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

REPLY IN SUPPORT OF CERTIORARI

OFFICE OF THE KENTUCKY ATTORNEY GENERAL
700 Capitol Ave.
Suite 118
Frankfort, KY 40601
(502) 696-5300
Barry.Dunn@ky.gov

**Counsel of Record*

BARRY L. DUNN*
Deputy Attorney General

VICTOR B. MADDOX
Assistant Deputy Attorney General

CARMINE G. IACCARINO
Assistant Attorney General

Counsel for Petitioner

February 19, 2021

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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It's hard to understand what Kentucky should have done differently to ensure a full defense of its laws.

When Respondents challenged the constitutionality of HB 454, the Secretary of the Cabinet for Health and Family Services vigorously defended the law on behalf of the Commonwealth through a five-day trial. The Secretary continued defending on appeal, even after an election changed Kentucky's gubernatorial administration. And as part of that effort, the Attorney General's office represented the Secretary before the Sixth Circuit.

After the panel ruled against the Commonwealth, the Secretary decided not to appeal further. But Kentucky had a safeguard in place. Kentucky law authorizes the Attorney General to "prosecute an appeal" in "any case . . . whenever, in his judgment, the interest of the Commonwealth demands it." Ky. Rev. Stat. 15.090. So the Attorney General moved to intervene within two days and tendered a timely petition for rehearing en banc.

The Attorney General's request was modest: swap one official-capacity defendant for another so the Commonwealth can exhaust its appellate rights in defending HB 454. All the Attorney General asked for was the ability to finish the appeal—something that the Kentucky legislature expressly empowered him to do. *See id.*; Ky. Rev. Stat. 15.020.

The panel below nevertheless denied the Attorney General's motion as "untimely," and Respondents now downplay that decision as "routine" and "fact-specific."

But what is "routine" about denying a State the ability to have its chosen representative intervene when a public official declines to defend a law? Respondents cannot point to any other case in which such a "routine" application of the law occurred. And what is the "fact-specific" reason for holding, as the court below did, that the Attorney General should have had the clairvoyance to predict the Secretary would make an about-face and abandon his years-long defense of state law?

At bottom, Respondents make the same mistakes as the panel. This case is not about the personal interest of the Attorney General, nor was it about the personal interest of the Secretary in the years before. It is about Kentucky's interest in defending its laws in federal court. Kentucky law provides the Attorney General the power to do so, and the panel's failure to give that any consideration or effect was an affront to the Commonwealth's sovereignty.

I. The Sixth Circuit profoundly erred.

Respondents insist the decision below was correct and insignificant. BIO at 29–31, 10–19. They are doubly wrong.

A. Start with the errors in the decision. This Court has had few occasions to address appellate intervention, but what little it has said cuts against the decision below.

The question when considering "post-judgment intervention for the purpose of appeal" is whether, "in view of all the circumstances the intervenor acted promptly." *United Airlines, Inc. v. McDonald*, 432 U.S.

385, 395–96 (1977). Intervention is appropriate—even after final judgment—as long as the non-party moves "as soon as it [becomes] clear . . . that [his or her] interests . . . would no longer be protected" by the existing parties. *Id.* at 394.

Even setting aside the sovereignty issues, it's hard to see how the Attorney General did not act promptly. Respondents conceded below that the Secretary "adequately represented" the Commonwealth's interest before the panel's decision, as he had "vigorously defended against the challenge to H.B. 454." *See* 6th.Cir.Dkt. 58 at 22 (cleaned up). Given that, it seems obvious that the Attorney General moved "as soon as it [became] clear . . . that [the Commonwealth's] interests . . . would no longer be protected." *See McDonald*, 432 U.S. at 394.

The panel avoided this conclusion by requiring the Attorney General to know the unknowable. *See* Pet. at 27. And Respondents merely double down: they argue the Attorney General should have known his interest was not protected *before* the Secretary decided to abandon the appeal, even while "his office represented the Secretary" in defense of the law. *See* BIO at 30. That position is impossible to square with *McDonald*.

Respondents' cries of prejudice are equally misplaced. The Attorney General tendered his petition for rehearing en banc by the ordinary deadline, and his petition mirrored what the Secretary could have submitted himself.

To this end, Respondents' focus on third-party standing is a red herring. First, it's just wrong to say

the Attorney General moved to intervene "principally to raise third-party standing." *See* BIO at 30. True, that is one issue the Attorney General raised in his petition. But it was just that—*one* issue. *See* 6th.Cir.Dkt. 60 at 13–20. The Attorney General also defended HB 454 on the merits, which is why he pressed forward even after *June Medical* cast doubt on the standing argument. The purpose for intervening was (and still is) to defend HB 454.[1]

It's also odd that Respondents argue the Attorney General sought to "interject" new issues into the litigation. BIO at 30. The Sixth Circuit decided every issue raised in the Attorney General's tendered en banc petition (including standing), as even Respondents acknowledge. BIO at 5–6.

B. Even still, this is no ordinary case of intervention, and the panel's decision to treat it as such (although it erred in its analysis) is indefensible.

The Attorney General's interest here is not personal. Neither was the Secretary's before him. Rather, both officials have participated as agents of Kentucky. That matters for two reasons.

First, the panel's humdrum timeliness analysis treated the Attorney General as though he represents an interest *previously unrepresented.* But the Attorney General moved to intervene on behalf of the

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[1] The Attorney General tendered his second petition for rehearing (addressing the denial of intervention) after *June Medical* and did not focus on standing. 6thCir.Dkt. 62-1 at 18–24. The panel did not allow the Attorney General even to file it. App.131.

Commonwealth to represent the same sovereign interest that the Secretary defended before. Understood this way, how could the Attorney General's motion be untimely? Even if he sat on the sidelines, the Commonwealth was in the game. And it is the Commonwealth's interest the Attorney General represents.

Second, by ignoring the real interests at stake, the panel blew past the State's "legitimate interest in the continued enforceability of its own statutes." *See Maine v. Taylor*, 477 U.S. 131, 137 (1986). That's no small thing. "[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). Yet Respondents treat the Commonwealth's interest in the continued enforcement of its laws as an afterthought—irrelevant to the motion.

What's most troubling is that Kentucky has done everything it can to prevent the kind of procedural default the Sixth Circuit imposed here. Similar to other states, the Kentucky Attorney General has the statutory power to represent the Commonwealth's interest in court. *See* Ky. Rev. Stat. 15.020. The Attorney General also can "*prosecute an appeal*" when "the interest of the Commonwealth demands." Ky. Rev. Stat. 15.090 (emphasis added). The Kentucky legislature, in other words, expected that a public official might abandon the Commonwealth's interest in court, and it enacted a failsafe allowing the Attorney General to step in.

As this Court has recognized, a State is entitled to "designate agents to represent it in federal court." *See Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013). Must States now stack the trial-court docket with multiple officials as defendants to prevent one from leaving the State helpless if he or she abdicates?[2]

One more point: Respondents implicitly concede the real stakes by conflating the Secretary and the Attorney General—referring to *both* as "the Commonwealth." *Compare* BIO at 3 ("After the close of the plaintiffs' case, the Commonwealth [the Secretary] made an oral motion . . . ."), *with id.* at 31 ("Petitioner objects to the Commonwealth [the Attorney General] being treated like every other party regarding timeliness."). Respondents are right to do so: the proper way to think about the Attorney General's motion is to acknowledge that the real party in interest is *the Commonwealth*, and the Attorney General simply wants to substitute one official-capacity defendant for another. *See* App.122 (Bush, J., dissenting).

In fact, when Respondents opposed the motion below, they objected because the Secretary already "adequately represented" the Commonwealth's interest. 6th.Cir.Dkt. 58 at 20–22. If that's true, how can Respondents now argue the Attorney General should have intervened earlier?

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[2] This conundrum adds context to the stipulation dismissing the Attorney General from the trial-court proceeding without prejudice. That stipulation of dismissal—which reserved the Attorney General's rights to appeal, including those under Ky. Rev. Stat. 15.090—came when another state official was already defending the law.

Nor have they limited such claims to this case. One of Respondents (the EMW clinic) also has challenged other Kentucky laws in a separate action. *See EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, Case 3:19-cv-178-DJH (W.D. Ky.). When that case had been pending for less than a year, and discovery had not begun, the Attorney General moved to intervene. *Id.* at Dkt. 53. The clinic objected, again because the Secretary already adequately represented the Commonwealth's interests. *Id.* at Dkt. 56 at 10. So which is it? Is a State attorney general *required* to intervene early in a case or *prohibited* from doing so?

Respondents' position is not about timing. It's about procedurally defaulting the Commonwealth and insulating the court below from further review. *See* App.124–25 (Bush, J., dissenting). That should not be how federal courts resolve important questions like the constitutionality of a state law.

II. The decision below plainly split with the Ninth Circuit.

Respondents wave away the Sixth Circuit's split from the Ninth as based on factual differences. But any differences favor the Attorney General, only highlighting how the panel below broke from the Ninth Circuit's approach.

Take *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007), the case in which the Ninth Circuit allowed Hawaii to intervene to petition for rehearing en banc. Respondents contend that *Day* is different because, unlike here, Hawaii participated as an amicus before moving to intervene. Yet that cuts *against*

Respondents' position. Hawaii participated as an amicus to raise issues the parties would not. Or said another way, Hawaii declined to intervene despite knowing that the parties were not adequately representing its interests. In contrast, the Attorney General here had no reason even to file an amicus brief because the Secretary was already representing the Commonwealth's interests in full (with the Attorney General as counsel).

What's notable, however, is that the Ninth Circuit acknowledged the timeliness problem for Hawaii and still granted intervention. The reason? Because the State's sovereign interests were too important to overlook: "[E]ven though Hawaii could have and should have intervened earlier, we will not foreclose further consideration of an important issue" that will have "long term impact on the State of Hawaii." *Id.* at 966. The Ninth Circuit gave determinative weight to the State's sovereign interests and refused to procedurally bar Hawaii from exhausting the appellate process even though it did not diligently protect its rights.

The Sixth Circuit, by contrast, paid no mind to the Commonwealth's sovereign interests. And in fact, the panel imposed a *higher* burden on the Attorney General than even ordinary litigants face—faulting him for not predicting the Secretary would abandon the litigation. That decision cannot be reconciled with the Ninth Circuit's approach.

III. Respondents' vehicle problems are imagined.

There are no vehicle problems with this case.

A. Respondents argue it is inappropriate for the Sixth Circuit to reconsider this case in light of *June Medical* because the Attorney General should first go to the district court for relief under Fed. R. Civ. P. 60. BIO at 21–23. If adopted more broadly, that argument would all but nullify this Court's well-established GVR practice. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166–67 (1996) (per curiam). The Court GVR's cases "in light of a wide range of developments, including [its] own past decisions." *Id.* at 166. And in fact, this Court GVR'd two cases after *June Medical*, both of which the panel below relied on when it issued its merits decision. *See* Pet. at 17. Accepting Respondents' argument would mean the Court should not have granted these two GVR's based on *June Medical*.

Respondents' position might make sense if *June Medical* came after the Commonwealth's appellate rights expired. But it makes no sense here, when the intervening change in law came while this matter is still pending. The Attorney General agrees, of course, that the lower courts should re-evaluate this case in light of *June Medical*. The most expeditious way to do so is with a GVR.

B. Respondents' disagreement over whether *June Medical* changes the outcome of this case only illustrates why the Attorney General should be permitted to intervene and seek further relief below.

No one can seriously question that the Chief Justice's concurrence in *June Medical* matters—in fact, the Sixth Circuit concluded just as much only a few months later. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 433 (6th Cir. 2020). The fact that Respondents disagree over how *June Medical* applies to this case is *exactly why* this matter should not end by default. This Court should allow the Commonwealth to fully argue the issues below.

This conclusion does not change because, as Respondents contend, the Sixth Circuit included an alternative holding. That footnote—which contained *no* analysis—addressed a narrow argument the Secretary made *before* the benefit of *June Medical*. *See* App.17 n.3. It did not hold, as Respondents claim, that HB 454 would fail even under the Chief Justice's standard—how could it? The Court had not released *June Medical*, and the remainder of the Sixth Circuit's opinion is infused with the standards that the Chief Justice rejected.

One footnote cannot undo the irreconcilability of the panel's decision with *June Medical*. The court below balanced burdens against benefits, and the Chief Justice rejected such a scale. The court below discarded the *Gonzales* holding about deference to the States in areas of medical uncertainty, and the Chief Justice affirmed it. The court below denied that abortion providers must make good-faith efforts to comply with laws before challenging them, and the Chief Justice reiterated that requirement. At every stage of the analysis, the court below adopted a legal standard that is irreconcilable with *June Medical*. Rather than, as

Respondents invite, summarily concluding that none of these legal errors were consequential, the Court should let the ordinary process play out with full briefing below.

C. Respondents also contend that "every court to consider a law similar to Kentucky's has agreed that it unduly burdens the right to elect abortion before viability." BIO at 25. Yet Respondents only cite cases decided before *June Medical*. *Id.*

There's a reason for that: the landscape has changed dramatically since. The Fifth Circuit, for example, recently granted rehearing en banc in a challenge to an analogous Texas law. *See Whole Women's Health v. Paxton*, 978 F.3d 974, 975 (5th Cir. 2020) (Mem). At the panel stage, the Fifth Circuit found the law unconstitutional over a dissent by Judge Willett. A crucial disagreement between the majority and dissent was how to apply *June Medical*. *Compare Whole Women's Health v. Paxton*, 978 F.3d 896, 904 (5th Cir. 2020) (panel op.), *with id.* at 914–15 (Willett, J., dissenting). Yet the Sixth Circuit prevented Kentucky from even asking for rehearing en banc.

A challenge to a similar Arkansas law tells an even more compelling story. A district court enjoined the law in 2017. But on appeal three years later, the Eighth Circuit vacated that injunction. *Hopkins v. Jegley*, 968 F.3d 912 (8th Cir. 2020) (per curiam). It held that the Chief Justice's concurrence in *June Medical* controlled and remanded the matter for further consideration. *Id.* at 914–16. The Eighth Circuit recognized two problems with the district court's pre-*June Medical* decision: First, it applied the "cost-benefit" analysis from

Hellerstedt that the Chief Justice's concurrence repudiated. *Id.* at 915. And second, the district court declined to give the state "wide discretion" to legislate "in areas of medical uncertainty." *Id.* at 916. Both errors predominate the Sixth Circuit's merits decision as well. Pet. at 17–21.

So Respondents leave out a lot when they claim *June Medical* has no bearing here because "every court to consider a law similar to Kentucky's has agreed that it unduly burdens the right to elect abortion." BIO at 25. After *June Medical*, other states continue to defend dismemberment laws under a new legal landscape, while Kentucky must live with the Secretary's surrender.

D. On whether this case is a good vehicle, Respondents inadvertently highlight why the Court should grant certiorari by pointing to *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993). As here, the Court of Appeals in *Izumi* denied the petitioner's motion to intervene. *Id.* at 29. But unlike here, the petitioner did not seek relief from that decision. Instead, the petitioner sought certiorari on the merits without regard for the fact that the petitioner was not a party under 28 U.S.C. § 1254(1). To review the merits, the Court needed to expand the question presented to include the intervention issue. But it declined to do so because it "strongly disapprove[s] the practice of smuggling additional questions into a case after we grant certiorari." *Id.* at 34 (cleaned up).

Still, the Court explained, "[o]ne who has been denied the right to intervene in a case in a court of

appeals may petition for certiorari to review that ruling." *Id.* at 30. That's what happened here. Given the sovereign interests at stake, it's hard to imagine a better vehicle for addressing appellate intervention.

CONCLUSION

The Court should grant the petition, allow the Attorney General to intervene, and vacate the judgment below and remand for further consideration in light of *June Medical.*

Respectfully submitted,

OFFICE OF THE
KENTUCKY ATTORNEY
GENERAL
700 Capitol Ave.
Suite 118
Frankfort, KY 40601
(502) 696-5300
Barry.Dunn@ky.gov

BARRY L. DUNN*
Deputy Attorney General

VICTOR B. MADDOX
Assistant Deputy Attorney General

CARMINE G. IACCARINO
Assistant Attorney General

**Counsel of Record*