

STATE OF INDIANA)
) SS:
COUNTY OF MONROE) CAUSE NO. 53C06-2208-PL-001756

PLANNED PARENTHOOD GREAT)
NORTHWEST, HAWAI'I, ALASKA,)
INDIANA, KENTUCKY, INC.; WOMEN'S)
MED GROUP PROFESSIONAL)
CORPORATION; WHOLE WOMAN'S)
HEALTH ALLIANCE; and ALL-OPTIONS, INC.)
on behalf of themselves, their staff, physicians,)
and patients; and AMY CALDWELL, M.D.,)
on her own behalf and on behalf of her patients,)

Plaintiffs,)

v.)

MEMBERS OF THE MEDICAL)
LICENSING BOARD OF INDIANA, in)
their official capacities; and the)
HENDRICKS COUNTY PROSECUTOR,)
LAKE COUNTY PROSECUTOR,)
MARION COUNTY PROSECUTOR,)
MONROE COUNTY PROSECUTOR,)
ST. JOSEPH COUNTY PROSECUTOR,)
TIPPECANOE COUNTY PROSECUTOR,)
and the WARRICK COUNTY PROSECUTOR,)
in their official capacities,)

Defendants.)

**MARION COUNTY PROSECUTOR'S RESPONSE IN
OPPOSITION TO MOTION TO STRIKE APPEARANCES**

The Marion County Prosecutor, by counsel, responds in opposition to the Co-Defendants' Motion to Strike Appearances and requests that the motion be denied.

Prosecutors are universally recognized as having the discretion to do what they think is best for their communities in determining how to allocate their resources in prosecuting crime and what crimes should be prosecuted. The electorate holds them accountable if it perceives that such discretion is used inappropriately. Marion County Prosecutor Mears has concluded that requiring

him to enforce the abortion ban and criminal penalties created by Senate Enrolled Act 1 that was passed during the Indiana General Assembly's 2022 Special Session (SEA 1) would not be in the best interests of the residents of Marion County and would be an extraordinary misuse of prosecutorial resources and discretion. Prosecutor Mears bases that conclusion on his belief that the prohibitions imposed by SEA 1 force him to choose between using his office to help people or bully them. In his view, SEA 1 is designed to keep people from seeking medical care that they need and to punish those who attempt to provide that care. He thinks that the restrictions imposed by SEA 1 do not allow doctors and nurses to provide standard medical care for their patients and make what is already a gut wrenching time for patients even more difficult. In his view, the law beats down the poorest women and intimidates doctors who are simply trying to provide routine care and treatment. Prosecutor Mears deserves to have a legal representative who will advance that belief on his behalf. It is clear that the Office of Attorney General Rokita will not be such an advocate.

I. Factual Background

Plaintiffs, through their ACLU counsel, seek to enjoin enforcement of the provisions of SEA 1 and have sued Members of the Medical Licensing Board of Indiana and seven County Prosecuting Attorneys in their official capacities for injunctive relief. Among the defendants is Ryan Mears, the elected Prosecutor of Marion County. Upon receiving the Complaint, Prosecutor Mears investigated and identified the counsel who he believes will best represent his interests.

On September 6, 2022, Prosecutor Mears exercised his right to select counsel of his choice and attorneys Linda Pence and Suzannah Overholt appeared on his behalf. On September 8, 2022, attorneys from the Office of the Indiana Attorney General appeared on behalf of Prosecutor Mears and moved to strike his counsels' appearances.

The Attorney General's Office has a demonstrated history of not representing the interests of the Office of the Marion County Prosecutor. Attorney General Rokita's office previously represented Marion County Prosecutor Mears in another lawsuit regarding Indiana's abortion laws, *Jane Doe No. 1, et al. v. Attorney General of Indiana, et al.*, in the United States District Court for the Southern District of Indiana, Cause No. 1:20-CV-3247. The defendants in that action included the Attorney General, the Commissioner of the Indiana State Department of Health, the members of the Medical Licensing Board of Indiana and the Indiana State Board of Nursing, and the Marion County Prosecutor. During the course of that litigation, the plaintiffs served the defendants with various discovery requests, which the Deputy Attorney General assigned to the case forwarded to Prosecutor Mears' office for response. Pursuant to the DAG's request, Prosecutor Mears provided responses, directed his staff to communicate with the DAG about those responses, and suggested revisions to them. During those conversations, the DAG indicated that Prosecutor Mears' responses would be incorporated into the final discovery responses to be served on behalf of the defendants. However, when the final responses were served, they did not incorporate Prosecutor Mears' responses. See Exhibit 1, e-mail exchange between Robert Rowlett and Celita Scott regarding discovery requests and responses.

Further, Attorney General Rokita's views regarding Indiana's abortion laws and their enforcement are diametrically opposed to those of Prosecutor Mears. On June 24, 2022, Prosecutor Mears announced that his office would not prosecute abortion-related cases if the state legislature criminalized the procedure. Pak-Harvey, Amelia, "Indianapolis won't prosecute abortion cases if state outlaws procedure, prosecutor says," Indianapolis Star, June 24, 2022. In his announcement, Prosecutor Mears stated, "It should not be a priority for the prosecutor's office or law enforcement to second-guess the decision and choices made by health care professionals....

Everybody here realizes that we have a number of challenges in Marion County. One of those challenges is not incarcerating doctors and nurses." *Id.*

By contrast, Attorney General Rokita stated that he hoped Indiana legislators would pass an abortion ban without exception and said he would ask courts to reconsider state laws restricting abortion that had been blocked under *Roe v. Wade*. See Exhibit 2, Grove, Dustin, "Indiana attorney general hopeful for abortion restriction ahead of special session," WTHR, July 1, 2022. Mr. Rokita made national news when he accused Dr. Caitlin Bernard of not complying with Indiana law when she performed an abortion on a 10 year old rape victim. The invalidity of his allegations resulted in a defamation suit and ethics complaint being filed against him. See Exhibit 3, Paul, Maria Luisa, and Bellware, Kim, "Indiana AG's comments endangered abortion provider, complaint says," Washington Post, July 19, 2022.

Prosecutor Mears does not want representation from the Office of the Indiana Attorney General because he does not believe the Attorney General will adequately represent the interests of the Office of the Marion County Prosecutor.

II. Argument

Prosecutor Mears has the authority to hire private counsel, particularly when he does not believe that the Office of the Indiana Attorney General will adequately represent his interests. This authority is rooted in both the Indiana Constitution and statutes.

As the Motion to Strike recognizes, Prosecutor Mears is a state official. See Motion p. 2 ¶ 3 (citing *Jones v. Cummings*, 998 F.3d 782, 786 (7th Cir. 2021) (holding that "Indiana's laws and statutes indicate that [the prosecutor] is a state official")). Indiana law specifically grants state officials the ability to select their own counsel and does not impose any requirement that the

Attorney General consent to such representation. I.C. § 4-6-2-1.5. Defendants have not cited any authority which supports depriving Prosecutor Mears of this right.

Significantly, the law distinguishes between state “officers” and state “officials”. Indiana Code § 4-6-2-1 gives the Indiana Attorney General responsibility to defend actions brought against state *officers* in their official capacities, but that article of the code does not define “state officer.” While I.C. § 4-2-6-1(19) defines “state officer” as the governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and attorney general, that definition only applies to Title 4, Article 2. I.C. § 4-2-6-1.

No other definition of state officer is contained in Title 4 of the Indiana Code, and Title 4 does not contain any provisions that would lead to the conclusion that a prosecuting attorney is an “officer.” For example, I.C. § 4-2-1-1.5 lists the salaries of the “state officers other than the Governor” and only includes the lieutenant governor, secretary of state, auditor of state, treasurer of state, and the attorney general. Additionally, all information about prosecuting attorneys is found in Title 33, Court and Court Officers.

Defining a Prosecuting Attorney as an officer of the State would lead to an absurd result. State law requires that the Attorney General prosecute and defend all suits against the state of Indiana when informed or “whenever the governor or *a majority of the officers of state* require the attorney general in writing, with reasonable notice, to prosecute or defend a suit.” I.C. § 4-6-2-1(a) (emphasis added). Defining every prosecutor, not to mention other state official, as an “officer” would require an enormous undertaking each time a lawsuit is filed.

Further, the statutes elaborating upon the office of county prosecutor clearly grant prosecutors the ability to retain their own counsel. The State of Indiana is required to pay for expenses “incurred by a prosecuting attorney from a threatened, pending, or completed action or

proceeding that arises from making, performing, or failing to make or perform a decision, a duty, an obligation, a privilege, or a responsibility of the prosecuting attorney's office.” I.C. § 33-39-9-4. “Expenses” are specifically defined to include reasonable attorney’s fees. *See* I.C. § 33-39-9-2(1). This indicates that the Prosecutor can retain his own counsel, and there is no requirement that the Attorney General consent to such representation unless the prosecutor seeks reimbursement from the State for such attorney’s fees.

The Indiana Supreme Court recently addressed the issue of the limits of the Attorney General’s representation of state officers and officials in *Holcomb v. Bray*, 187 N.E.3d 1268 (Ind. 2022). In that case, the Governor filed suit against the General Assembly and various members seeking declaratory and injunctive relief based on a challenge to the constitutionality of a House bill that authorized the General Assembly to commence an emergency session based on a simple resolution of the Legislative Council, representing eight members from each chamber, in the event the Governor declared a state of emergency. The Governor retained private counsel to represent him in the action and the Attorney General moved to strike “appearances and all filings by unauthorized attorneys purporting to represent the Governor.” *Id.* at 1274. The trial court denied the motion to strike and ruled that the House bill was constitutional. The Governor appealed the ruling on the constitutionality of the House bill. *Id.* at 1275.

On appeal, the defendants continued to argue that the Governor did not have authority to bring the action without the consent of the Attorney General. *See id.* at 1288. While the Supreme Court noted that various statutes “give the Attorney General exclusive power to both represent and direct litigation strategy for state agencies and the state,” the Court noted that I.C. § 4-3-1-2 states: “[t]he governor may employ counsel to protect the interest of the state in any matter of litigation

where the same is involved.” *Id.* at 1288 (discussing I.C. §§ 4-6-2-1(a), 4-6-3-2(a), 4-6-5-3(a), and 4-3-1-2).

The Court concluded that, while the Attorney General's office may direct litigation on behalf of state agencies and the state as a whole, it cannot prevent the Governor from bringing a suit and hiring outside counsel to do so. *Id.* at 1289. The Court rejected the defendants’ argument that the Governor fell within I.C. § 4-6-5-3(a), the statute that requires state agencies to get written consent from the Attorney General to hire outside counsel. *Id.* at 1288. The defendants pointed to I.C. § 4-6-3-1, which defines state agency as, among other things, an “office” or “officer,” which they argued includes the Governor. *Id.* at 1289. However, the Court concluded “that definition applies only to ‘this chapter’ – Title 4, Article 6, Chapter 3. I.C. § 4-6-3-1. But the statute requiring agencies to get Attorney General consent is in Chapter 5.” *Id.* The Court also noted that accepting the defendants’ argument “would render the governor-specific section 4-3-1-2 meaningless,” noting that the Court “must presume the Legislature did not enact a useless provision.” *Id.* (citing *Robinson v. Wroblewski*, 704 N.E.2d 467, 475 (Ind. 1998)). The Court also articulated separation of powers concerns if the governor could not appoint his own counsel. *See id.* at 1289. Thus, the Court found that “the Legislature did not intend to require the Governor to get written consent from the Attorney General before hiring outside counsel to protect the interests of the state in a suit...” *Id.*

While Prosecutor Mears recognizes that his position is distinguishable from that of the Governor, the analysis in *Holcomb* demonstrates that he is able to retain his own counsel. As was the case in *Holcomb*, the Attorney General seeks to apply the requirements of I.C. § 4-6-5-3(a) to Prosecutor Mears. However, as was clearly articulated in *Holcomb*, that language does not apply because Prosecutor Mears is not a state agency. As a state official and prosecutor, Prosecutor

Mears is entitled to retain his own counsel. *See* I.C. §§ 4-6-2-1.5, 33-39-9-4. Reaching a contrary conclusion would render I.C. §§ 4-6-2-1.5 and 33-39-9-4 meaningless.

In addition, the separation of powers concerns addressed in *Holcomb* are also present here. The position of county prosecutor is created by Article 7 of the Indiana Constitution and is part of the judicial branch of government. *See* Ind. Const. art. 7, § 16. By contrast, the Attorney General is created by statute and, notably, the statutory provisions regarding the Attorney General's office are in the same title as those defining the executive branch. Further, the Indiana Attorney General may only exercise the authority granted the office by statute. *See State ex rel. Steers v. Holovachka*, 142 N.E.2d 593, 602 (Ind. 1957). Thus, the separation of powers argument that led the Indiana Supreme Court to conclude that the Governor must be allowed to hire his own counsel should also apply to prosecuting attorneys since they are in a separate branch of government from the Attorney General.

The Attorney General's reliance on I.C. § 4-6-3-2 is wholly unrelated to this case, as this is not a "civil action[] ... brought in the name of the state of Indiana or any state agency." The remainder of this section involves the inspector general and prosecuting attorneys prosecuting civil actions, and does not relate to defending cases. The Marion County Prosecutor is defending this action filed by Plaintiffs, who have retained counsel from the American Civil Liberties Union. The court should not expand the section beyond the plain meaning of the statute.

Similarly, the cases cited by the Attorney General do not stand for the proposition that Attorney General representation is required for a county prosecutor when he is sued. The case of *Banta v. Clark*, 398 N.E.2d 692, 693 (Ind. Ct. App. 1979), involved an attorney representing a state agency. The case of *State ex. Rel. Young v. Niblack*, 229 Ind. 596 (Ind. 1951), involved an attorney representing the Indiana State Board of Education. The case of *State ex. Rel Sendak v.*

Marion Superior Court, Room. No. 2, 373 N.E.2d 145 (Ind. 1978), involved the issue of whether the Governor is able to hire private counsel to represent a State Agency without the Attorney General's consent, and involved an attorney representing the Alcoholic Beverage Commission. *See Holcolmb v. Bray*, 187 N.E.3d 1268, 1288 (Ind. 2020) (noting that *Sendak* was limited to the narrow question of whether "the Governor could hire private counsel on behalf of a state agency without the Attorney General's consent"). None of the cases support the conclusion that Prosecutor Mears may not retain his own counsel.

Finally, the Attorney General's argument that the office "routinely represents prosecuting attorneys in state and federal court when they are defendants" (Motion p. 4 ¶ 11) does not require a different outcome. As was discussed above, while a state official like Prosecutor Mears is entitled to a defense from the Attorney General in an action such as this, Prosecutor Mears is permitted by law to select his own counsel. *See* I.C. § 4-6-2-1.5(i).

III. Conclusion

Prosecutor Mears is exercising his authority to retain counsel outside of the Office of the Indiana Attorney General for the instant action. His decision to do so is well founded and based upon his duty to act in the best interest of the citizens of Marion County and his prior experience with the current Attorney General in not adequately representing the interests of the Marion County Prosecutor.

WHEREFORE, the Marion County Prosecutor requests that the Motion to Strike Appearances be denied and for all other appropriate relief.

Respectfully submitted,

/s/ Linda L. Pence

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the following by electronic filing service using the Court's ECF System this 14th day of September, 2022:

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/s/ Linda L. Pence

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