No. 20-601

In the
Supreme Court of the United States

DANIEL CAMERON, ATTORNEY GENERAL, ON BEHALF OF THE COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

EMW WOMEN'S SURGICAL CENTER, P.S.C., ON BEHALF OF ITSELF, ITS STAFF, AND ITS PATIENTS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Through more than two years of litigation, the Secretary of Kentucky's Cabinet for Health and Family Services led the Commonwealth's defense of one of its laws regulating abortions. While this matter was before the Sixth Circuit, the Secretary retained lawyers from the Kentucky Attorney General's office to represent him. After the court of appeals upheld the permanent injunction against Kentucky's law, the Secretary decided not to seek rehearing or a writ of certiorari.

As a matter of Kentucky law, the final say on whether to accept a decision enjoining state law does not belong to the Secretary, but rests with Kentucky's Attorney General. Upon learning of the Secretary's decision, Attorney General Daniel Cameron promptly moved to intervene to pick up the defense of Kentucky's law where the Secretary had left off. The Sixth Circuit denied this motion as untimely.

The question presented is:

Whether a state attorney general vested with the power to defend state law should be permitted to intervene after a federal court of appeals invalidates a state statute when no other state actor will defend the law.

PARTIES TO THE PROCEEDING

Petitioner is Daniel Cameron, Attorney General, on behalf of the Commonwealth of Kentucky.

Respondents are EMW Women's Surgical Center, P.S.C., on behalf of itself, its staff, and its patients; Ashlee Bergin, M.D., M.P.H., on behalf of herself and her patients; Tanya Franklin, M.D., M.S.P.H., on behalf of herself and her patients; and Eric Friedlander, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS AND STATUTES

RULES

OTHER AUTHORITIES

OPINIONS BELOW

The Sixth Circuit's decision denying the Attorney General's motion to intervene is unreported but is available at 831 F. App'x 748. JA 228–51. The Sixth Circuit's decision refusing to accept for filing the Attorney General's tendered petition for rehearing is unreported. JA 270–72. The Sixth Circuit's decision affirming the district court's permanent injunction is reported at 960 F.3d 785. JA 84–151. The district court's decision is reported at 373 F. Supp. 3d 807. JA 33–67.

STATEMENT OF JURISDICTION

The Sixth Circuit denied the Attorney General's motion to intervene on June 24, 2020, and it refused to accept his tendered petition for rehearing on July 16, 2020. The Sixth Circuit affirmed the district court's judgment on June 2, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2106. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 209 (1965); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 30 (1993) (per curiam).

STATUTORY PROVISION INVOLVED

The Kentucky law challenged in this lawsuit is codified in relevant part at Ky. Rev. Stat. § 311.787. Pet.App. 135–36.

INTRODUCTION

This case began as a challenge to a Kentucky law regulating abortions, but it has transformed into a dispute about a State's sovereign ability to defend its laws. The Secretary of Kentucky's Cabinet for Health and Family Services led Kentucky's defense of its law through a bench trial and appellate briefing. At that point, Kentucky held its general elections and elected a new Governor. The new Governor in turn appointed a new Secretary. Even though the Secretary could have reversed course and sought to dismiss his appeal, he pressed forward. And he did so by retaining lawyers from the Kentucky Attorney General's office to represent him before the Sixth Circuit.

Shortly after the Sixth Circuit upheld the permanent injunction against Kentucky's law, the Secretary told the Attorney General's office that he would not seek rehearing or petition for a writ of certiorari. Two days later, and before any of the Secretary's appellate deadlines had run, the Attorney General moved to intervene on behalf of the Commonwealth. His motion asked only to exhaust the preexisting appellate remedies by pursuing rehearing and, if necessary, a writ of certiorari. The Secretary did not oppose the Attorney General's request to intervene. In every way, the Attorney General's motion functioned to hand off the defense of Kentucky's law from one state official to another before any appellate deadlines ran.

The Sixth Circuit saw things differently. By a divided vote, it denied the Attorney General's motion as untimely because he did not move before the panel affirmed the district court's permanent injunction. The court reached this conclusion even though the Attorney General's office had been representing the Secretary in front of the Sixth Circuit and even though none of the Secretary's appellate deadlines had expired when the Attorney General sought to intervene.

The problems with the decision go still deeper. The panel did not blink at prohibiting a State from fully defending its law with the official of its choosing. Kentucky law gives the Attorney General the authority to defend state law when no other official will. So when the Attorney General moved to intervene, his motion was no ordinary filing. It was an exercise of the Commonwealth's sovereign power to make its own decisions with the representative of its choosing. A court of appeals cannot close the courthouse doors when a State seeks only to hand off the defense of state law from one official to another without otherwise delaying the matter.

STATEMENT OF THE CASE

A. The Kentucky Attorney General

Every State gets to decide who speaks for it in court. *See Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013). "That agent is typically the State's attorney general." *Id.* Some States, by contrast, allow their legislature to represent the State at times. *See Va. House*

of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1952 (2019).

Kentucky puts the power to represent its interests in court in the hands of its Attorney General. Ky. Rev. Stat. §§ 15.020, 15.090. But as is often the case, the story is a little more complicated than that.

1. Kentucky divides its executive power into several constitutional offices. *See* Ky. Const. §§ 69, 91. The Governor serves as the chief magistrate, *id.* § 69, but the Attorney General is "the chief law officer of the Commonwealth" with the power to represent Kentucky's interest "in all cases" that might arise. Ky. Rev. Stat. § 15.020. The Attorney General's "primary obligation is to the Commonwealth, the body politic, rather than to its officers, departments, commissions, or agencies." *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974).

Though much of this power is codified now, Kentucky's Attorney General inherently possesses all the "common law duties and rights" that traditionally belong to the office. *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820, 826–27 (Ky. 1942). Just as the attorney general and "chief legal advisor of the king" was "charged with the duty of representing him in all legal matters," so too does the Attorney General speak for the people of the Commonwealth in court.

See Hancock v. Terry Elkhorn Mining Co., Inc., 503 S.W.2d 710, 715 (Ky. 1973).

It is thus uncontroversial to say that "[t]here is no question" that the Kentucky Attorney General has the right "to appear and be heard in a suit brought by someone else in which the constitutionality of a statute is involved." *See Paxton*, 516 S.W.2d at 868. In fact, Kentucky law demands nothing less. No court of the Commonwealth can enter a judgment declaring a statute "constitutionally infirm" without first ensuring that the Attorney General had notice of the suit and a chance to be heard. *See Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 363 n.4 (Ky. 2016) (citing Ky. Rev. Stat. § 418.075). In this respect, the Attorney General's role as the "chief law officer of the Commonwealth" is supreme. *See* Ky. Rev. Stat. § 15.020.

2. Now, the complication. Despite holding broad powers to defend the Commonwealth in court, Kentucky's Attorney General does not have the exclusive right to represent the Commonwealth's various state agencies and officials. Rather, each executive-branch agency "may employ" its own counsel. *See* Ky. Rev. Stat. § 12.210(1). State agencies and officials remain free to retain the Attorney General, *see* Ky. Rev. Stat. §§ 12.211, 15.020, but they need not do so.

As a result, state agencies and their officials sometimes provide the frontline defense in challenges to the legality of state law. This pairs well with the Attorney

General's "broad discretion" to decide when to participate in a given case. *See Overstreet v. Mayberry*, 603 S.W.3d 244, 265 & n.98 (Ky. 2020). When an agency uses its own lawyers to defend state law in federal court, the Attorney General's added presence is not always needed.

But that does not mean Kentucky's agencies or officials have the final say on when to defend the Commonwealth's laws. Kentucky provides multiple failsafes if an agency or official decides not to do so.

To start, Ky. Rev. Stat. § 15.020 broadly empowers the Attorney General to defend the Commonwealth's interests "in *all* cases" and "*all* litigation." *Id.* (emphasis added). The Attorney General can also "prosecute an appeal, without security, in any case from which an appeal will lie whenever, in his judgment, the interest of the Commonwealth demands it." Ky. Rev. Stat. § 15.090. And to ensure nothing falls through the cracks, Ky. Rev. Stat. § 418.075 requires that any party challenging the legality of a state law notify the Attorney General—not just at the start of the litigation, but also once any appeal begins. *See* Ky. Rev. Stat. § 418.075(1)–(2). So although the Attorney General does not have the exclusive right to represent state agencies and their officials in court, he remains

the "chief law officer of the Commonwealth" in every sense of the phrase. *See* Ky. Rev. Stat. § 15.020.

B. The challenge to HB 454

1. Kentucky's General Assembly passed House Bill 454 in March 2018, after which then-Governor Matt Bevin signed it into law. HB 454 regulates the abortion procedure known as dilation and evacuation, or D&E for short. A D&E abortion involves using "grasping forceps" to "tear apart" and remove an unborn child from a woman's uterus. *See Gonzales v. Carhart*, 550 U.S. 124, 135–36 (2007). This Court has recognized that "[n]o one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life." *Id.* at 158.

HB 454 lessens one particularly dehumanizing aspect of a D&E abortion. Abortion providers regularly perform D&E abortions while the unborn child is still alive. HB 454 prohibits performing a D&E abortion this way after a certain stage in pregnancy except if a medical emergency arises. *See* Ky. Rev. Stat. § 311.787(1)–(2). In doing so, HB 454 allows providers to keep performing these procedures as long as the provider causes fetal death before "dismember[ing]" the unborn child. *See* Ky. Rev. Stat. § 311.787(1)(a).

2. EMW Women's Surgical Center, P.S.C. and two of its abortion providers (together, EMW) sued under 28 U.S.C. §§ 1331 and 1343 claiming that HB 454 violates the Fourteenth Amendment. D.Ct.Dkt. 1 ¶¶ 3, 46–49. EMW's complaint named various state officials

as defendants, including Kentucky's Attorney General and the Secretary of Kentucky's Cabinet for Health and Family Services, both in their official capacities. *Id.* ¶¶ 9–10.

At the time, Andy Beshear served as Kentucky's Attorney General. *Id.* ¶ 9. Shortly after EMW sued, then-Attorney General Beshear and EMW submitted, and the district court entered, a "Stipulation and Order of Dismissal Upon Conditions," which dismissed the Attorney General from the lawsuit without prejudice. JA 28–29. By that time, however, the Secretary had begun to defend HB 454 on the merits. D.Ct.Dkt. 43. In the stipulation, Attorney General Beshear agreed to be bound by the judgment, but "generally reserve[d] all rights, claims, and defenses that may be available to him." JA 29–30. He also "specifically reserve[d] all rights, claims, and defenses relating to whether he is a proper party in this action and *in any appeals* arising out of this action." *Id.* at 29 (emphasis added). The stipulation also absolved the Attorney General of any responsibility for EMW's attorneys' fees and costs, but noted that the Attorney General could bear such responsibility "should [he] later be determined by this Court or another court of competent jurisdiction to be a party." *Id.* at 30.

The Secretary then led the Commonwealth's defense of HB 454 during a five-day bench trial in which more than a dozen experts testified. The district court ultimately sided with EMW and entered a permanent injunction against the enforcement of HB 454. *Id.* at

67–69. In doing so, the district court applied a balancing test, which it discerned from *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), to conclude that HB 454 unduly burdens "the right to terminate a pregnancy before viability." JA 57, 60. The Secretary appealed to the Sixth Circuit. D.Ct.Dkt. 128.

Weeks after the parties finished briefing the appeal, Kentucky held its 2019 general elections for statewide officers. Kentuckians elected then-Attorney General Beshear as their Governor, unseating the incumbent whose administration had led the charge in defending HB 454. But Governor Beshear's newly appointed Secretary quickly removed any doubt about whether the change in administration would lead to a change in the defense of HB 454. Within weeks of taking office, the Secretary retained lawyers from the office of newly elected Attorney General Daniel Cameron to keep defending the law in the Sixth Circuit. JA 74–83. And so the Commonwealth's defense of HB 454 continued just as before.

3. The Sixth Circuit affirmed the district court's judgment by a divided vote. Like the district court, the panel majority relied on language from *Hellerstedt* to "weigh[] 'the burdens a law imposes on abortion access together with the benefits those laws confer.'" *Id.* at 97 (quoting *Hellerstedt*, 136 S. Ct. at 2309); *see also id.* at 124–25.

The panel majority also determined that EMW had standing to press this suit, though it was skeptical that the Secretary had preserved the issue. *Id.* at 94–

95 n.2. The majority held that the district court "rightly rejected" the Secretary's standing argument and reasoned that abortion providers "unquestionably" have standing "when a law threatens them with criminal prosecution." *Id.* (citation omitted). Not stopping there, the panel interpreted this Court's case law as having "long since determined that abortion providers have" third-party standing to assert their patients' rights. *Id.* at 95 n.2.

Judge Bush dissented. In his view, "the evidence presented at trial demonstrate[s] a potential conflict of interest [between EMW and its patients] that destroys Plaintiffs' standing" to challenge HB 454. *Id.* at 136 (Bush, J., dissenting). He also criticized the majority for issuing its opinion only weeks before this Court would decide *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). JA 149–51 (Bush, J., dissenting).

C. The Attorney General moves to intervene

Things moved quickly after the panel affirmed the district court's judgment. Within one week, the Secretary told the Attorney General's office that he would not petition for rehearing or seek a writ of certiorari. *Id.* at 153, 161. But the Secretary agreed not to oppose the Attorney General intervening on behalf of the Commonwealth. *Id.* at 153–54. He even consented to some of his former attorneys representing the Attorney General going forward.

Two days after the Secretary informed the Attorney General's office of his decision, the Attorney General moved to intervene. *Id.* at 153, 161. He did so on behalf of the Commonwealth so that he could petition for rehearing and, if necessary, seek a writ of certiorari. *Id.* at 154. The Secretary, true to his word, did not oppose the Attorney General's motion.

Five days later (and while the motion to intervene remained pending), the Attorney General tendered a petition for rehearing of the panel's merits decision. *Id.* at 210–27. In doing so, the Attorney General submitted his petition by the ordinary, 14-day deadline for an existing party. *See* Fed. R. App. P. 35(c); Fed. R. App. P. 40(a)(1). That way, no one could reasonably say that the Attorney General's motion delayed the proceedings by even one day.

And yet the Sixth Circuit rejected the Attorney General's motion to intervene as untimely. JA 236–37. The panel faulted the Attorney General for not predicting the Secretary's decision. Even though the Secretary had retained the Attorney General's office to keep defending HB 454, the panel reasoned that the Attorney General should have preemptively "inquire[d] into and prepare[d] for the Secretary's intended course in the event of an adverse decision." *Id.* at 234.

The court also held that allowing the Attorney General to intervene would "significantly prejudice" EMW. *Id.* at 235. On this point, the panel focused on the Attorney General's decision to argue third-party

standing (as one of several issues) in his tendered rehearing petition. *Id.* at 235–36. The panel concluded that allowing the Attorney General to intervene and raise this issue—the issue on which Judge Bush dissented—would prejudice EMW because the Secretary had not preserved the issue on appeal. *Id.* at 235 (citation omitted).

Although the panel stated that it considered the "purpose" of the Attorney General's motion to intervene, *id.* at 232–33, the court never considered the Commonwealth's sovereign interests in defending its laws. In fact, the panel declined to "reach the issue of whether Attorney General Cameron has a substantial legal interest in the subject matter of this case." *Id.* at 237 n.4.

Judge Bush dissented again. *Id.* at 238–51 (Bush, J., dissenting). He argued that the Attorney General is "no Johnny-come-lately" to this litigation. *Id.* at 238 (Bush, J., dissenting). Instead, "[t]he Attorney General is *the same counsel* who represented Secretary Friedlander in this appeal, and Secretary Friedlander *does not oppose* the substitution of the Attorney General to represent the Commonwealth's interests." *Id.* Judge Bush continued: "Attorney General Cameron's motion is essentially to allow his state to substitute its party representative to defend the constitutionality of its law . . . ." *Id.* at 244. The dissent also noted the effect of the majority's ruling only days before this Court's impending decision in *June Medical*. "Without anyone in court to defend H.B. 454, [EMW's] challenge

to that law will succeed, even if our ruling in this case proves to be directly contrary to the Supreme Court's holding in *June Medical*." *Id.* at 239.

Five days later, this Court decided *June Medical* in ways that, in the Attorney General's view, undercut the rationale of the majority's decision on the merits (especially the panel's application of a balancing test). *See* Pet. 18–21. The Attorney General then tried to file a timely petition for rehearing—this time asking for rehearing of the panel's decision denying his motion to intervene. JA 252–69. That petition sought to alert the panel and the full court to *June Medical*'s implications for this case. *Id.* at 264–68. The panel, however, refused to even allow the Attorney General to file his rehearing petition. *Id.* at 271. This prompted another dissent from Judge Bush—his third. *Id.* at 271–72 (Bush, J., dissenting).

Attorney General Cameron, acting on behalf of the Commonwealth, sought a writ of certiorari from this Court. The Court granted certiorari to resolve whether Attorney General Cameron should have been allowed to intervene to defend HB 454. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 141 S. Ct. 1734 (2021).

SUMMARY OF ARGUMENT

I. The Attorney General expressed the sovereign will of Kentucky when he moved to intervene and exhaust the Commonwealth's remaining appellate rights. The States have the right to choose who represents their interests in federal court. This is an essential part of state sovereignty, and it is perhaps never more important than when a State finds itself defending against a constitutional challenge to state law. Kentucky's sovereign interests predominate any analysis of whether the Attorney General timely moved to intervene.

The critical question for post-judgment intervention is whether the potential intervenor acted promptly given all the circumstances. An intervenor meets this standard when he or she promptly asks to step in after discovering that the party representing his or her interests will no longer do so, especially if that intervention does not otherwise delay the ordinary litigation timeline.

The Attorney General's motion meets that standard. He moved to intervene only days after his office received notice that the Secretary would no longer defend HB 454. And he tendered his petition for rehearing by the ordinary deadline after an appellate decision. By denying the Attorney General's motion in these circumstances, the Sixth Circuit undercut the Commonwealth's choice to designate the Attorney General as the official who can step in to defend state law.

II. Even setting aside Kentucky's sovereign right to designate who represents it in court, the Attorney General still was entitled to intervene. Every factor that might ordinarily bear on whether to allow a non-party to intervene cuts in the Attorney General's favor. He moved to intervene within days of learning that the Secretary would not seek further judicial review; he tendered a petition for rehearing within the ordinary deadline for doing so; and he sought only to exhaust the Commonwealth's already-existing appellate options—all of which, of course, happened just before this Court was set to release a potentially landscape-shifting decision in *June Medical*. If the Court were to concoct the perfect case for allowing appellate intervention to seek rehearing and a writ of certiorari, this would be it.

The Sixth Circuit's contrary conclusion collapses under even modest review. The panel faulted the Attorney General for not intervening while his office represented the Secretary before the Sixth Circuit. It faulted the Attorney General for raising an alleged new issue in his rehearing petition even though the Attorney General asked only to step into the Secretary's shoes and even though the panel had resolved the supposedly new issue against the Secretary. And the panel downplayed the significance of an impending decision from this Court by suggesting that the situation would resolve itself no matter what. Even under ordinary circumstances, without the sovereign choices of a State at issue, the Sixth Circuit's decision cannot stand.

III. None of the other factors that courts typically consider in the Rule 24 context point against intervention. The Attorney General has significant protectable interests in defending HB 454 that will be impaired if the district court's permanent injunction is upheld. And the Secretary's decision not to pursue this case further shows that he does not adequately represent the Attorney General's interests.

ARGUMENT

This Court has said very little about how to judge the timeliness of a post-judgment motion to intervene, especially one filed in a court of appeals. Although Federal Rule of Civil Procedure 24 only applies in federal district courts, Fed. R. Civ. P. 1, the Court has treated Rule 24 as a "helpful analog[y]" when considering whether to allow intervention before an appellate court. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 216 (1965); *see also id.* at 217 n.10 ("[T]he policies underlying intervention [in trial courts] may be applicable in appellate courts."). So while Rule 24 does not strictly apply in the courts of appeals, it helps inform whether to permit appellate-stage intervention.

Under Rule 24, the "critical inquiry" for "post-judgment intervention for the purpose of appeal" is "whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395–

96 (1977). In the main, that means a nonparty's motion is timely if it comes "promptly" after "it became clear to the [nonparty] that [its] interests . . . would no longer be protected by" the existing parties. *Id.* at 394. Any other rule would induce "protective motions" to intervene by nonparties merely to "guard against the possibility" that no appeal will be taken. *See id.* at 394 n.15. And while a district court's timeliness finding under Rule 24 is reviewed for abuse of discretion, *Nat'l Ass'n for the Advancement of Colored People v. New York*, 413 U.S. 345, 366 (1973), that standard does not give lower courts free rein, *see McDonald*, 432 U.S. at 395–96, or immunize their legal errors from correction, *see Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559–60 (1974).

Against this legal backdrop, the Sixth Circuit's decision comes up short. There are two broad ways to think about this.

First, the Sixth Circuit's timeliness analysis failed to give full effect to the Commonwealth's sovereign choice to designate the Attorney General as its agent to step in under these circumstances. The Attorney General moved to intervene promptly so that he could meet the ordinary deadlines for the rest of the appeal. The only way a court could find that kind of swift action untimely is to treat the Attorney General as a stranger to this suit, rather than as the state official who speaks for the Commonwealth when another state official declines to defend Kentucky law. In circumstances like this, where one state official has

simply handed off the litigation to another without delaying the ordinary resolution of the case, a court cannot overrule the State's choice by declaring the intervenor untimely.

Second, even if state sovereignty could be separated from the question before the Court, the Attorney General's motion to intervene was timely by every possible metric. It came promptly upon learning that the Secretary would not seek rehearing or a writ of certiorari. It sought only to exhaust Kentucky's preexisting appellate rights. It came before any of the Secretary's appellate deadlines expired. It caused no prejudice to EMW. And it came in anticipation of this Court's *June Medical* decision.

I. Kentucky's sovereign interests predominate the timeliness analysis.

A. The States decide who speaks for them in court.

Under our dual-sovereign system of government, the States are not mere passive actors. They instead possess "a residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)). As separate sovereigns, the States "exist as a refutation of th[e] concept" that the federal government is "the ultimate, preferred mechanism for expressing the people's will." *Alden v. Maine*, 527 U.S. 706, 759 (1999). The States, in other words, "are not relegated to the role of mere provinces or political corporations,

but retain the dignity, though not the full authority, of sovereignty." *Id.* at 715.

A core part of the States' sovereignty is the power to enact and enforce their own laws subject to the limits imposed by the Constitution. In fact, "'the power to create and enforce a legal code, both civil and criminal' is one of the quintessential functions of a State." *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982)). The States' power to govern themselves has many virtues. It "allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (cleaned up) (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)).

A State "clearly has a legitimate interest in the continued enforceability of its own statutes." *Maine v. Taylor*, 477 U.S. 131, 137 (1986). "No one doubts" this. *Hollingsworth*, 570 U.S. at 709–10. So when a federal court considers whether to enjoin a State from enforcing its law, the court must approach the case with "respect for the place of the States in our federal system." *See Arizonans for Off. English v. Arizona*, 520 U.S. 43, 75 (1997). Indeed, "[a]ny time a State is enjoined by a

court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). That is why "[f]ederal nullification of a state statute is a grave matter." *See Maine*, 477 U.S. at 135.

Integral to the States' power to create and enforce a legal code is the ability to choose *who* represents their interests in federal court. This choice belongs to the States alone. A State, this Court has held, "*must* be able to designate agents to represent it in federal court." *Hollingsworth*, 570 U.S. at 710 (emphasis added). Such a choice is no small matter. By choosing who exercises its powers, "a State defines itself as a sovereign." *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). It follows that the federal judiciary must accept each State's decision about who speaks for it in court. *See Hollingsworth*, 570 U.S. at 710.

This Court's decision in *Bethune-Hill* captures this point. There, after the district court enjoined Virginia from enforcing its law, Virginia's Attorney General decided not to appeal further. *Bethune-Hill*, 139 S. Ct. at 1950. "Continuing the litigation, the Attorney General concluded, would not be in the best interest of the Commonwealth or its citizens." *Id.* (cleaned up).

Virginia's House of Delegates (which had passed the law at issue) sought to override the Attorney General's decision. *See id.* But the House faced a hurdle:

Virginia law did not allow it "to displace Virginia's Attorney General as representative of the state." *Id.* Rather, Virginia had "chosen to speak as a sovereign entity with a single voice"—its Attorney General. *Id.* at 1951–52. And that choice, the Court explained, "belongs to Virginia." *Id.* at 1952. So even though the House desired to press forward, the Court dismissed the appeal because, as relevant here, Virginia—acting through its chosen agent—"would rather stop than fight on." *See id.* at 1956.

But *Bethune-Hill* came with a caveat. If Virginia "had designated the House to represent its interests, and if the House had in fact carried out that mission," the Court explained, "we would agree that the House could stand in for the State." *See id.* at 1951.

B. Intervention to hand off litigation to another state official is timely if it does not otherwise delay the case.

This case is the flip side of *Bethune-Hill*. Kentucky's agent wants to "fight on," not "stop." *See id.* at 1956. Yet the Sixth Circuit folded Kentucky's hand.

That decision overlooked Kentucky's sovereign interests in two keys ways. First, the court refused to give effect to the Commonwealth's choice to make the Attorney General its final decision-maker on whether to accept an adverse judgment or exhaust all appeals. In doing so, the court of appeals viewed the timeliness question all wrong, treating the Attorney General as a

tardy litigant instead of the Commonwealth's designated agent to step in when these circumstances arise. Second, the court made this mistake when it matters most—when the Commonwealth faced a judgment from a federal court permanently enjoining one of its laws.

1. As outlined above, Kentucky law gives the Attorney General a prominent role in litigation affecting the Commonwealth. *See* Ky. Rev. Stat. § 15.020. The Attorney General speaks for Kentucky in any case "in which the Commonwealth has an interest." *See id.* Even so, Kentucky state agencies and officials can choose counsel other than the Attorney General to represent them. *See* Ky. Rev. Stat. § 12.210. But Kentucky law does not give those officials the final say on whether the Commonwealth declines to appeal a decision enjoining Kentucky law. That decision belongs to the Attorney General. *See* Ky. Rev. Stat. §§ 15.020, 15.090.

To put a finer point on it, if the Attorney General disagrees with a state official's decision not to appeal an adverse ruling, Kentucky law empowers the Attorney General to overrule that decision. So while state officials like the Secretary can take litigation positions without the Attorney General's consent, from Kentucky's perspective, any decision to accept a lower court's adverse ruling is not the last word on the matter.

This point was lost on the court below. Rather than accept the Attorney General as the Commonwealth's

agent to seek rehearing and petition for a writ of certiorari, the court mistakenly focused on *the Secretary's* decision-making. The Secretary, the court speculated, might ultimately seek a writ of certiorari. JA 230 n.1 ("[T]here is and would be nothing to prevent [the Secretary] from changing course and pursuing certiorari . . . ."); *id.* at 233 n.2 (similar). Never mind that the Attorney General had represented to the Sixth Circuit that the Secretary would not do so. *Id.* 153, 161. And never mind that this representation proved true. In any event, the panel's fixation on what the Secretary might do robbed the Commonwealth of its ability to decide for itself who speaks on its behalf.

The Sixth Circuit's focus on the Secretary's decision-making departs sharply from *Bethune-Hill*. As discussed above, the Court there simply accepted the Virginia Attorney General's decision not to appeal even though one chamber of the legislature wanted to go forward. *Bethune-Hill*, 139 S. Ct. at 1950–52. Here, by contrast, the Sixth Circuit effectively overrode Kentucky's decision to seek rehearing and a writ of certiorari by ignoring the Attorney General's authority to step in. This turns *Bethune-Hill* on its head. If federal courts must accept a State's decision not to appeal, by like token they must accept the State's decision to keep defending its law. That decision "belongs to" the State no matter what it decides. *See id.* at 1952.

The Sixth Circuit sidestepped this issue by faulting the Attorney General for not moving to intervene earlier. JA 232–36. But that only illuminates the problem

with the court's rationale: This case has never been about the personal interest of the Secretary. Nor is it about the personal interest of the Attorney General. It is about *Kentucky's interest* in enforcing its law and in defending it all the way through this Court if necessary. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." (internal citation omitted)). Viewed this way, what reason is there for requiring the Attorney General to intervene earlier when a state official was already defending Kentucky's law in court? Even if the Attorney General sat on the sidelines for some time (recall, however, that his office represented the Secretary before the court of appeals), the Commonwealth was always in the game. And it is the Commonwealth's interest that the Attorney General represents.

The Attorney General's motion to intervene is best understood "essentially to allow his state to substitute its party representative to defend the constitutionality of its law." JA 244 (Bush, J., dissenting). Indeed, the Secretary did not even oppose the Attorney General's motion. *Id.* at 246 (noting that the Secretary "seems to have no problem passing the baton to the Attorney General to allow him to take control of the litigation"). Even though the Secretary wanted the case to be over, he offered no reason to oppose handing off the litigation to the official that the Commonwealth authorized to step in.

And *that* is the key flaw in the lower court's timeliness analysis. Federal courts should have no interest in who a State designates to defend its laws. *See Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 802 (7th Cir. 2019) (explaining that there is "no reason why a federal court would bat an eye if a state required [one state official] to withdraw from his representation and allow another entity . . . to take over the case"). Instead, the court's timeliness inquiry should have treated the Attorney General *as if he were no different from the Secretary*—stepping into his shoes on the Commonwealth's behalf.

In fact, the handoff from the Secretary to the Attorney General is little different than *McDonald*—a case that did not even implicate the sovereign interests discussed in *Bethune-Hill*. There, the Court allowed a putative class member to intervene upon learning that the class representatives would not appeal. *McDonald*, 432 U.S. at 390, 396. Unlike the Sixth Circuit, this Court cared not about how long the case had been ongoing. *See id.* at 390 (quoting the district court's statement that "this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek any relief from this Court in any way during that period of time, and litigation must end").

Rather than hold the age of the case against the intervenor, *McDonald* focused on how she stepped into the shoes of the class representatives and how she did

so promptly upon learning that the class representatives would no longer represent her interests. As this Court explained, the intervenor moved "as soon as it became clear to the [intervenor] that the interests of the unnamed class members *would no longer be protected* by the named class representatives." *Id.* at 394 (emphasis added); *see also id.* at 395 n.16 (favorably discussing two cases permitting post-judgment intervention into matters that were "representative in nature"). Put differently, the Court allowed a nonparty to intervene to take an appeal because, until that point, another party had represented her interests. *See id.* at 394–95.

This case is no different. Until the Attorney General moved to intervene, the Secretary had defended Kentucky's law. And for some of that time, the Attorney General's office had served as the Secretary's counsel. But when the Secretary decided to stop litigating, the Attorney General, just like the intervenor in *McDonald*, learned that the Commonwealth's previously represented interest was no longer protected. And just like in *McDonald*, the Attorney General sought only to pick up where the Secretary left off. *See id.* at 392; *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 573 (7th Cir. 2009) ("To allow the substitution of a party that has a legally protectable interest in the statute enjoined by the district court is as proper as permitting an unnamed class member in a class action suit to intervene when the class representative drops out.").

McDonald is not the only time this Court has permitted intervention for purposes of appeal. It has allowed a nonparty to intervene *before this Court* "to file the nonparty's own petition for certiorari where [the nonparty's] interests, which were defended by the losing party below, had been abandoned by the losing party's failure to apply for certiorari." Stephen M. Shapiro et al., *Supreme Court Practice* 6.16(c) at 6-62 (11th ed. 2019) (citing *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 389 U.S. 813 (1967), 390 U.S. 459 (1968); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969)); *see also Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation Dist.*, 464 U.S. 863 (1983). A common denominator in these cases was that the Court allowed the real party in interest to seek certiorari after an existing party declined to do so. *Cf.* Shapiro, *supra*, 2.5 at 2-22 & n.43; Federal Respondents' Opposition to Motion for Leave to Intervene at 2, 13–14, *Arizona v. City & Cnty. of San Francisco*, No. 20M81 (May 17, 2021). The Attorney General occupies just such a position here. *See Overstreet*, 603 S.W.3d at 265 ("Under Kentucky law, the Attorney General, as a constitutionally elected official, is empowered to represent the Commonwealth in cases in which the Commonwealth is the real party in interest.").

2. Compounding the problem even more, the Sixth Circuit overlooked the ultimate stakes of this case—a federal court enjoining a State from "effectuating statutes enacted by representatives of its people." *See Maryland*, 567 U.S. at 1303 (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal.*, 434 U.S.

at 1351 (Rehnquist, J., in chambers)). This Court's precedent teaches that "[f]ederal nullification of a state statute is a grave matter." *Maine*, 477 U.S. at 135. Yet after reading the Sixth Circuit's decision, one would be forgiven for having no idea of the sovereign interests at stake.

The Ninth Circuit's decision in *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007) (order), reflects the role that the States' interests should play in the timeliness inquiry. There, Hawaii participated in district court and the Ninth Circuit as an amicus. *Id.* at 964. From this perch, Hawaii persuaded the district court to adopt an argument that the party it supported declined to make. *Id.* at 964–65. Because that party did not pursue Hawaii's argument on appeal, however, the party had no incentive to press the issue further after the Ninth Circuit eventually rejected Hawaii's argument. *Id.* at 965. That put Hawaii in a bind. As an amicus, it could not seek rehearing or petition for certiorari. So it moved to intervene as a party. *Id.* at 964.

The court granted Hawaii's motion. It did so *even though* Hawaii's request to intervene came after the panel's decision, *even though* the court found Hawaii's explanation for its delay "less than entirely persuasive," and *even though* the State "could have and should have intervened earlier." *Id.* at 966. All of that, the court explained, was "outweighed by [its] discomfort" about what would happen if Hawaii could not intervene: there would be no petition for rehearing and "no opportunity for the Supreme Court to consider

whether to grant certiorari." *Id.* That is to say, while the panel may well have denied an ordinary litigant's motion to intervene, the court's "discomfort" with sidelining a State justified allowing Hawaii to intervene in a case with a "long term impact" on its interests. *See id.*; *see also Peruta v. Cnty. of San Diego*, 824 F.3d 919, 940–41 (9th Cir. 2016) (en banc) (granting California leave to intervene after a panel decision).

By contrast, the court below showed no discomfort in preventing the Commonwealth from exhausting its remaining appellate rights. Responding to the dissent's criticism that the majority's decision "flies in the face of our precedent allowing states' attorneys general to intervene on appeal in order to defend their states' laws," JA at 238 (Bush, J., dissenting), the panel countered that it need not consider that precedent, *id.* at 237 n.4. "[W]e do not," the panel clarified, "reach the issue of whether Attorney General Cameron has a substantial legal interest in the subject matter of this case." *Id.* And EMW, for its part, readily acknowledges that the appeals court "expressly disclaimed any ruling on the legal interest of the Attorney General." BIO 1.

This Court's precedents require the opposite. The judiciary must show "respect for the place of the States in our federal system." *See Arizonans for Off. English*, 520 U.S. at 75. After all, "[a] state's right to participate in federal litigation implicating its interests as a sovereign is a serious matter." *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 391 (7th Cir. 2019).

And a State's interest in protecting its sovereignty reaches its zenith when faced with a challenge to the constitutionality of its laws. *See Maine*, 477 U.S. at 135. These interests cannot be irrelevant to the timeliness inquiry.

3. One other aspect of *McDonald* matters here. The intervenor there moved to intervene "18 days after the District Court's final judgment, and thus . . . well within the 30-day period for an appeal to be taken." *McDonald*, 432 U.S. at 390. The Court returned to this fact again and again, at one point emphasizing that "the motion complied with, as it was required to, the time limitation for lodging an appeal." *Id.* at 392. Elsewhere, *McDonald* explained that several cited cases "were consistent" with its decision "[i]nsofar as the motions to intervene . . . were made within the applicable time for filing an appeal." *Id.* at 395 n.15. *McDonald*'s repetition underscores the importance of a post-judgment motion to intervene not otherwise delaying the resolution of the case. *See also Lopez-Aguilar*, 924 F.3d at 389 ("[W]e, like our sister circuits, give significant weight to the fact that the motion to intervene was filed within the time limit for filing a notice of appeal.").

McDonald's emphasis on meeting the existing party's appeal deadline makes sense. If a nonparty moves to intervene by the existing party's deadline, the resulting appeal will not unfold all that differently than an appeal by the existing party would have. Put differently, if a motion to intervene comes promptly

enough that the appeal that would follow can move on roughly the same timeline as an appeal by an existing party, a court has little reason to question the timeliness of that motion.

The Attorney General's motion fits this bill. To recap, the Attorney General learned that the Secretary would not seek further review one week after the Sixth Circuit's decision. JA 161. Two days later, the Attorney General moved to intervene. *Id.* At that point, the Sixth Circuit's mandate had not issued. *See* Fed. R. App. P. 41(b); *see* 6thCir.Dkt. 66. In fact, the Secretary's 14-day period for seeking rehearing had not even expired. *See* Fed. R. App. P. 35(c); Fed. R. App. P. 40(a)(1). So when the Attorney General came forward, no deadlines had run.

But the Attorney General did not rest there. Not wanting to delay matters by even one day, the Attorney General tendered his petition for rehearing by the Secretary's 14-day deadline. JA 210–27. The Attorney General did so even though EMW did not object to extending the rehearing deadline. *Id.* at 171. And on the same day that the Attorney General tendered his rehearing petition, he replied in support of his motion to intervene. *Id.* at 197–209. So within one week of learning that the Secretary would not pursue rehearing or a writ of certiorari, the Attorney General fully briefed his motion to intervene and tendered a petition for rehearing. It is hard to imagine how the Attorney General could have moved more quickly. If the Sixth Circuit had granted his motion to intervene, no one could

say that doing so would have otherwise delayed this matter.

* * *

Putting *Bethune-Hill* and *McDonald* together resolves this appeal. Under *Bethune-Hill*, federal courts must accept Kentucky's decision to empower the Attorney General to represent its sovereign interests in defending state law. And under *McDonald*, a handoff of litigation authority for the purpose of appeal is timely when the intervenor moves promptly and within "the time limitation for lodging an appeal." *See McDonald*, 432 U.S. at 392, 394.

That is what happened here. The Attorney General's motion was timely because—as Kentucky's designated agent to step in when necessary to keep defending the Commonwealth's interests—he moved quickly enough to meet the Secretary's appellate deadlines. The only way to conclude otherwise is to treat the Attorney General as an entirely new party, rather than the official chosen to speak for the Commonwealth in these circumstances.

II. Sovereignty aside, the Attorney General timely moved to intervene.

Even if a court could set aside Kentucky's sovereign interests, the Attorney General's motion still was timely. The Sixth Circuit's conclusion otherwise cannot survive scrutiny on its own terms.

In the Rule 24 context, timeliness turns on "whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *Id.* at 395–96. The Sixth Circuit found that the circumstances do not support the Attorney General: It determined that the Attorney General should have intervened before the court issued its merits ruling. It treated intervention to take a matter-of-right appeal from the district court as entirely unlike intervention to seek rehearing and a writ of certiorari. It determined that the Attorney General's intervention would prejudice EMW. And it found that any unusual circumstances favor EMW. Each argument falls under its own weight.

1. The court of appeals focused on the Attorney General's failure to intervene before its merits ruling. JA 232–34. But the Attorney General was no stranger to this case when he moved to intervene. For the five months before the court of appeals ruled, his office had served as counsel of record for the Secretary in this very matter, during which time counsel from the Attorney General's office argued the matter before the panel. *Id.* at 74–83; *see Ross v. Marshall*, 426 F.3d 745, 755 (5th Cir. 2005) (finding post-judgment motion timely where movant provided counsel to the existing party).

Yet the court of appeals surmised that the Attorney General should have predicted that the Secretary would ultimately halt his years-long defense of HB 454. *Id.* at 233–34. The new Secretary, however, could

have sought to dismiss this matter upon taking office. Fed. R. App. P. 42(b). It is not unheard of for the government to change litigation positions after an election. *See, e.g.*, Letter from Acting Solicitor General at 1, *Terry v. United States*, No. 20-5904 (Mar. 15, 2021). But the Secretary stuck to his predecessor's position. Less than one month after taking office, he retained the Attorney General's office to move forward. Surely the Attorney General may rely on the Secretary's resolve just like the intervenor in *McDonald* could rely on the class representatives' history of litigating the case. *See McDonald*, 432 U.S. at 393–94.

The alternative required by the court of appeals is unworkable. Assume for a moment that the Attorney General had done what the panel envisioned—that he had moved to intervene before the Sixth Circuit's merits decision even though his office already represented the Secretary. According to the panel, the Attorney General's office needed to preemptively ask the Secretary whether he would appeal further if the Sixth Circuit ruled against him. JA 234 & n.3. Imagine how this hypothetical conversation might go: The Attorney General's office would ask what its client intends to do without knowing how the court of appeals would rule or on what grounds. And suppose that in this hypothetical conversation the Secretary told the Attorney General's office that he would accept an adverse ruling whatever the rationale. According to the panel, the Attorney General's office should have then sought the Secretary's permission to disclose his position publicly. *Id.* at 234 n.3. And then assuming the Secretary

agreed to that request,[1] the panel expected the Attorney General to move to intervene. But what would such a motion say? Presumably, the panel expected the Attorney General to argue that his intervention is needed because the Secretary will accept any ruling against him no matter the basis. *See id.* This is "strange indeed." *See id.* at 245 (Bush, J., dissenting).

The panel marshalled no precedent requiring the Attorney General to undertake this contorted series of steps. In fact, *McDonald* would have come out differently under the panel's rule. In such a paradigm, the *McDonald* intervenor would have been forced to incessantly quiz the class representatives about what they may or may not do in the future to ensure that she timely moved to intervene. But nothing in *McDonald* requires a potential intervenor always to assume the worst about what the party representing its interests will do.

The reality is that the panel's decision, if affirmed, will inevitably lead to more and more protective motions to intervene. Must Kentucky now stack trial-court dockets in constitutional challenges with state officials to prevent one official from leaving the State without the ability to appeal? *McDonald* warned about

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[1] If the Secretary did not consent to such a disclosure, the panel hypothesized that the Attorney General should then seek intervention "without disclosing his communications with the Secretary." JA 234 n.3. But EMW would have opposed such a motion by arguing that the Secretary already adequately represents the Attorney General's interests.

this very eventuality, in which nonparties file "protective motions" to become mere "superfluous spectator[s]" so they can "guard against the possibility" that an existing party does not appeal. *See McDonald*, 432 U.S. at 394 n.15. Such a rule would serve "no purpose." *See id.*

2. The court of appeals placed near-dispositive reliance on the fact that the Attorney General's motion came "years into [the case's] progress, after both the district court's decision and—more critically—this Court's decision." JA 232. This fact, the court found, "points *decisively* against intervention." *Id.* (emphasis added). That analysis fits uncomfortably next to this Court's admonition—in the Rule 24 context—that "the point to which the suit has progressed is one factor in the determination of timeliness" but "is not solely dispositive." *New York*, 413 U.S. at 365–66.

More fundamentally, the Sixth Circuit failed to justify treating intervention to appeal a trial court's judgment as altogether different from intervention to seek rehearing and a writ of certiorari. The former practice is "often" allowed. *United States v. Detroit*, 712 F.3d 925, 932 (6th Cir. 2013). And in both instances, the intervenor only seeks to pursue the appellate remedies that belong to the existing party with the record as it is. If anything, the fact that the Attorney General desires to exhaust appellate remedies that are discretionary (as opposed to as of right) cuts against the lower court's inflexible, "decisive[]" rule.

The panel identified no precedent denying a State's motion to intervene in such a posture. In fact, existing case law is to the contrary. In *Peruta*, the en banc court allowed California to intervene after a panel issued a decision that "if left intact, would have substantially impaired California's ability to regulate firearms." *Peruta*, 940 F.3d at 940. In *Day*, the court of appeals allowed Hawaii to intervene post-decision to safeguard its "protectable interest in the lands granted to it." *Day*, 505 F.3d at 965. And in *Democratic National Committee v. Hobbs*, No. 18-15845, Dkt. 137 (9th Cir. Apr. 9, 2020), a case currently on this Court's docket, the court of appeals allowed Arizona to intervene to defend its election laws even later than the intervention request here—after the en banc court had taken up the case and ruled. *See id.*, Dkt. 128; *see also Igartúa v. United States*, 636 F.3d 18, 18 (1st Cir. 2011) (granting Puerto Rico's motion to intervene to file a rehearing petition); *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (per curiam) (en banc) (noting the court granted the Michigan Attorney General's motion to intervene "on behalf of the State of Michigan" at the en banc stage).[2]

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[2] In addition, "amici have been permitted by courts of appeals to intervene after judgment, in unusual circumstances, in order that such parties would have standing to petition for rehearing and to file petitions for certiorari." Shapiro, *supra*, 2-20 & n.40. And other decisions have permitted intervention to seek rehearing or certiorari or to be involved in that process. *United States v. $186,416.00 in U.S. Currency*, 722 F.3d 1173, 1175 (9th Cir.

The Sixth Circuit's firm line between intervening to appeal a trial court's decision and intervening to seek rehearing or a writ of certiorari also overlooks that even this Court grants motions to intervene when the circumstances warrant. In addition to the examples provided above, *supra* Part I.B.1, the Court recently granted a motion to intervene after the respondent raised potential vehicle problems related to the identity of the petitioner. *See N. B. D. v. Ky. Cabinet for Health & Family Servs.*, 140 S. Ct. 860 (2020); Motion for Leave to Intervene as Petitioner at 1, *N. B. D. v. Ky. Cabinet for Health & Family Servs.*, No. 19-638 (Dec. 23, 2019). The Court also recently granted a nonparty leave to intervene as a respondent after the existing respondent declined to defend part of the lower court's judgment. *See BNSF Ry. Co. v. E.E.O.C.*, 140 S. Ct. 109 (2019); Motion for Leave to Intervene at 1, *BNSF Ry. Co. v. E.E.O.C.*, No. 18-1139 (Aug. 22, 2019). This Court thus "allow[s] certain persons to participate in the proceedings in order to protect their interests, regardless of whether they were parties or intervenors below." *See* Shapiro, *supra*, 6.16(c) at 6-63.

3. Any consideration of timeliness must assess the prejudice the existing parties will face. *See McDonald*, 432 U.S. at 394. But there is no reasonable argument that allowing the Attorney General to intervene here would prejudice EMW. That is because the Attorney

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2013) (order); *Ruthardt v. United States*, 303 F.3d 375, 386 (1st Cir. 2002).

General only asked to step into the shoes of the Secretary. JA 162. A litigant who challenges a state law must expect that the State will defend its law through this Court if necessary. *See Flying J*, 578 F.3d at 574. While such a litigant no doubt hopes the State will not litigate to the end, no one is entitled to a "pass as to an opponent." JA 251 (Bush, J., dissenting).

In these circumstances, EMW "can hardly contend that its ability to litigate the issue was unfairly prejudiced simply because an appeal on behalf of [the Commonwealth] was brought by [the Attorney General], rather than by [the Secretary]." *See McDonald*, 432 U.S. at 394. The prejudice analysis need go no further. *See id.*; *see also Flying J*, 578 F.3d at 573 ("There is no prejudice to [the existing party], because it could not have assumed that, if it won in the district court, there would be no appeal."); *Lopez-Aguilar*, 924 F.3d at 390 (holding that, even if the State's motion to intervene had been filed earlier, "the burden to the parties of reopening the litigation and resuming settlement negotiations would have been the same").

The panel reasoned that EMW would suffer "significant[] prejudice" because the Attorney General intended to pursue a supposedly new issue (third-party standing) in his petition for rehearing.[3] JA 235. But

[3] When the Attorney General argued third-party standing in his petition for rehearing, he did not have the benefit of *June Medical*. After *June Medical*, the Attorney General acknowledged that the decision "cast[s] doubt on the standing argument." Pet.Reply at 4. Thus, if the Court allows the Attorney General to intervene, his focus in defending HB 454 will be on the other problems with

Judge Bush had dissented based on third-party standing. *Id.* at 135–36 (Bush, J., dissenting). Any litigant seeking rehearing en banc of a divided panel opinion would be well-served to remind the full court how its dissenting colleague viewed the case. Thus, by raising that issue (as one of several) in his tendered petition for rehearing, the Attorney General simply asked the en banc court to rehear the case on a ground urged by one of its colleagues—a request that just as easily could have been made by the Secretary. That is not injecting a new issue into the appeal.[4]

Even still, the only explanation the panel gave for finding prejudice was that EMW would have "to respond to last-minute-argument-by-ambush"—a reference to the third-party-standing issue. JA 235 (citation omitted). But that is not true. The Attorney General made clear in his motion that he sought only to

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the panel's decision. *See* JA 265–68. So even though the panel's prejudice analysis was wrong at the time it denied intervention, any arguable prejudice related to third-party standing no longer exists.

[4] Nor can standing be described as a new issue under the majority's opinion. Although the panel thought the Secretary likely failed to preserve the issue, the panel decided it against the Secretary. JA 94–95 n.2. It found the district court "rightly rejected" the Secretary's standing argument, explained that this Court has "long since determined" that abortion providers can "assert[] their patients' rights," and found the dissent's contrary arguments as "altogether without merit." *Id.* The majority thus faulted the Attorney General for pursuing an argument that the panel itself rejected. *See also Planned Parenthood of Tenn. & N. Miss. v. Slatery*, --- F. Supp. 3d ---, 2021 WL 765606, at *11 (M.D. Tenn. Feb. 26, 2021) (relying on the Sixth Circuit's resolution of standing in this matter).

"pick[] up where [the] Secretary . . . left off." JA 162. So if the Secretary had in fact forfeited the standing issue, the Attorney General did not argue that he could raise it anew. In fact, the Attorney General argued in his rehearing petition that the Secretary could not forfeit the issue, *id.* at 216 n.2—evidencing that the Attorney General sought only to take over the case as the Secretary had litigated it. If the panel thought the Attorney General could not press standing in his rehearing petition, the proper recourse was not to deny intervention, but to allow the Attorney General to argue the other issues raised in his petition, such as how the panel misapplied *Hellerstedt*. *See Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001); *Detroit*, 712 F.3d at 932; *see also McDonald*, 432 U.S. at 392 n.12.

The rub of the lower court's error is that the panel treated the regular burdens of litigation as prejudicial simply because the Attorney General sought to intervene. But prejudice arises when a party's untimely intervention "disrupt[s]" the ordinary course of events. *See New York*, 413 U.S. at 369. That is why this Court has explained that a party suffers no prejudice when an intervenor exercises appellate rights that would otherwise be available to the existing parties. *See McDonald*, 432 U.S. at 394–95; *see also Day*, 505 F.3d at 965; *Flying J*, 578 F.3d at 573. While it might be inconvenient for EMW to keep litigating a case it would prefer to win by default, any such inconvenience is not prejudicial.

4. Finally, the court below wrongly determined that no "unusual circumstances militate in favor of intervention here." JA 236; *see New York*, 413 U.S. at 368 (considering whether there were "unusual circumstances warranting intervention"). This matter, however, is a case study in the unusual—from the Attorney General representing the Secretary for a time, to the Secretary deciding to accept the Sixth Circuit's ruling, and to the sovereign interests underlying the Attorney General's motion. But perhaps most unusual is the shadow that *June Medical* casts over this case.[5]

The panel majority affirmed the district court's judgment less than one month before *June Medical* came down—a point the dissent chided the majority on. JA 149–51 (Bush, J., dissenting). And the majority's decision denying the Attorney General's motion to intervene came a mere five days before the Court released *June Medical*, when everyone knew that decision was imminent. Yet the Court waved this all away. It reasoned that if *June Medical* "contradicts this Court's decision, the Supreme Court's decision will prevail as a matter of course and this case need not be further litigated on that basis." *Id.* at 236.

The Attorney General struggles to make sense of what the panel meant by *June Medical* prevailing as a "matter of course" without this case being "further

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[5] This Court's grant of certiorari in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, only underscores the necessity of allowing the Attorney General to intervene.

litigated." *See id.* The court of appeals, after all, had just upheld a permanent injunction against Kentucky's law and had prohibited the Attorney General from intervening. Even still, what matters is that the Attorney General moved to intervene in anticipation of a decision from this Court that all three judges acknowledged might affect this case's bottom line. *See id.*; *id.* at 239 (Bush, J., dissenting). What better captures the notion of "unusual circumstances" than that?

Of course, we now know what *June Medical* says. The point here, though, is not whether *June Medical* undercuts the panel's reasoning. (It does. Pet. 18–21.) The point is that determining how this Court's intervening decision bears on the constitutionality of a state statute is a question that should not be resolved against a State by default.[6] "In our federal system, legal arguments are to be tested through the fire of adversarial argument, which includes the full appellate process." JA 251 (Bush, J., dissenting).

The court below downplayed this troubling result by noting that review in this Court is not a matter of

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[6] Making matters worse, shortly after the Court decided *June Medical*, the Attorney General sought rehearing of the panel's order denying intervention. JA 252–69. Among other things, the Attorney General tried to alert the panel and the full court to *June Medical* and how it affected the merits of this case. *Id.* at 264–68. Yet the panel majority refused to allow the Attorney General's rehearing petition to be filed and thus circulated to the full court. *Id.* at 271. *But see W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 261 (1953) (finding it "essential that litigants be left free to suggest to the court . . . that a particular case is appropriate for consideration by all the judges").

right. *Id.* at 233. The court, it seems, was making a harmless-error argument: Even if it permitted intervention, the appeals court thought it unlikely that this Court would grant certiorari on the merits. But speculation about what this Court may or may not do is not a valid reason to prevent Kentucky from seeking a writ of certiorari. Nor, conversely, does it justify denying this Court the ability to decide for itself whether to grant plenary review or send this case back to the lower court for further consideration in light of *June Medical*. *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, 141 S. Ct. 184 (2020) (ordering further consideration based on *June Medical*); *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 141 S. Ct. 187 (2020) (same); *see also* JA 98–99 (relying on these now-vacated decisions).

III. The Attorney General is otherwise entitled to intervene.

Apart from the motion's alleged untimeliness, the Sixth Circuit did not otherwise question the Attorney General's ability to intervene. *Id.* at 236–37 & n.4. The panel in fact acknowledged that it likely would have granted the Attorney General's motion but for its conclusion that he should have sought to intervene earlier. *Id.* at 237 n.4. Indeed, after denying intervention here, the Sixth Circuit permitted the Attorney General to intervene in another challenge to Kentucky's abortion laws. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, No. 18-6161, Dkt. 92-2 (6th Cir. Aug. 6,

2020).[7] All of this is to say that if the Court finds the Attorney General's motion to be timely, there is no other reason to keep him out of this case. *See* JA 249–51 (Bush, J., dissenting).

As outlined above, Rule 24 helps inform whether a court should allow appellate-stage intervention. *See Scofield*, 382 U.S. at 216–17 & n.10. With this in mind, the Attorney General was otherwise entitled to intervene to seek rehearing and a writ of certiorari, whether under principles of intervention of right or permissive intervention. *See* Fed. R. Civ. P. 24(a)–(b).

As the state official who represents Kentucky's sovereign interests, the Attorney General has significant protectable interests in this litigation. *See N.E. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006) (holding that a State has a "manifest legal interest in defending the constitutionality of [its] laws"); *Hollingsworth*, 570 U.S. at 709–10 ("No one doubts that a State has a cognizable interest in the continued enforceability of its laws that is harmed by a judicial decision declaring a state law unconstitutional." (cleaned up)). Even if that were not enough, the Attorney General "may seek injunctive relief as well as civil and criminal penalties" related to "violations of" HB 454.

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[7] For reference, this other motion to intervene (filed on the heels of the denial here) came almost a year after the Sixth Circuit held oral argument but before the court resolved the appeal. *See EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 428 (6th Cir. 2020).

See Ky. Rev. Stat. § 15.241(1)(b);[8] *see also Sec. & Exch. Comm'n v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 458–60 (1940); *Nuesse v. Camp*, 385 F.2d 694, 704–05 (D.C. Cir. 1967). On top of that, the judgment here will bind the Attorney General. JA 29–30.

Nor is there any question that this matter may impede or impair the Attorney General's ability to protect these interests. Not only will the judgment bind him, but without his participation, the Commonwealth will be unable to see this case through to its conclusion despite its chosen agent wanting to do so. *See Day*, 505 F.3d at 965–66; *Blackwell*, 467 F.3d at 1007–08.

Finally, the Secretary does not adequately represent the Attorney General's interests. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (describing the showing required in this regard as "minimal"). The Secretary's decision not to seek rehearing or a writ of certiorari more than establishes inadequate representation. *See, e.g.*, *Ross*, 426 F.3d at 761; *Ams. United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990).

[8] Kentucky's legislature recently amended this statute. EMW admitted in its complaint that, even before this amendment, the Attorney General had enforcement powers related to HB 454. *See* D.Ct.Dkt. 1 ¶ 9.

CONCLUSION

The Sixth Circuit's decision denying the Attorney General's motion to intervene should be reversed.

Respectfully submitted,

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