UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

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Mr. Andrew Beck
Ms. Meagan Burrows
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Mr. Daniel J. Cameron
Mr. Barry Lee Dunn
Mr. Carmine Gennaro Iaccarino
Mr. Stephen Chad Meredith
Mr. Brett Robert Nolan
Office of Attorney General of Kentucky
700 Capital Avenue, Suite 118
Frankfort, KY 40601

Mr. Benjamin Michael Flowers
Office of the Attorney General
30 E. Broad Street, 14th Floor
Columbus, OH 43215

Ms. Heather Lynn Gatnarek
325 W. Main Street, Suite 2210
Louisville, KY 40202

Ms. Michele D. Henry
Craig Henry, 401 W. Main Street
Louisville, KY 40202

Ms. Roxann E. Henry
Morrison & Foerster
2000 Pennsylvania Avenue, N.W., Suite 6000
Washington, DC 20006

Ms. Alexa Kolbi-Molinas
Ms. Elizabeth Watson
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Mr. Matthew Franklin Kuhn
Mr. Mark Stephen Pitt
Office of the Governor of Kentucky
700 Capital Avenue, Suite 101
Frankfort, KY 40601

Ms. Ester Murdukhayeva
Office of the Attorney General
28 Liberty Street, 23rd Floor
New York, NY 10005

Ms. Kimberly A. Parker
Wilmer, Cutler, Pickering, Hale and Dorr
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006

Ms. Alexandra Preece
Morrison & Foerster
12531 High Bluff Drive, Suite 100
San Diego, CA 92130

Ms. Catherine E. York
Commonwealth of KY
Cabinet for Health and Family Services, 250 E. Main Street, 5w-B
Frankfort, KY 40621

Re: Case No. 19-5516, *EMW Women's Surgical Center, et al v. Eric Friedlander, et al*
Originating Case No. : 3:18-cv-00224

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Ms. Vanessa L. Armstrong

Enclosure

NOT RECOMMENDED FOR PUBLICATION

No. 19-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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, Plaintiffs - Appellees, v. ERIC FRIEDLANDER, in his official capacity as Acting Secretary of Kentucky's Cabinet for Health and Family Services, Defendant-Appellant, THOMAS B. WINE, et al., Defendants.	**FILED** Jun 24, 2020 DEBORAH S. HUNT, Clerk ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

O R D E R

Before: MERRITT, CLAY, and BUSH, Circuit Judges.

Daniel Cameron, the Attorney General of Kentucky, moves to intervene as a defendant in this case regarding the constitutionality of Kentucky House Bill 454, which prohibits physicians from administering a dilation and evacuation abortion prior to fetal demise. Defendant-Appellant Eric Friedlander, Acting Secretary of Kentucky's Cabinet for Health and Family Services, has not

responded to the motion. Plaintiffs-Appellees EMW Women's Surgical Center, Dr. Ashlee Bergin, and Dr. Tanya Franklin oppose intervention, and Cameron replies. For the reasons set forth below, we **DENY** Cameron's motion to intervene.

Plaintiffs first brought suit against a number of Kentucky officials in their official capacities, including then-Attorney General Andrew Beshear, just after H.B. 454 was signed into effect in April 2018. All but two of the original defendants, including Attorney General Beshear, were dismissed prior to trial. Attorney General Beshear stipulated to his dismissal in May 2018, reserving all rights and claims on appeal. After a five-day bench trial in November 2018, the district court in May 2019 entered judgment for Plaintiffs and an order permanently enjoining the enforcement of H.B. 454. *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F. Supp. 3d 807 (W.D. Ky. 2019). Then-Secretary of the Cabinet of Health and Family Services, Adam Meier, appealed, and throughout fall 2019, the parties submitted briefing to this Court. In January 2020, upon a change in gubernatorial administrations, now-Acting Secretary of the Cabinet of Health and Family Services Eric Friedlander was substituted for Meier as Defendant. Friedlander continued to press the appeal in defense of H.B. 454, now represented by lawyers from the office of newly elected Attorney General Daniel Cameron, the current proposed intervenor. The parties presented argument in this case on January 29, 2020. On June 2, 2020, this Court issued its opinion affirming the district court's judgment. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, No. 19-5516, 2020 WL 2845687 (6th Cir. June 2, 2020).

On June 11, 2020, the Attorney General moved to intervene as of right or, in the alternative, permissively, explaining that the Secretary had chosen not to pursue rehearing en banc or petition

for a writ of certiorari and seeking to intervene as a defendant in order to do so.[1] The Attorney General tendered a brief in support of rehearing en banc on June 16, 2020.

This Court reviews four factors in deciding whether to grant a motion for intervention as of right. To succeed on such a motion, the movant must demonstrate that: "1) the [motion] was timely filed; 2) the [movant] possesses a substantial legal interest in the case; 3) the [movant's] ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately represent the [movant's] interest." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011); *see also* Fed. R. Civ. P. 24(a)(2). "Each of these elements is mandatory, and therefore failure to satisfy any one of the elements will defeat intervention under the Rule." *Id.* While ordinarily we construe the elements broadly in favor of potential intervenors, *see Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir. 2007), "a motion to intervene filed during the final stages of a proceeding is not favorably viewed." *United States v. BASF-Inmont Corp.*, 52 F.3d 326 (6th Cir. 1995) (table); *accord, e.g.*, *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985).

Given the stage at which the Attorney General moved to intervene, we are particularly mindful of the requirement of timeliness. In assessing the timeliness of a motion to intervene, we consider five factors:

> 1) the point to which the suit has progressed; 2) the purpose for which intervention is sought; 3) the length of time preceding the [motion] during which the proposed intervenors knew or should have known of their interest in the case; 4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and 5) the existence of unusual circumstances militating against or in favor of intervention.

[1] The dissent says that the Secretary is no longer actively litigating this case. But the Secretary remains a party, and while he has not filed a timely petition for rehearing en banc, there is and would be nothing to prevent him from changing course and pursuing certiorari, regardless of whether the Attorney General's motion to intervene was granted.

Blount-Hill, 636 F.3d at 284 (quoting *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)).

Considering the first factor, the Attorney General's motion to intervene in this case comes years into its progress, after both the district court's decision and—more critically—this Court's decision. We rarely grant motions to intervene filed on appeal, and we agree with the D.C. Circuit that "[w]here . . . the motion for leave to intervene comes *after* the court of appeals has decided a case, it is clear that intervention should be even more disfavored." *Amalgamated Transit Union Int'l*, 771 F.2d at 1552; *see also id.* at 1553 n.5 (collecting cases "uniformly" finding such motions to be untimely); *accord* 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1916 (3d ed. 2020) ("There is even more reason to deny an application made . . . after the judgment has been affirmed on appeal."). Otherwise, we provide potential intervenors every incentive to sit out litigation until we issue a decision contrary to their preferences, whereupon they can spring to action. Perhaps this is also why the Attorney General is unable to identify any case in which this Court has granted a motion to intervene following issuance of its decision and can identify only two doing so across the whole of federal jurisprudence. *See Peruta v. City of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007). Our own review of the case law yields no more. This factor, then, points decisively against intervention.

Turning to the second factor, the Attorney General seeks intervention for the purpose of filing a petition for rehearing en banc. But this itself is "an extraordinary procedure," and not one that parties are due as a matter of course, as is the case with an appeal. 6 Cir. I.O.P. 35(a). Review

on certiorari is likewise "not a matter of right." Sup. Ct. R. 10.[2] Moreover, it is apparent that the foremost argument that the Attorney General seeks to advance on rehearing is a third-party standing argument that the Secretary elected not to present to this Court on appeal, and that he did not flesh out before the district court. At present, Supreme Court precedent suggests this argument should be denied. *See Friedlander*, 2020 WL 2845687, at *4 n.2 (collecting cases).

Regarding the third factor, the Attorney General had ample notice of his interest in this case. Indeed, when Plaintiffs filed their complaint, they named the Attorney General as a defendant. And even accounting for the fact that Attorney General Cameron himself took office only after the initiation of this suit and the stipulated dismissal of the Attorney General as a defendant, Cameron was put on notice of his interest when he swore his oath of office in December 2019, before this Court heard oral argument in the case and seven months before its decision. Against these facts, Attorney General Cameron contends that he could not have been aware of his interest because, until recently, the Secretary vigorously defended H.B. 454, with lawyers from the Attorney General's office defending him. But there was every reason for the Attorney General's office to inquire into and prepare for the Secretary's intended course in the event of an adverse decision prior to undertaking his representation of the Secretary.[3]

[2] Contrary to the dissent's assertions, our denial of the Attorney General's motion to intervene does not prevent further review of our decision on the merits. The parties and even the Attorney General have had ample opportunity to seek further review. The Secretary could have chosen to petition for rehearing en banc and could still choose to petition for certiorari. The Attorney General could have sought to intervene at an earlier date in order to independently access that review. If the parties are now unable to secure further review, it is only due to their own decisions.

[3] The dissent contends that the Attorney General would have been violating privilege had he sought to intervene earlier. But of course, the Attorney General could have sought intervention without disclosing his communications with the Secretary or could have requested the Secretary's permission to disclose those communications, just as he has done in filing his current motion.

The time for which the Attorney General has been aware of his interest distinguishes this case from the leading case in which a court of appeals has granted a motion to intervene following issuance of its decision. In *Peruta v. County of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016), the Ninth Circuit allowed the State of California to intervene even after issuing its decision upon concluding that "California had no strong incentive to seek intervention . . . at an earlier stage, for it had little reason to anticipate either the breadth of the panel's holding or the decision of [the defendant] not to seek panel rehearing or rehearing en banc." In this case, by contrast, there was every reason for the Attorney General to anticipate our holding, as it not only hewed close to the issues briefed by the parties, but also substantially mirrored the holding of every court to hear a challenge to a fetal-demise law to date. As discussed, the Attorney General could also have anticipated the Secretary's decision regarding petitioning for rehearing en banc and certiorari, given that he himself represented the Secretary.

Turning then to the fourth factor, it is clear that granting the Attorney General's motion would significantly prejudice Plaintiffs. As discussed, Attorney General Cameron seeks to raise in his petition for rehearing en banc a third-party standing argument not raised before this Court and not argued in any particulars before the district court. Yet the Attorney General's own office chose not to raise this argument upon becoming aware that the Supreme Court had granted certiorari in *June Medical Services, LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (2019). It was not addressed by the parties at oral argument except in response to judges' questioning, nor was it raised via a notice of supplemental authorities filed pursuant to Federal Rule of Appellate Procedure 28(j). This provides us every reason to conclude that the parties and the Attorney General himself—like the majority in this case—thought that it presented no barrier to Plaintiffs' claim. Now the Attorney General seeks to benefit from this Court's decision by

asserting an argument first raised by the dissent. This is not the purpose of a motion to intervene, and we agree with Plaintiffs that they "should not be required to respond to last-minute argument-by-ambush." (Pls. Resp. to Mot. to Intervene at 11.)

The prejudice to Plaintiffs, too, distinguishes this case from those in which such delayed motions to intervene have been granted. In *Peruta*, the plaintiffs did not oppose intervention and so conceded the issue of prejudice. 824 F.3d at 940. Here, Plaintiffs make no such concession and, indeed, strongly oppose intervention. In *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007), the court's decision hinged on the fact that "granting the State of Hawaii's Motion to Intervene will not create delay by 'inject[ing] new issues into the litigation,'" as the State had already raised those issues in prior amicus briefing, thus allowing the plaintiffs their due opportunity to respond. *Id.* at 965 (alteration in original) (quoting *Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004)). In the case at bar, Plaintiffs have had no opportunity to respond to the third-party standing argument the Attorney General seeks to raise, nor have they had any reason to anticipate it based upon current Supreme Court precedent.

Finally, we do not think that unusual circumstances militate in favor of intervention here—in fact, given the unusual stage at which the Attorney General seeks to intervene, we think just the opposite. The Attorney General complains that the Supreme Court is soon to issue its decision in *June Medical Services*, and that decision may bolster its new third-party standing argument. We are skeptical of the notion that the Supreme Court will overturn decades of its own precedent in such a manner. But even if the Attorney General is correct, if *June Medical Services* 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.

Taking these factors in sum, we are convinced that the Attorney General's motion to intervene is untimely. Because the Attorney General has failed to show this necessary element, we need not reach the remaining elements that a proposed intervenor must show on moving for intervention as of right.[4] Likewise, because timeliness is among our foremost considerations in deciding whether to grant permissive intervention, the Attorney General's motion on that basis also fails. *See* Fed. R. Civ. P. 24(b)(1) ("On *timely* motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.") (emphasis added); *see also Blount-Hill*, 636 F.3d at 287. Timeliness is likewise required of a government party who seeks permissive intervention, and so Federal Rule of Civil Procedure 24(b)(2) also does not require us to grant the Attorney General's motion here. *Id.* ("On *timely* motion, the court may permit a . . . state governmental officer . . . to intervene if a party's claim or defense is based on . . . a statute . . . administered by the officer . . . .") (emphasis added). We are thus left with no basis for granting the Attorney General's motion.

Accordingly, we **DENY** the Attorney General's motion to intervene and **DISMISS** his petition for rehearing en banc.

[4] The dissent suggests that our decision contravenes our precedent regarding state attorneys general's legal interest in defending their state laws. But this misrepresents our holding, as we do not reach the issue of whether Attorney General Cameron has a substantial legal interest in the subject matter of this case. Nor do we question whether states' attorneys general may appropriately intervene to defend their states' laws in some—or indeed, even in many—situations. We simply conclude that the Attorney General's intervention in this particular case would be untimely.

JOHN K. BUSH, Circuit Judge, dissenting. This odd case has become even odder. Plaintiffs prevailed in a trial at which none of the people whose constitutional rights were at stake were parties or even witnesses. Now, after the judgment has been affirmed on appeal, Plaintiffs want to keep away from court not only the people they purport to represent, but also their adversaries. Attorney General Daniel Cameron, acting on behalf of the Commonwealth of Kentucky, sought to intervene after Secretary Friedlander declined to continue the appeal. Plaintiffs opposed the intervention, and the majority sides with Plaintiffs. This result inappropriately and prematurely cuts short the adversarial process. What is more, it flies in the face of our precedent allowing states' attorneys general to intervene on appeal in order to defend their states' laws.

Contrary to what the majority holds, the party who seeks to intervene, the Attorney General of Kentucky, is no Johnny-come-lately. The 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. Moreover, the Attorney General's arguments defending the substance of H.R. 454 are *identical* to those that Secretary Friedlander made, and although the Attorney General's challenge to Plaintiffs' standing is more developed than was Secretary Friedlander's, standing was objected to below. In any event, the question of whether we have jurisdiction cannot be ignored, regardless of when the issue was raised.

Plaintiffs' opposition to the Attorney General's motion to intervene is an understandable strategy. With the denial of this motion, there will be no one in this case to defend the challenged state law. It 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? With the Attorney General denied the right to continue the appeal in defense of the law, there is no one left to file a petition for rehearing en banc on behalf of the Commonwealth's interests. Even more importantly, there is no one left to file a petition for certiorari, since Secretary Friedlander will not do so. As a result, regardless of how the Supreme Court rules in its review of *June Medical Services, LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (2019)—a ruling that may be issued any day now—the present case will not be governed by the Supreme Court's decision, even though *June Medical* presents questions identical or similar to issues in the present case. Without anyone in court to defend H.B. 454, Plaintiffs' 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*. This anomalous result would be the outcome of the majority's decision to deny the Attorney General's motion to intervene.

For these reasons and those stated below, I respectfully dissent. The Kentucky Attorney General should be allowed to intervene so that the Commonwealth's interests can be defended through the entire appellate process.

I.

Attorney General Cameron's motion to intervene comes to us in unusual circumstances. After the Commonwealth appealed the district court's judgment in this case, Kentucky held elections. Andy Beshear, who had been the Attorney General of the Commonwealth, was elected Governor. In that same election, Daniel Cameron was elected Attorney General and thus is Governor Beshear's successor in that office. Less than a month before oral argument, Secretary Friedlander, an appointee of Governor Beshear, was substituted for former Secretary Meier as a defendant. Secretary Friedlander took the same position in this case as had his predecessor, and he retained Attorney General Cameron to represent him at oral argument. However, after we

issued our panel decision, Secretary Friedlander reversed course, advising Attorney General Cameron that he would not seek rehearing or certiorari. The Secretary's decision meant that there was no defendant left in the litigation that would continue the appeal. Two days after learning that Secretary Friedlander would no longer defend H.B. 454, Attorney General Cameron filed a motion to intervene on behalf of the Commonwealth, seeking to assert the Commonwealth's interests in defending its law.

II.

The majority holds that the Attorney General's motion is too little, too late. I respectfully disagree. Under Rule of the Federal Rules of Civil Procedure 24(a)(2), a motion to intervene of right should be granted if the proposed intervenor establishes the following:

> (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not adequately represent the proposed intervenor's interest.

United States v. Michigan, 424 F.3d 438, 443 (6th Cir. 2005) (citing *Grutter v. Bollinger*, 188 F.3d 394, 397–98 (6th Cir. 1999)). These four elements should be "broadly construed in favor of potential intervenors." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir. 2007) (quoting *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991)). As explained below, Attorney General Cameron has established each of the four elements.

1. *Timeliness*

To determine the timeliness of an application for intervention of right, we consider five factors:

> 1) the point to which the suit has progressed; 2) the purpose for which intervention is sought; 3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; 4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene

> after they knew or reasonably should have known of their interest in the case; and 5) the existence of unusual circumstances militating against or in favor of intervention.

Blount-Hill v. Zelman, 636 F.3d 278, 284 (6th Cir. 2011) (quoting *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)). "No one factor is dispositive, but rather the 'determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances.'" *Id.* (quoting *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472–73 (6th Cir. 2000). Based on these five factors, Attorney General Cameron's motion to intervene is timely.

Regarding the first factor, the parties cited three cases in which a party sought to intervene after an appellate panel rendered judgment. In two of the cases, the Ninth Circuit granted motions to intervene, *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, 965 (9th Cir. 2009), and in the other case, the D.C. Circuit denied such a motion, *Amalgamated Transit Union Intern., AFL-CIO v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985). This case is more like *Peruta* and *Day* than *Donovan*. As here, both *Peruta* and *Day* involved the unusual circumstance of a state finding itself with nobody left in the suit to defend its interests after the panel ruled. *Peruta*, 824 F.3d at 941; *Day*, 505 F.3d at 966. And in both cases, the Ninth Circuit granted intervention to allow the state to finish the appeal by seeking rehearing or certiorari. *Peruta*, 824 F.3d at 941; *Day*, 505 F.3d at 966. In *Donovan*, by contrast, the court denied intervention to seek rehearing or certiorari because Secretary Donovan, a government official and defendant in the lawsuit, was still actively litigating the case. Moreover, the intervenor sought to represent entirely different interests than the government official. *Donovan*, 771 F.2d at 1552. That is not the case here. Secretary Friedlander is no longer actively litigating the case, and Attorney General Cameron seeks to represent the same interest that Secretary Meier and Secretary

Friedlander represented throughout the course of litigation—Kentucky's interest in defending its law. This factor weighs heavily in favor of a finding of timeliness.

As to the second factor, we have previously endorsed the very purpose for which Attorney General Cameron seeks to intervene on behalf of the Commonwealth—to ensure that the validity of a state law is defended to the conclusion of the remaining appellate process. In *Associated Builders & Contractors, Saginawy Valley Area Chapter v. Perry*, 115 F.3d 386 (6th Cir. 1997), Michigan's Attorney General moved to intervene following final judgment in the district court upon learning that the state official who was a party would not seek appellate review in a challenge to a state law. *Id.* at 389. The district court denied the motion to intervene, but we reversed and allowed the Attorney General to intervene. *Id.* at 390. That should be the outcome here as well. As did Michigan's Attorney General in *Perry*, Attorney General Cameron moved to intervene to defend his state's interests soon after learning that the state official in the lawsuit would no longer do so. *See id.* at 389; *see also N.E. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (citation omitted) (granting a motion to intervene because "the interests of the Secretary and the State of Ohio potentially diverge"). Attorney General Cameron's motion is essentially to allow his state to substitute its party representative to defend the constitutionality of its law, which is precisely what we allowed Michigan's Attorney General to do in *Perry*.

The third factor also points in Attorney General Cameron's favor. Attorney General Cameron was very prompt in intervening after he became aware of his need to do so. *See Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994) (citation omitted) (holding that the proper "gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties"). Secretary Friedlander

communicated that he would no longer defend H.B. 454 on June 9. Two days later, Attorney General Cameron filed his motion to intervene on behalf of the Commonwealth. He obviously responded in a timely manner to Secretary Friedlander's decision. *See id.* (holding that a motion to intervene was timely when it was filed 15 days after the would-be intervenor became aware of its need to intervene); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 267 (5th Cir. 1977) (holding that where would-be intervenors filed their motion less than one month after learning of their interest in the case, they discharged their duty to act quickly).

The majority seems to think that Attorney General Cameron should have anticipated his need to intervene months ago when he swore his oath of office, because "there was every reason for the Attorney General's office to inquire into and prepare for the Secretary's intended course." But there is no evidence that, prior to June 9, the Secretary expressed any intention to Attorney General Cameron not to defend H.B. 454 through the entire appellate process. Quite to the contrary, Secretary Friedlander retained the Attorney General's office to represent him at oral argument in this case. If the Secretary had privately expressed his intentions earlier, it would have been strange indeed—and arguably malpractice—for the Attorney General to move to intervene based on their privileged communication regarding the Secretary's future plans in this case.

All the more confusing, the majority expects Attorney General Cameron to have intervened in a case in which he was already the attorney of record for a party, representing the interests of the Commonwealth—the exact same interests that he seeks to represent now. To top it off, Secretary Friedlander does not oppose Attorney General Cameron's continued representation of the Commonwealth's interests. Given these circumstances, we cannot expect that Attorney General Cameron should have intervened earlier. *See Blount-Hill v. Zelman*, 636 F.3d 278, 287 (6th Cir. 2011) (holding that "actual or constructive knowledge of their interest in th[e] litigation"

is necessary to trigger awareness of the need to seek intervention); *Midwest Realty Mgmt. Co. v. City of Beavercreek*, 93 F. App'x 782, 788 (6th Cir. 2004) (holding that mere "suspicions" are not enough); *Linton by Arnold v. Comm'r of Health and Env't, State of Tenn.*, 973 F.2d 1311, 1318 (6th Cir. 1992) (recognizing that "the movants had no reason to intervene in the instant action so long as they believed that the [Defendant-State] would protect their interests"). And even if Attorney General Cameron could have anticipated the need to file a motion to intervene a few months ago, that does not mean that we should deny his motion now. *Day*, 505 F.3d at 965 ("[T]he fact that the State of Hawaii is filing its Motion now, rather than earlier in the proceedings, does not cause prejudice to Day and the other plaintiffs, since the practical result of its intervention—the filing of a petition for rehearing—would have occurred whenever the state joined the proceedings." (citation omitted)).

The fourth factor also weighs in favor of a finding of timeliness. Plaintiffs will not be prejudiced by Attorney General Cameron's intervention on behalf of the Commonwealth. Secretary Friedlander has not opposed the Attorney General's motion, and he seems to have no problem passing the baton to the Attorney General to allow him to take control of the litigation. And although the Attorney General's intervention on behalf of the Commonwealth will mean that this litigation will continue, that does not unfairly prejudice Plaintiffs. When one brings a constitutional challenge to a state law, it is reasonable to expect the state to defend that law through the full appellate process. Furthermore, Attorney General Cameron is not injecting new issues into the litigation; he merely seeks a rehearing or certiorari on the very issues that were decided by our panel on the merits. The Attorney General is thus simply picking up where Secretary Friedlander left off (actually, to be more precise, Attorney General Cameron is picking up where he left off, since he has always been the attorney of record in this case). *See Peruta*, 824 F.3d at

941 (holding that there was no prejudice in granting the motion to intervene because doing so "will not create delay by injecting new issues into the litigation, but instead will ensure that our determination of an already existing issue is not insulated from review simply due to the posture of the parties" (citation omitted)).

The majority asserts that Attorney General Cameron is seeking to intervene to introduce a "new third-party standing argument," and that prejudices Plaintiffs because they "have had no opportunity to respond" to that argument. But the third-party standing argument is hardly a new issue. Defendants challenged Plaintiffs' standing at the district court level, (R. 108 at PageID 104–105), and the dissent from the panel's decision was devoted almost entirely to that issue. Even if the third-party standing issue were somehow new, granting Attorney General Cameron's motion to intervene would only prejudice Plaintiffs if it could "be said that [he] ignored the litigation or held back from participation to gain tactical advantage." *Day*, 508 F.3d at 966. There is no evidence of such bad faith from Attorney General Cameron here. Instead, he is intervening only because Secretary Friedlander indicated he would not continue the appeal. If Secretary Friedlander had fully exercised his rights on appeal, Plaintiffs would have had to respond to the third-party standing argument anyway at the en banc or certiorari stage. *See League of Woman Voters of Mich. v. Johnson*, 902 F.3d 572, 578 (6th Cir. 2018) (finding no prejudice and reversing a district court decision denying a motion to intervene because "the new issues that would have arisen had the [motion to intervene been granted] would likely have arisen anyway during the natural course of litigation"). Finally, we have an independent obligation to ensure that we have jurisdiction, so even if Plaintiffs' standing were a new issue, it should not be ignored. *See Cmty. First Bank v. Nat'l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994) (holding that there is "no authority for the plaintiffs' argument that prudential standing requirements may be [forfeited] by the parties"

and declining to "recogniz[e] a distinction between prudential and constitutional standing requirements in this context").

As to the fourth factor, the highly unusual circumstances present in this case militate in favor of intervention. These circumstances include the recent election of Governor Beshear, the posture of this appeal at the time that Attorney General Cameron assumed office, Attorney General Cameron's role as Secretary Friedlander's attorney during the appellate process, and Attorney General Cameron's recent discovery that Secretary Friedlander would no longer defend H.B. 454.

Because each of the five factors weighs in Attorney General Cameron's favor, his motion to intervene is timely.

2. *The Commonwealth's Legal Interest in the Subject Matter of This Case*

As to the second element governing intervention of right, the Commonwealth through Attorney General Cameron has a substantial legal interest in the subject matter of this case. "[T]his Circuit 'has opted for a rather expansive notion of the interest sufficient to invoke intervention of right.'" *Granholm*, 501 F.3d at 780 (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)). We have determined that the term "'interest' is to be construed liberally." *Bradley v. Milliken*, 828 F.2d 1186, 1992 (6th Cir. 1987) (citing *Hatton v. County Bd. of Educ. of Maury County, Tenn.*, 422 F.2d 457, 461 (6th Cir. 1970)).

As we recently explained, "[a] state may designate an agent to represent its interests in court. This is most commonly the state's Attorney General." *State by & through Tenn. Gen. Assembly v. U.S. Dep't of State*, 931 F.3d 499, 515 (6th Cir. 2019). So it is in Kentucky. As a matter of state law, Attorney General Cameron is the Commonwealth's "chief law officer." KRS 15.020. He must "*enter his appearance in* all cases, hearings, and proceedings . . . and attend to *all* litigation and legal business in or out of the state required of him by law, or in which the

Commonwealth has an interest." *Id.* (emphasis added). As the Supreme Court of Kentucky has recognized, it is a "bedrock principle[]" of Kentucky law that the Attorney General possesses "broad powers to initiate and defend actions on behalf of the people of the Commonwealth." *Commw. ex rel. Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009). "There is no question," Kentucky's highest court has emphasized, "as to the right of the Attorney General to appear and be heard in a suit brought by someone else in which the constitutionality of a statute is involved." *Commw. ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974). Attorney General Cameron, on behalf of the Commonwealth, clearly satisfies the second element to intervene of right.

The majority's decision to the contrary contravenes our precedent. We have held, on multiple occasions, that states' attorneys general have the authority to intervene to defend their states' laws, even at the appellate stage. *See Perry*, 115 F.3d at 390 (noting that the Michigan Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed" (citations omitted)); *Blackwell*, 467 F.3d at 1009 (noting that the Ohio State Attorney General could intervene because he is "the State's chief legal officer and a representative of the people and the public interest" (citation omitted)).

3. *The Attorney General's Ability to Protect the Commonwealth's Interests*

As to the third and fourth elements, the Commonwealth's interests in defending H.B. 454 undoubtedly will be impaired by this litigation and will not be adequately represented absent intervention. Indeed, those interests will not be represented at all. Without intervention, the Commonwealth will be denied the opportunity to continue defending H.B. 454 in court. The Commonwealth's only option now is to seek en banc or certiorari of the denial of the Attorney General's motion to intervene. Unless the Attorney General on behalf of the Commonwealth

becomes a party, Secretary Friedlander's decision not to continue his appeal will not just "hinder," but will perhaps be fatal to "the State's ability to litigate the validity of the [Kentucky] law." *Blackwell*, 467 F.3d at 1008–09 (citations omitted).

III.

Rule 24 of the Federal Rules of Civil Procedure instructs that we "*must* permit anyone to intervene" who establishes the four elements discussed above. Fed. R. Civ. P. 24(a) (emphasis added). Each of those elements weighs decidedly in favor of granting the motion to intervene. Intervention is particularly warranted because, without adding the Attorney General as a party, there will be no one left in the case to defend H.B. 454.

Finally, our views as to the merits of Plaintiffs' constitutional challenge and whether they have standing to sue should not affect our ruling on the motion to intervene. Regardless of whether the majority is correct as to resolution of the issues presented in the case, Plaintiffs are not entitled to a pass as to an opponent. In our federal system, legal arguments are to be tested through the fire of adversarial argument, which includes the full appellate process. I therefore respectfully dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk