuelo Hernandez**
- **Cheryl Mango-Paget**
- **Regina Romero**
- **Debra Stark**

Attorneys for: Amicus Curiae

Nathan J Fidel, Esq. (AZ Bar No. 25136)

Joshua Rosenthal, Esq. (AZ Bar No. joshuarosenthal)

Jim Davy, Esq. (AZ Bar No. jimdavy)

Jordan Phillips, Esq. (AZ Bar No. jordanphillips)

CASE STATUS

Jul 30, 2024.....Pending

PREDECESSOR CASE(S)		Cause/Charge/Class	Judgment/Sentence	Judge, Role <Comments>	Trial	Dispo
MAR	CV2024-017968			Christopher Whitten, Trial		

27 PROCEEDING ENTRIES

1.	30-Jul-2024	FILED: Appellants' ARCAP 10 Statement in Expedited Election Matter and Request for Scheduling Confrence; Certificate of Service (Appellants Toma, et al.)
2.	31-Jul-2024	FILED: Record on Appeal- MCSC: Exhibit: HD 7/25/24- [List #5 IN A MINILA ENVELOPE]

CV-24-0167-AP/EL ARIZONA FOR ABORTION ACCESS v TOMA et al

27 PROCEEDING ENTRIES

3.	31-Jul-2024	On July 30, 2024, Appellants Speaker of the Arizona House of Representatives Ben Toma and President of the Arizona Senate Warren Petersen, et al., filed "Appellants' ARCAP 10 Statement in Expedited Election Matter and Request for Scheduling Conference," designating this case as an expedited election matter pursuant to Rules 10(c)(2) and 10(d)(1), Arizona Rules of Civil Appellate Procedure (ACRAP). In lieu of a telephonic scheduling conference, Court staff has consulted with counsel for Appellants who, in turn, has coordinated with counsel for Appellee Arizona for Abortion Access. Court staff has been informally advised that the publicity printing deadline is August 29, 2024, and that depending on the disposition of the appeal, the Legislative Council may wish sufficient time in advance of that deadline to convene a meeting. IT IS ORDERED Appellee Secretary of State Adrian Fontes shall file a statement on or before August 5, 2024, advising the Court of the last day to decide this matter. Upon consideration and agreement of the parties, IT IS ORDERED if any party wishes to use transcripts, such party will file authorized transcripts as soon as possible. IT IS FURTHER ORDERED Appellants will file their opening brief (no more than 3,500 words) no later than 4:00 p.m. on Monday, August 5, 2024. IT IS FURTHER ORDERED Appellee will file its answering brief (no more than 3,500 words) no later than 4:00 p.m. on Wednesday, August 7, 2024. IT IS FURTHER ORDERED Appellants will file their reply brief (no more than 2,000 words) no later than 4:00 p.m. on Friday, August 9, 2024. The parties have indicated that they give blanket consent to the filing of amici briefs. IT IS FURTHER ORDERED any amicus curiae brief is due no later than 4:00 p.m. on Wednesday, August 7, 2024, and will not exceed 2,000 words. IT IS FURTHER ORDERED briefs will be in a legible 14-point font, double-spaced, and will include all arguments the parties wish to present to the Court. They may be filed in memorandum format (no tables of contents or authorities). IT IS FURTHER ORDERED in addition to filing briefs with the Clerk of the Supreme Court (with filing and service through AZTurboCourt), all filings are also to be sent by email to all the parties as required by ARCAP Rule 10(h) and to SACrtDocs@courts.az.gov and Court staff when filed. This matter will be considered without oral argument. Justice Bolick has recused himself from consideration of this matter. (Hon. Kathryn H. King)
4.	31-Jul-2024	FILED: Record
5.	1-Aug-2024	FILED: Reporter's Transcript - 7/25/24 Evidentiary Hearing [Luz Franco]; (Duplicate) Reporter's Transcript - 7/25/24 Evidentiary Hearing [Luz Franco]
6.	1-Aug-2024	FILED: Amended ASC Election Scheduling Order (Amending Reference to Arizona Rules of Civil Appellate Procedure)
7.	2-Aug-2024	RECEIPT No.: 2024-00195 ; $280.00, Authorization: 8300386830512359, Applied to: BEN TOMA, et al. - Class A Filing Fee ($280.00) Paid for: BEN TOMA, et al. - By nCourt LLC
8.	4-Aug-2024	FILED: [Stricken Per 8/6/24 Order] Notice of Motion to Submit an Amicus Curiae Brief; Certificate of Service (Amicus Redkey)
9.	4-Aug-2024	FILED: [Stricken Per 8/6/24 Order] Brief Amici Curiae of David Redkey; Certificate of Service; Certificate of Compliance (Amicus Redkey)
10.	4-Aug-2024	FILED: Motion for Leave to File as Amicus (Amicus Redkey)
11.	5-Aug-2024	FILED: Motion for Recusal of Arizona Supreme Court Justice William Montgomery; Certificate of Service (Appellee Arizona for Abortion Access)
12.	5-Aug-2024	FILED: Notice Regarding Printing Deadline; Certificate of Service (Appellant Fontes)
13.	5-Aug-2024	FILED: Opening Brief of Appellants; Certificate of Service; Certificate of Compliance (Appellants Toma, et al.)

27 PROCEEDING ENTRIES

14.	6-Aug-2024	On August 5, 2024, Plaintiff/Appellee ("Appellee") filed a "Motion for Recusal," citing Rule 2.11(A) of the Arizona Code of Judicial Conduct. In support of the motion, Appellee's argument equates the circumstances in the motion for recusal filed in CV-23-0005-PR on October 26, 2023, regarding Planned Parenthood Arizona, Inc. v. Mayes ("PPAZ"), 257 Ariz. 110 (2024), with the present one and relies on the recusal order issued in PPAZ, as well. See Order, CV-23-0005-PR, November 30, 2023 (J. Montgomery). Additionally, Appellee argues that there is a basis for "significant doubt that justice would be done in this case" based on an unsupported claim without any citation to authority regarding prior use of language like that found in the publicity pamphlet at issue and allegedly used by the groups listed. Finally, Appellee asserts that language relied on in the prior recusal motion, which was denied, also supports recusal in this matter. Of course, a prior recusal is an insufficient basis for recusal in a subsequent matter given the fact that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Liteky v. United States, 510 U.S. 540, 555 (1994); see also State v. Greenway, 170 Ariz. 155, 162 (1991) ("It is generally conceded that the bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source . . . ."); In re 4E Brands Northamerica LLC, 655 B.R. 331, 336 (Bankr. S.D. Tex. 2023) ("The existence of an extrajudicial source is a significant (and often determinative) . . . factor in deciding recusal matters. At the same time, the presence of extrajudicial facts, without something more, does not suffice to show bias." (alteration in original) (internal quotations marks omitted) (internal citations omitted)). More to the point, the present matter does not involve either of the parties from PPAZ nor any of the facts or legal issues present in that case. Thus, the basis for the previous recusal in PPAZ, as well as the PPAZ motion for recusal, is not relevant to these present proceedings. See Order, CV-23-0005-PR, November 30, 2023 (J. Montgomery). With respect to prior statements—assumed or otherwise—as noted, this matter involves different parties and different issues and "[t]he fact that a judge may have an opinion as to the merits of the cause or a strong feeling about the type of litigation involved, does not make the judge biased or prejudiced." In re Guardianship of Styer, 24 Ariz. App. 148, 151 (1975). And my responsibility to perform my duties with honor and integrity and with fidelity to my oath of office is paramount to any opinion or feeling about any issue that may come before the Court, including this one. For the foregoing reasons, Appellee's motion is denied. (Hon William G Montgomery)
15.	6-Aug-2024	On August 4, 2024, pro per David Redkey filed a "Brief Amici [sic] Curiae of David Redkey," a "Motion for Leave to File as Amicus," and a "Notice of Motion to Submit an Amicus Brief," alleging pursuant to ARCAP 16(b)(1)(C)(ii) and (iii) that he has an interest in another case that the decision in the present case may affect and he can provide information, perspective, or argument that can help the appellate court beyond the help that the parties' lawyers provide. Upon consideration, The "Brief Amici [sic] Curiae of David Redkey," "Motion for Leave to File as Amicus," and "Notice of Motion to Submit an Amicus Brief" fail to meet the requirements of ARCAP 16(b)(1)(C)(ii) and (iii). Therefore, IT IS ORDERED that the "Motion for Leave to File as Amicus" is denied. IT IS FURTHER ORDERED striking the "Brief Amici [sic] Curiae of David Redkey," and "Notice of Motion to Submit an Amicus Brief" both filed on August 4, 2024, from the record in this matter. (Hon William G Montgomery)
16.	6-Aug-2024	FILED: Amended ASC Order Re: Motion for Recusal (Amending Hon. William G Montgomery's Name)
17.	7-Aug-2024	FILED: Arizona for Abortion Access's Answering Brief; Certificate of Service; Certificate of Compliance (Appellee Arizona for Abortion Access)
18.	7-Aug-2024	FILED: Separate Appendix to Answering Brief; Certificate of Service (Appellee Arizona for Abortion Access)
19.	7-Aug-2024	FILED: Legislative Democrats Answering Brief; Certificate of Service; Certificate of Compliance (Appellants Fernandez, et al./Appellants Gutirrez, et al.)
20.	7-Aug-2024	FILED: The Attorney General's Amicus Brief in Support of Plaintiff/Appellee Arizona for Abortion Access; Certificate of Service; Certificate of Compliance (Amicus Mayes)
21.	7-Aug-2024	FILED: (Copy of) Order (ASC) Filed 8/1/24 (Amicus Mayes)
22.	7-Aug-2024	FILED: Consent Brief of Elected Officials as Amici Curiae Supporting Appellate And Affirmance; Certificate of Service; Certificate of Compliance (Amici Benatar, et al.)
23.	7-Aug-2024	FILED: (Copy of) Order (ASC) Filed 8/1/24 (Amici Benatar, et al.)
24.	9-Aug-2024	FILED: Reply Brief of Appellants; Certificate of Service; Certificate of Compliance (Appellants Toma, et al.)
25.	14-Aug-2024	FILED: Letter to [Nathan Fidel] (Verification of Pro Hac Vice Status for Jim Davy, Joshua Rosenthal, and Jordan Phillips)

CV-24-0167-AP/EL ARIZONA FOR ABORTION ACCESS v TOMA et al

27 PROCEEDING ENTRIES

26.	14-Aug-2024	The Court has considered the briefs of the parties and amicus curiae and the record in this matter. Initially, though Defendants/Appellants (Legislative Republican members of the Legislative Council) ("Appellants") filed this matter as an expedited election appeal under ARCAP 10, the Court accepts jurisdiction as a special action because there is no statutory basis to treat this matter as an election appeal, despite that it perhaps falls under ARCAP 10(d)(1). See ARCAP 10, Comment 1; Tobin v. Rea, 231 Ariz. 189, 193 ¶ 8 (2013) (citing Ariz. R.P. Spec. Act. 1(a), 4(a), 7(b)); see also Ariz. Legislative Council v. Howe, 192 Ariz. 378, 382 ¶ 10 (1998). Therefore, IT IS ORDERED that the Court accepts special action jurisdiction to decide this matter. Pursuant to A.R.S. § 19–124(C), the Legislative Council must write an "impartial analysis" of each initiative measure that will appear on the general election ballot for inclusion in the publicity pamphlet the Secretary of State sends to registered voters before the election. Under § 19–124(C), the analysis may also "contain background information, including the effect of the measure on existing law." The proponents of the Arizona Abortion Access Act ("Act"), Initiative I-05-2024 ("Initiative"), Arizona for Abortion Access ("Appellee") challenged the impartiality of the Legislative Council's analysis ("Analysis") in superior court. Specifically, Appellee argues that the Council's use of the phrase "unborn human being" — which is the specific phrase used in existing law, A.R.S. § 36-2322 — violates A.R.S. § 19–124(C)'s impartiality requirement. The superior court agreed. We conclude that the Analysis provides the information required by A.R.S. § 19–124(C) and "substantially complies" with the statute's impartiality requirement. See Tobin, 231 Ariz. at 193 ¶ 11; Howe, 192 Ariz. at 384 ¶ 22. Therefore, We hold that Appellants have shown that the superior court erred in determining that the Council's Analysis of the Initiative violates A.R.S. § 19–124(C)'s impartiality requirement. Based on the foregoing, IT IS ORDERED granting relief on the petition for special action and reversing the superior court's ruling that the Council's use of the phrase "unborn human being" violates A.R.S. § 19–124(C)'s impartiality requirement. The permanent injunction and writ of mandamus granted by the superior court are vacated and the Secretary of State is authorized to prepare the publicity pamphlet. Chief Justice Ann A. Scott Timmer and Justice James P. Beene dissent. They would affirm the superior court's ruling. An opinion more fully explaining this decision order will issue in due course. Justice Clint Bolick has recused himself from this case. Pursuant to article 6, section 3 of the Arizona Constitution, Justice John Pelander (Retired) of the Arizona Supreme Court was designated to sit on this matter until it is finally determined. (Hon. John R. Lopez)
27.	15-Aug-2024	RECEIPT No.: 2024-00210 ; $140.00, Authorization: 8652288092690523, Applied to: ARIZONA FOR ABORTION ACCESS - Class B Filing Fee ($140.00) Paid for: ARIZONA FOR ABORTION ACCESS - By nCourt LLC