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

BRIEF FOR AMICI CURIAE ARIZONA, ALABAMA, ALASKA, ARKANSAS, GEORGIA, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA

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INTEREST OF AMICI CURIAE

The following twenty States submit this brief as *amici curiae*: Arizona, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia ("Amici States").[1] Amici States have a strong and indisputable sovereign interest in defending their laws in federal court.

The threats to these sovereign interests are particularly acute in this case. The Sixth Circuit panel majority deprived the Commonwealth of Kentucky from seeking complete appellate review of the District Court's injunction invalidating one of its duly enacted laws. And it did so on purely procedural grounds, holding that the Kentucky Attorney General could not intervene to vindicate state law on appeal because a single state officer had decided to abandon defense of a law passed by both houses of its Legislature and signed into law by its Governor. Amici States therefore urge this Court to summarily reverse the order denying intervention by Kentucky's Attorney General under *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977), and vacate and remand the panel decision on the merits in light of *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). *See* Sup. Ct. R. 16.1.

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[1] Pursuant to Rule 37.6, the undersigned certifies that no party's counsel authored this brief, and only Amici States through their Attorneys General made a monetary contribution to this brief's preparation and submission. Counsel of record for all parties received notice of Amici States' intent to file at least ten days prior to this brief's due date. *See* Sup. Ct. R. 37.2(a).

SUMMARY OF ARGUMENT

The primary issue presented here might appear, at first blush, to be merely procedural in nature. But it actually is one of profound substantive importance to our democratic system of governance. Kentucky—like the federal government and other states—has a particular procedure for enacting laws. Both houses of its Legislature must approve the same bill and it must be signed into law by the Governor (or enacted by supermajorities following a veto). And all of the legislators and the Governor are elected directly by the people of Kentucky. Repealing laws must follow the system of bicameralism and approval by the executive (or veto override).

The Sixth Circuit usurped these democratic processes from the people of Kentucky and their elected officials here purely through procedural machinations. By a 2-1 vote, a Sixth Circuit panel allowed the unilateral capitulation of a single unelected official to be the final word on whether a duly enacted law of Kentucky would be invalidated (and thus de facto repealed). It did so even though another Kentucky official—its Attorney General, who has unquestioned authority to represent Kentucky in federal court—sought to defend the constitutionality of the statute *on the merits*.

But rather than permit Kentucky to offer a defense of its law, the Sixth Circuit held that the strategic surrender of a single official obviated any ability for further review of whether the law was actually unconstitutional and instead constituted the definitive answer as to whether it was. As Judge Bush rightly observed in dissent, this "is a plaintiff's dream case: what if every litigant who successfully

challenged the constitutionality of a state law could bar the state attorney general from seeking complete appellate review?" App.117 (Bush, J., dissenting).

The panel majority's actions must be reversed. States have a compelling and indisputable sovereign interest in defending the constitutionality of their laws when challenged in federal court. Indeed, this Court reiterated that interest only two terms ago in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). While the Court required that the defense be made by an official empowered under state law to speak for the State, *id.* at 1951-52, that is precisely what happened here. A mere *two days* after the Secretary of Kentucky's Cabinet for Health and Family Services informed the Attorney General that he no longer wished to pursue the defense of state law through the conclusion of the appellate process, the Attorney General moved to intervene without objection from the Secretary. And it is common ground that the Attorney General was previously representing the Secretary and is specifically empowered as a matter of Kentucky law to defend the State's laws himself. App.110; Ky. Rev. Stat. 15.020, 15.090, 418.075.

Nonetheless, the Sixth Circuit panel, over a strong dissent by Judge Bush, attempted to insulate itself from any further review by denying the requested intervention as untimely. App.107. As Judge Bush noted, the denial of intervention "flies in the face of [Sixth Circuit] precedent allowing states' attorneys general to intervene on appeal in order to defend their states' laws." App.116 (Bush, J., dissenting). The panel's actions also split with the Ninth Circuit.

The panel's efforts to insulate the District Court's judgment from further appellate review did not end there. Instead, the panel majority—again over a dissent by Judge Bush—directed the Sixth Circuit clerk to refuse to accept for filing the Attorney General's tendered petition for rehearing en banc of the denial of intervention. App.131; *id.* at 131-32 (Bush, J., dissenting).

Absent correction by this Court, the laws of all states are threatened by the possibility that their democratic processes will be circumvented by strategic surrenders. It is one thing to have state laws invalidated when they are found unconstitutional after full litigation of the constitutional merits. *See* U.S. Const. art. VI. But it is quite another to permit federal courts to be used as the contrivance to circumvent state democratic processes and empower single officials to repeal disfavored laws through the simple expedient of capitulation in litigation. And the Sixth Circuit then compounded these grave violations by singling out Kentucky for the uniquely disfavored treatment of being unable to seek rehearing en banc—a demeaned status seemingly reserved for no other litigant.

The panel's decision violates fundamental principles of federalism and democracy, and the importance of these issues is enormous. This Court should therefore reverse summarily the denial of intervention under *United Airlines* and vacate and remand the panel's merits opinion in light of *June Medical*, which came out five days after the panel's opinion on the constitutionality of Kentucky's law. *See* Sup. Ct. R. 16.1.

ARGUMENT

I. The States Have A Strong And Indisputable Sovereign Interest In Defending The Constitutionality Of Their Laws

The Petition well explains the important sovereign interests at stake in this case. These interests are hardly unique to Kentucky but rather are shared not only by the Amici States but by all of the States in our Nation, and ultimately by the voters of each State, who elect their representatives to pass and execute laws for the welfare of their respective States. Kentucky's petition seeks to vindicate these critical interests.

In our dual-sovereign system of government, the States' interest in fully defending the constitutionality of their laws is a direct corollary of the proposition that the States retained sovereign powers independent of the federal government. "When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority 'to do all ... Acts and Things which Independent States may of right do.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) (quoting Declaration of Independence para. 32 (U.S. 1776)). "The Constitution limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'" *Id.* (quoting The Federalist No. 39, at 245 (James Madison) (C. Rossiter ed. 1961)); *accord Printz v. United States*, 521 U.S. 898, 918-19 (1997); *see also Alden v. Maine*, 527 U.S. 706, 759 (1999) (The States exist "as a refutation" of the idea that the "National

Government [is] the ultimate, preferred mechanism for expressing the people's will."); *Gregory v. Ashcroft*, 501 U.S. 452, 457, (1991) (Our system of government is said to be one of "dual sovereignty.").

Meaningfully dividing power between the two levels of sovereign government is necessary for federalism to work properly, and it also promotes liberty, which is a primary purpose of the federalist system. "Perhaps the principal benefit of the federalist system is a check on abuses of government power," and "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458; *see also New York v. United States*, 505 U.S. 144, 181-82 (1992). Moreover, "[t]he federal structure 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.'" *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory*, 501 U.S. at 458); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (recognizing States' role as "laborator[ies]" with a "right to experiment" and cautioning against federal judges "erect[ing their] prejudices into legal principles").

Ultimately, this balance serves the purpose of promoting not just innovation but also individual liberty. *See Bond*, 564 U.S. at 221 ("Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. 'State sovereignty is not just an

end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" … Federalism secures the freedom of the individual.") (citations omitted); *Alden*, 527 U.S. at 751 ("When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.").

As the Petition well explained, a direct corollary of the above principles is that 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 v. Perry*, 570 U.S. 693, 709-10 (2013). This interest is so substantial that "[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*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1361 (1977) (Rehnquist, J., in chambers)); *see also Abbot v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). And federal law specifically empowers States to intervene to defend their laws when no state agency, officer, or employee is named. *See* 28 U.S.C. § 2403(b); Fed. R. Civ. P. 5.1.

Finally, inherent in the States' power to enforce their laws is the power to choose who defends those laws when they are challenged in court. "[A] State ***must*** be able to designate agents to represent it in federal court." *Hollingsworth*, 570 U.S. at 710 (emphasis added). This Court recently recognized that when the State makes that necessary designation, federal courts should respect it. In

Bethune-Hill, this Court recognized that "if the State had designated the House to represent its interests, and if the House had in fact carried out that mission, we would agree that the House could stand in for the State." 139 S. Ct. at 1951. This statement was in the procedurally analogous context where, after a federal court invalidated a law, the named official decided not to pursue appellate review. *Id.* at 1950.

Moreover, *Hollingsworth* and *Bethune-Hill* both recognize that a State may properly authorize more than one agent to defend the State's laws. Such provisions—which many states have enacted, including Kentucky—help promote democratic values by ensuring meaningful defense of state laws when they are challenged as unconstitutional. That is particularly important where a single state officer shares the policy objectives of plaintiffs and is willing to capitulate in litigation to permit them to achieve those objectives. Such shenanigans deprive the citizens of states of the fruits of their democracies in a very tangible manner. And nothing in federal law compels, or even permits, such a result. Federal courts are supposed to invalidate state laws as a *last* resort—not first resort where strategic surrender leaves a law briefly undefended (here for a mere two days). *See Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944) ("State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared.").

In sum, States have an important sovereign interest in defending the constitutionality of their laws that is fundamental to our dual-sovereign system of government and must be respected by all branches of the federal government, including the judiciary.

II. Summary Reversal Is Warranted Of The Panel Majority's Determination That The Attorney General's Motion To Intervene Was Untimely

Having declared a state law unconstitutional on the eve of a forthcoming opinion from this Court on the same subject matter, the panel majority then took unprecedented steps to slam the courthouse doors shut in the face of Kentucky's duly elected chief legal officer, who was specifically empowered under state law to continue the defense of the state's laws. Ky. Rev. Stat. 15.020; *see also* Ky. Rev. Stat. 418.075. This departure from ordinary procedures—and fundamental principles of federalism and democracy—fairly cries out for a summary reversal. *See* Sup. Ct. R. 16.1.

A. Summary reversal is proper in light of the Court's *United Airlines* opinion. In *United Airlines*, the Court held that "post-judgment intervention for the purpose of appeal" is proper so long as the intervenor, "in view of all the circumstances … acted promptly." 432 U.S. at 395-96. Ordinarily, that means a non-party may intervene even after a final judgment so long as he or she does so "as soon as it [becomes] clear … that [his or her interest] … would no longer be protected by" the parties in the case. *Id.* at 394. *United Airlines* makes very clear that timeliness is determined based on when a party abandons its defense of the law.

This case is controlled by *United Airlines*. The Attorney General's motion for intervention came a mere *two days* after the Secretary decided not to pursue appellate review to its logical conclusion, and the Secretary did not object to the Attorney General

continuing the defense of the State's law. (Only the Plaintiffs did.) The petition explains that "[s]hortly after the Sixth Circuit's decision, the Secretary informed the Attorney General's office that he would not file a petition for rehearing or a petition for writ of certiorari." Pet. at 9 (citing *EMW Women's Surgical Ctr. v. Friedlander*, No. 19-5516 Dkt. 56, at 1 (6th Cir. June 11, 2020)). "The Secretary however, stated that he would not oppose the Attorney General intervening in the litigation on behalf of the Commonwealth." *Id.* "Within two days of learning that the Secretary would not continue defending HB 454, the Attorney General moved to intervene on behalf of the Commonwealth." *Id.* On top of this, there is no conceivable prejudice because the Attorney General was simply seeking to intervene to maintain the legal defense of the law and had previously represented the Secretary. App. 110. For all of these reasons, the Attorney General is identically situated to the objectors who were permitted to intervene in *United Airlines.*

The panel majority's actions are also directly contrary to the recognition in *Bethune-Hill* and *Hollingsworth* that a State must be permitted to designate agents to defend its laws in federal court—designations that federal courts are supposed to respect, rather than ignore. Here, the only salient differences between the instant facts and *Bethune-Hill* are: Kentucky's Attorney General is empowered, and he is seeking not to institute appeal but to pursue appellate remedies to their logical conclusion (en banc review and certiorari). Kentucky law provides that "[t]he Attorney General may 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. As the Petition noted, "Kentucky law makes the Attorney General the lawyer for the people of Kentucky with the power and the duty to represent the Commonwealth's interests in court as he sees fit." Pet. at 15. Other than changing the caption from one state official to another, it is not even conceivable how this change affects the logical progression of the appeal, let alone the actual substance of the defense of the statute. *See Bethune-Hill*, 139 S. Ct. at 1951. In reality, while this procedurally was a motion to intervene, in substance it was simply an exercise of Kentucky's sovereign authority to *continue* to defend its laws; something the panel majority failed to recognize, let alone address. *Compare* App. 115 n.4, *with Bethune-Hill*, 139 S. Ct. at 1951 ("[A] State must be able to designate agents to represent it in federal court" (quoting *Hollingsworth*, 570 U.S. at 710)).

B. In addition to contravening *United Airlines* and *Bethune-Hill*, the panel majority's decision also created a split with the Ninth Circuit. The Ninth Circuit has granted a motion to intervene after the panel issued its decision. *See Peruta v. Cty. Of San Diego*, 824 F.3d 919, 940-41 (9th Cir. 2016) (en banc); *Day v. Apoliona*, 505 F.3d 963, 964-66 (9th Cir. 2007). Importantly, the *Day* court recognized that "the practical result of [the State's] intervention—the filing of a petition for rehearing—would have occurred whenever the state joined the proceedings." *Day*, 505 F.3d at 965. This statement in *Day* correctly recognizes the lack of any cognizable prejudice to plaintiffs from Kentucky continuing its defense of its law through its Attorney General rather than its Secretary. Virtually all litigants

surely prefer to win by default. But denying them that shortcut to victory when state officials actually stand ready, willing, and lawfully empowered to defend state law is not cognizable prejudice.

Similarly, in a case pending in this Court where Arizona is defending two of its election laws, *Brnovich v. DNC*, No. 19-1257, the en banc Ninth Circuit granted the State of Arizona's motion to intervene by a 10-1 vote after the en banc decision when the Arizona Secretary of State indicated she would not petition for certiorari. *DNC v. Hobbs*, No. 18-15845, Dkt. 137 (9th Cir. Apr. 9, 2020). The fact that the Court has granted certiorari in *Brnovich* only underscores that even if one state official does not wish to pursue an appeal to conclusion, the issues may still be meritorious and the State retains its legitimate sovereign interest in defending its laws.

In sum, the Ninth Circuit's decisions faithfully follow the clear rule of *United Airlines*. Indeed, that rule is so simple and straightforward that it has apparently presented no issue to the circuit courts in the ensuing four decades—underscoring the severity of the panel's departures from accepted jurisprudential practice. Thus, if the Court does not summarily reverse—which it should—it should grant certiorari to resolve this split. *See* Sup. Ct. R. 10(a).

C. Finally, if the Attorney General is permitted to intervene, then this Court must grant, vacate and remand (GVR) in light of *June Medical*. In the time since *June Medical*, this Court has granted GVRs in two similar cases. Pet. at 17 (citing *Box v. Planned Parenthood of Ind. & Ky., Inc.*, __ S. Ct. __, 2020 WL 3578669 (July 2, 2020); *Box v. Planned Parenthood of*

Ind. & Ky., Inc., __ S. Ct. __, 2020 WL 3578672 (July 2, 2020)). This case is thus clearly an excellent candidate for GVR. On top of this, the panel below actually relied on both of these now-vacated decisions in resolving the merits. App.15-16. A GVR is appropriate so that Kentucky can defend its law under the legal principles set forth by this Court in *June Medical*. See Pet. at 18-21.

III. The Decision Below Is Also Problematic In A Non-Unitary Executive Structure And Creates Serious Efficiency Problems For Attorneys General And Lower Courts

A. The panel majority's decision is highly problematic in a non-unitary executive branch—the structure of most state governments. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2448 & n.3 (2006) (noting that forty-three states elect their attorneys general). In non-unitary executive branches, it is critical that officials be permitted to intervene to defend state law when they have been authorized to do so by state law. Otherwise, this opens up challenges of state law to gamesmanship by plaintiffs, who could choose to sue only the most sympathetic state official with a colorable basis to be a defendant and then pursue a "sue and settle" strategy with that sole defendant.

Given the separation of powers concerns between a state's executive and its legislative branches, the scales should tip heavily in favor of allowing any duly authorized official to continue the defense of state law. This is not a minor question of mere procedure, but one implicating profound substantive

values, including federalism and democracy. And just as federal separation of powers protects individual liberty, so does state separation of powers. It respects the voters' ability to elect legislators separately from executive officials and the checks and balances within the state's legislative process.

B. The panel majority's decision also creates efficiency problems for both Attorneys General and federal courts. There are efficiency problems with requiring intervention at the outset of a case, when the named official does indicate they intend to defend the challenged laws. The panel's decision would effectively compel state officials to intervene at the outset even where the named defendants are (then) committed to defending the law. That is pointlessly inefficient. And it is precisely what *United Airlines* sought to avoid by recognizing that non-parties may rely on existing parties to defend the challenged law and seek to intervene only when existing parties stop doing so.

CONCLUSION

The Court should grant the petition, summarily reverse the denial of intervention in light of *United Airlines*, and vacate and remand on the merits in light of *June Medical*.

Respectfully submitted,

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