No. _____

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

PETITION FOR WRIT OF CERTIORARI

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

BARRY L. DUNN
Counsel of Record
Deputy Attorney General

VICTOR B. MADDOX
Assistant Deputy Attorney General

CARMINE G. IACCARINO
Assistant Attorney General

Counsel for Petitioner

October 30, 2020

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

QUESTIONS PRESENTED

Through more than two years of litigation, the Secretary of Kentucky's Cabinet for Health and Family Services led the Commonwealth's legal defense of its law prohibiting abortions in which an unborn child is dismembered while still alive. While this matter was pending before the Sixth Circuit, the Secretary retained lawyers from the Kentucky Attorney General's office to represent him. After the Sixth Circuit upheld the permanent injunction against Kentucky's law by a divided vote, the Secretary decided not to appeal further.

As allowed by Kentucky law, Attorney General Daniel Cameron promptly filed a motion to intervene to pick up the defense of Kentucky's law where the Secretary had left off. Over a dissent, the Sixth Circuit refused to allow the Attorney General to defend Kentucky law. The Attorney General, the majority held, should have moved to intervene earlier, even though his office had been representing the Secretary.

Five days later, this Court decided *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). The Attorney General raised *June Medical* in a timely petition for rehearing, arguing that it undercuts the panel's decision to invalidate Kentucky's law. Again over a dissent, the majority refused to allow the Attorney General's petition even to be filed.

The questions presented are:

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.

And if so, whether the Court should vacate the judgment below and remand for further consideration in light of *June Medical*.

PARTIES TO THE PROCEEDING

The parties in the court below, respondents here, 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.

Petitioner Daniel Cameron, Attorney General, on behalf of the Commonwealth of Kentucky, sought to intervene as a party before the Sixth Circuit.

STATEMENT OF RELATED PROCEEDINGS

No such proceedings exist.

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PETITION FOR WRIT OF CERTIORARI

Daniel Cameron, Attorney General, on behalf of the Commonwealth of Kentucky, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's decision denying the Attorney General's motion to intervene is unreported. App.106–29. The Sixth Circuit's decision refusing to accept for filing the Attorney General's tendered petition for rehearing is unreported. App.130–32. The Sixth Circuit's decision affirming the district court's permanent injunction is reported at 960 F.3d 785. App.1–68. The district court's decision entering a permanent injunction is reported at 373 F. Supp. 3d 807. App.69–103.

JURISDICTION

The Sixth Circuit denied the Attorney General's motion to intervene on June 24, 2020, and refused to file the Attorney General's 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, 208 (1965).

STATUTORY PROVISION INVOLVED

The Kentucky statute at issue here, codified in relevant part at Ky. Rev. Stat. 311.787, is reproduced in the appendix. App.135–36.

INTRODUCTION

This case began as a challenge to a Kentucky statute regulating abortion, but it is now a dispute about a State's authority to ensure that its laws are fully defended through this Court. In our dual-sovereign system of government, the States have a substantial interest in enforcing their laws. In recognition of this fact, the States get to decide for themselves who defends their laws in court. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951–52 (2019). Under Kentucky law, Attorney General Daniel Cameron has not only the power, but also the duty, to defend Kentucky's laws against legal challenge. *See* Ky. Rev. Stat. 15.020; Ky. Rev. Stat. 418.075. And when another state official declines to appeal an adverse ruling, Kentucky law empowers the Attorney General to step in and continue defending state law on appeal. *See* Ky. Rev. Stat. 15.090.

In the decision below, however, the Sixth Circuit barred the Attorney General from doing what state law requires of him. This cannot be justified under any circumstance, but it is especially intolerable here. Had the Attorney General's motion to intervene been granted, this case would not be over. This Court almost certainly would have granted certiorari, vacated the judgment below, and remanded for further proceedings (GVR) in light of *June Medical Services, L.L.C. v.*

Russo, 140 S. Ct. 2103 (2020). This Court decided *June Medical* five days after the Sixth Circuit refused to allow the Attorney General to intervene. And in the time since, the Court has granted GVRs in two similar cases, both of which the Sixth Circuit relied upon in its merits decision. It is difficult to imagine a better GVR candidate than this case.

In fact, in the short time since the Sixth Circuit invalidated Kentucky's statute, another panel of the court has interpreted *June Medical* in a way that raises serious questions about the decision below. *See EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, __ F.3d __, 2020 WL 6111008, at *14–*20 (6th Cir. Oct. 16, 2020). Yet, because the panel denied the Attorney General's motion to intervene, he cannot press these arguments.

In denying the Attorney General's motion, the Sixth Circuit also created a circuit split. In fact, in one of the cases the Court will hear this term, the Ninth Circuit allowed Arizona, represented by its attorney general, to intervene at a later stage than the Attorney General moved to intervene here—after the en banc court issued its ruling. *Brnovich v. Democratic National Committee*, 19-1257. And on two other occasions, the Ninth Circuit has granted a State's motion to intervene after the panel issued its decision. *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). In both of these cases, the Ninth Circuit recognized that a State's unique interests justify allowing the State to intervene even after a panel opinion.

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

STATEMENT OF THE CASE

At this point, this case concerns whether Kentucky's Attorney General should be permitted to intervene on behalf of the Commonwealth so that he can defend Kentucky law. But the importance of this dispute can only be appreciated by understanding the nature of the underlying litigation.

I. The Challenge to HB 454.

The Kentucky General Assembly passed House Bill 454 in March 2018, and Kentucky's Governor signed it into law. HB 454 regulates the abortion procedure known as dilation and evacuation, or D&E for short. A D&E abortion is a singularly gruesome procedure. It entails using "grasping forceps" to "tear apart" an unborn child. *See Gonzales v. Carhart*, 550 U.S. 124, 135 (2007). The result: "The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb." *Stenberg v. Carhart*, 530 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting). This Court has accordingly recognized that "[n]o one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life." *Gonzales*, 550 U.S. at 158.

Count the Commonwealth of Kentucky among the many. HB 454 thus prohibits an abortion provider from intentionally performing, or attempting to perform, an

abortion beginning at 13 weeks LMP[1] that "will result in the bodily dismemberment, crushing, or human vivisection" of a living unborn child. Ky. Rev. Stat. 311.787(1)–(2). Put more directly, HB 454 bars an abortion provider from dismembering an unborn child while the child is still alive. *See id.*

To be clear, HB 454 does not ban D&E abortions. It simply prohibits performing the D&E procedure on a *living* unborn child. *See id.* Under HB 454, D&E abortions can continue, but an unborn child must die before he or she is dismembered. In this simple way, HB 454 extends compassion to unborn children, thus demonstrating the Commonwealth's profound respect for life. HB 454 also protects the integrity of the medical profession by modifying an otherwise grisly procedure that would be unthinkable in any other part of the profession.

EMW Women's Surgical Center, P.S.C. and two of its doctors (together, EMW) sued under 28 U.S.C. §§ 1331 and 1343 to invalidate HB 454. EMW 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. D.Ct.Dkt. 1. At the time, Kentucky's Attorney General was Andy Beshear. Shortly after being sued, Attorney General Beshear and EMW agreed to a "Stipulation and Order of Dismissal Upon Conditions," which dismissed the Attorney General without prejudice. D.Ct.Dkt. 51 at 1.

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[1] All references to the age of a pregnancy are stated in terms of weeks from the last menstrual period, or LMP.

Attorney General Beshear agreed to be bound by the judgment in this case, but reserved "all rights, claims, and defenses that may be available to him." *Id.* at 1–2.

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. At trial, the Secretary's proof focused on two broad topics.

First, the Secretary demonstrated how HB 454 respects unborn life and protects the integrity of the medical profession. One doctor testified to witnessing a D&E abortion in which a doctor "pulled out a spine and some mangled ribs and the heart was actually still beating." D.Ct.Dkt. 103 at 14. Another doctor explained that, at the point in pregnancy when HB 454 takes effect, an unborn child is a "little human," with moving arms and legs, a beating heart, and organs. D.Ct.Dkt. 102 at 141–43. The Secretary also provided testimony from a neonatologist at Northwestern University, who explained that an unborn child definitely can feel pain by 22 weeks LMP and possibly can feel pain by 15 weeks LMP. D.Ct.Dkt. 103 at 139, 150–55.

Second, the Secretary presented expert testimony about the three primary ways that EMW can cause fetal death before a D&E abortion so as to comply with HB 454. EMW can cause the child's death by:

- Using a needle to inject a substance known as digoxin into either the amniotic fluid or the unborn child;
- Using a needle to inject potassium chloride into the unborn child's heart, chest, or umbilical cord; or

- Cutting the unborn child's umbilical cord.

E.g., D.Ct.Dkt.102 at 40–85; D.Ct.Dkt.103 at 17–48.

This Court has recognized two of these techniques. Two decades ago, the Court noted that "[s]ome physicians used intrafetal potassium chloride or digoxin to induce fetal demise prior to a late D & E (after 20 weeks), to facilitate evacuation." *Stenberg*, 530 U.S. at 925 (citation omitted). And in *Gonzales*, the Court again acknowledged, referring to digoxin and potassium-chloride injections, that "[s]ome doctors, especially later in the second trimester, may kill the fetus a day or two before performing" a D&E. *Gonzales*, 550 U.S. at 136.

The district court nevertheless invalidated HB 454 on its face by applying a balancing test purportedly required by *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). App.76–77.

The Secretary appealed. Shortly after briefing concluded in the Sixth Circuit, Kentucky held its general elections for statewide officers. Kentuckians elected then-Attorney General Beshear as their Governor and Daniel Cameron as their Attorney General. The day before Attorney General Cameron was sworn in, the Sixth Circuit scheduled oral argument in this matter. The new Secretary, who Governor Beshear had recently appointed, retained lawyers in the Attorney General's office to handle oral argument. 6thCir.Dkt. 41, 45–48. Thus, the new Secretary decided to soldier on in this matter.

The Sixth Circuit affirmed the district court's judgment by a divided vote. The court did so "by

weighing 'the burdens a law imposes on abortion access together with the benefits those laws confer.'" App.14 (quoting *Hellerstedt*, 136 S. Ct. at 2309). This balancing of interests pervades the opinion: Part I.A of the opinion is labeled "Burdens," Part I.B is "Benefits," and Part I.C. is "Balancing." App.18–42.

The panel rejected the Secretary's argument that it should follow *Gonzales*'s holding that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *See Gonzales*, 550 U.S. at 163. The panel concluded that *Hellerstedt* "clarified" this holding and thus refused to defer to the Kentucky General Assembly. App.17.

The Sixth Circuit also turned away the Secretary's argument that EMW must make a good-faith effort to comply with HB 454 before it can be invalidated. In this respect, the Secretary pointed out that EMW had undertaken no effort to perform any of the three techniques allowed by HB 454. The panel saw no problem with this. App.34–35.

Judge Bush dissented on the basis that EMW lacks third-party standing. App.50–68 (Bush, J., dissenting). He emphasized that "for whatever reason—be it financial, litigation strategy, or otherwise—EMW's physicians have refused to obtain the necessary training to perform fetal demise, even though uncontroverted studies presented at trial show that many, and perhaps a substantial majority, of women would choose fetal demise before undergoing a D&E procedure." App.51. Judge Bush also criticized the

panel's issuance of its opinion without waiting for this Court's decision in *June Medical*. App.66–68.

II. The Attorney General's Motion to Intervene.

Shortly 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 a writ of certiorari. 6thCir.Dkt. 56 at 1. 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. In so doing, the Attorney General simply sought to press on with the Commonwealth's legal defense of HB 454 through the rehearing stage and through this Court. True to his word, the Secretary did not oppose the Attorney General's motion to intervene. But EMW did. The Attorney General also tendered a timely petition for rehearing from the panel's decision. 6thCir.Dkt. 60. In this respect, the Attorney General did nothing more than attempt to exhaust the already-existing appellate remedies available to the State.

The panel, again by a divided vote, denied the Attorney General's motion to intervene. App.107. The panel emphasized that the Attorney General's motion "comes years into [the case's] progress, after both the district court's decision and—more critically—this Court's decision." App.110. While recognizing that the Attorney General's office previously represented the

Secretary, the Court criticized the Attorney General for not moving to intervene earlier. According to the panel, "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." App.112.

Judge Bush penned his second dissent, concluding 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." App.116 (Bush, J., dissenting). As Judge Bush explained, "[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 also noted what the majority's ruling meant in light of 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*." App.117.

Five days later, this Court decided *June Medical*. The Attorney General tendered a timely petition for rehearing from the panel's denial of his motion to intervene, alerting the panel to this Court's decision in *June Medical*. 6thCir.Dkt. 64. The panel, however, refused to allow the Attorney General's rehearing petition even to be filed and circulated to the en banc court. App.131. This prompted Judge Bush's third dissent. App.131–32 (Bush, J., dissenting).

This petition for certiorari follows.

REASONS TO GRANT THE PETITION

The Court should grant certiorari because of the important sovereign interests at stake and because of the split of authority about whether a state attorney general is entitled to intervene after a federal court of appeals issues its decision.

I. The Sixth Circuit Prohibited a Sovereign State from Fully Defending its Law.

The panel's refusal to allow Kentucky's Attorney General to defend the constitutionality of Kentucky law is an affront to state sovereignty. The Sixth Circuit closed the courthouse doors to the very person that Kentucky law empowers to represent the Commonwealth's interests in court. Still worse, the panel stuck to this holding even after *June Medical* undercut its rationale for invalidating HB 454.

A. Under our dual-sovereign system of government, the States retain "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)). "Although the Constitution begins with the principle that sovereignty rests with the people, it does not follow that the National Government becomes the ultimate, preferred mechanism for expressing the people's will. The States exist as a refutation of that concept." *Alden v. Maine*, 527 U.S. 706, 759 (1999). Dividing power between two sovereigns promotes liberty. *Id.* at 758.

A core part of the States' retained sovereignty is enforcing their own laws, subject of course to the limits set by the Constitution. This 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 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)).

For these reasons, 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, 1351 (1977) (Rehnquist, J., in chambers)); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018).

Inherent in the States' power to enforce their laws is the power to choose who defends those laws when they are challenged in court. *Hollingsworth*, 570 U.S. at 710 ("[A] State must be able to designate agents to represent it in federal court."). It follows that federal courts must not only respect, but also abide by, a State's decision about who represents its interests in

court. *See id.* Although state laws vary, most States have tapped their attorney general for this job. *Id.* ("That agent is typically the State's attorney general.").

This Court's recent decision in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), demonstrates the States' latitude in this regard. There, after the district court invalidated Virginia's redistricting scheme, Virginia's Attorney General decided not to appeal because, in his view, it "would not be in the best interest of the Commonwealth or its citizens." *Id.* at 1950. Virginia's House of Delegates nevertheless sought to appeal. *Id.*

The 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." *Id.* at 1951. This, however, had not occurred. Under Virginia law, Virginia had "chosen to speak as a sovereign entity with a single voice"—through its Attorney General. *Id.* at 1951–52. This choice, the Court emphasized, "belongs to Virginia." *Id.* at 1952. And because Virginia's chosen agent had decided not to appeal, the Court dismissed the House's appeal for lack of jurisdiction. *Id.* at 1956. Thus, state law defines who gets to speak in federal court on behalf of the State.

B. So what does Kentucky law say about Attorney General Cameron's right to represent the State when its laws are challenged? As it turns out, a lot. Under Kentucky law, the Attorney General is "the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions." Ky. Rev. Stat. 15.020. This isn't just a

title. Under state law, the Attorney General "shall . . . enter his appearance in all cases . . . and attend to all litigation . . . in which the Commonwealth has an interest." *Id.*; *see also* Ky. Rev. Stat. 418.075. And the Attorney General gets to decide when the Commonwealth has an interest in a case that warrants his participation. *Overstreet v. Mayberry*, 603 S.W.3d 244, 265 & n.98 (Ky. 2020).

The Supreme Court of Kentucky has accordingly recognized the Attorney General's "broad powers to initiate and defend actions on behalf of the people of the Commonwealth." *Commonwealth 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." *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974); *see also Commonwealth ex rel. Beshear v. Commonwealth Office of Governor ex rel. Bevin*, 498 S.W.3d 355, 361–66 (Ky. 2016) (discussing the Attorney General's common-law powers).

Importantly, Kentucky law also grants the Attorney General broad powers to take an appeal from a decision that affects the Commonwealth. Under Ky. Rev. Stat. 15.090, "[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." This means that if another state actor declines to appeal an adverse ruling, the Attorney General can override that decision by appealing on his own. *See id.* More to the point, this

statute provides that the Attorney General is the final decision-maker about whether to appeal a decision invalidating Kentucky law. *See id.*

So to summarize: 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. Important for present purposes, this includes deciding for the Commonwealth whether to continue defending its laws on appeal.

C. The Sixth Circuit disregarded the Commonwealth's sovereign decision to vest Attorney General Cameron with this power. Instead, the panel relied on the alleged untimeliness of the Attorney General's motion to intervene. App.109–15. The court's timeliness holding is not only wrong, but it created a circuit split, as described in Part II. More fundamentally, though, the Sixth Circuit minimized to irrelevance Kentucky's sovereign authority to decide for itself who defends its laws in court.

After reading the panel's decision denying the Attorney General's motion, one is justified in thinking that this case simply is a routine denial of a late-filed motion to intervene. The Sixth Circuit blandly noted that it "rarely grant[s] motions to intervene filed on appeal" and concluded that a motion filed after a panel's decision is "even more disfavored." App.110 (citation omitted). And the panel refused to decide whether the Attorney General "has a substantial legal interest in the subject matter of this case." App.115 n.4. The panel's decision thus contains no discussion of the sovereign interests at stake.

This approach ignores the significance of the Attorney General's motion. When the Attorney General moved to intervene, he did not come to the court as an ordinary litigant. Instead, he brought to bear Kentucky's powers as delegated to him by its General Assembly through Ky. Rev. Stat. 15.020 and Ky. Rev. Stat. 15.090. Put more directly, the Attorney General's motion to intervene was not just a motion; it was an exercise of a sovereign state's authority to defend its laws.

This case thus presents the opposite situation to that in *Bethune-Hill*. There, the state actor trying to defend state law lacked the power to do so, while the party with that power declined to appeal. *See Bethune-Hill*, 139 S. Ct. 1950–52. Here, by contrast, the Sixth Circuit turned away the Commonwealth's "chief law officer," who has the power to defend Kentucky's laws in this very situation. If federal courts must respect the decision of a State's chosen agent not to appeal an adverse ruling, as *Bethune-Hill* holds, the courts also must abide by the decision to exhaust all appellate remedies if the decision is made by the appropriate State official. *Bethune-Hill* instructs that "a State *must* be able to designate agents to represent it in federal court." *Id.* at 1951 (emphasis added) (quoting *Hollingsworth*, 570 U.S. at 710). That guarantee proved empty here.

The resulting injury to the Commonwealth's sovereign interests is substantial. The Commonwealth is unable to enforce HB 454 not because it ultimately lost after exhausting all available appeals, but because a federal court said it couldn't appeal any further. This,

Judge Bush recognized, "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).

D. The underlying legal dispute underscores the necessity of allowing Attorney General Cameron to push forward in defending HB 454. After *June Medical*, the panel's rationale for invalidating HB 454 no longer holds. Only a few months' time has proven true Judge Bush's prediction that "[w]ithout 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.*

June Medical came five days after the Sixth Circuit denied the Attorney General's motion to intervene. If the panel had permitted the Attorney General to intervene, there is little doubt that he eventually would have secured, at the very least, a GVR from this Court in light of *June Medical*. Shortly after *June Medical*, this Court granted GVRs in two cases that, like the decision below, applied *Hellerstedt*'s purported balancing test. *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). The panel below relied on *both* of those now-vacated decisions in deciding that HB 454 is unconstitutional. App.15–16 (citing *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973 (7th Cir. 2019); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State*

Dep't of Health, 896 F.3d 809 (7th Cir. 2018)). Thus, this case almost certainly would not be over but for the panel's denial of the Attorney General's motion to intervene. *See Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163, 166–68 (1996) (per curiam) (discussing the use of GVRs).

If the Attorney General were able to secure a GVR from this Court, the legal landscape upon returning to the Sixth Circuit would look very different. Two weeks ago, in an appeal concerning another of Kentucky's abortion statutes, the Sixth Circuit concluded that the Chief Justice's concurring opinion in *June Medical* controls.[2] *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, __ F.3d __, 2020 WL 6111008, at *10 (6th Cir. Oct. 16, 2020).

In light of this intervening development, there can be no question that the panel's decision invalidating HB 454 is no longer good law in the Sixth Circuit in at least three respects.

First, the panel applied the purported balancing test from *Hellerstedt*. This conclusion is inescapable. The panel "answer[ed] th[e] question" whether an undue burden exists by "weighing 'the burdens a law imposes on abortion access together with the benefits those laws confer.'" App.14 (quoting *Hellerstedt*, 136 S. Ct. at 2309). In so doing, the panel expressly rejected the Secretary's argument that "it is the legislature's

[2] As discussed below, in this other case, the Sixth Circuit granted Attorney General Cameron's motion to intervene even though it came nearly a year after oral argument. *See Friedlander*, 2020 WL 6111008, at *5.

place—and not the courts'—to assess whether the Commonwealth's interest justifies regulating abortion." App.15.

This is irreconcilable with the Chief Justice's opinion in *June Medical*. The Chief Justice explained that "[t]here is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were." *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in the judgment). Such weighing, the Chief Justice reasoned, "would require us to act as legislators, not judges." *Id.* As a result, the Chief Justice concluded that, under the undue-burden test, "benefits [are] not placed on a scale opposite the law's burdens." *See id.* at 2138. Consequently, the panel majority's embrace of a balancing test can no longer be justified. *See Friedlander*, 2020 WL 6111008, at *14 (rejecting a balancing test in light of *June Medical*).

Second, the Sixth Circuit rejected the Secretary's argument that the court should apply *Gonzales*'s holding that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U.S. at 163. This aspect of *Gonzales* matters greatly to this appeal—in fact, it is dispositive—in light of the extensive expert testimony that the Secretary offered about, for example: (i) the feasibility of the three fetal-death techniques that enable EMW to comply with HB 454; and (ii) the likelihood of an unborn child feeling pain. At a minimum, the Secretary's proof on these topics readily creates "medical and scientific

uncertainty" under *Gonzales* sufficient for HB 454 to survive EMW's facial challenge. *See id.*

The panel nevertheless concluded that *Hellerstedt* "clarified" *Gonzales*'s holding and therefore refused to apply it. App.17. The Chief Justice's concurrence, however, refutes this conclusion. Quoting *Gonzales*, the Chief Justice reiterated the "traditional rule" that "state and federal legislatures have wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in the judgment) (citation omitted). Consequently, in this respect as well, the Sixth Circuit's rationale for invalidating HB 454 cannot be squared with the Chief Justice's *June Medical* opinion. *See Friedlander*, 2020 WL 6111008, at *14 (applying *Gonzales*'s uncertainty holding in light of the Chief Justice's opinion).

Third, the Sixth Circuit refused to require EMW to undertake a good-faith effort to comply with HB 454. "[F]or whatever reason—be it financial, litigation strategy, or otherwise—EMW's physicians have refused to obtain the necessary training to perform fetal demise . . . ." App.51 (Bush, J., dissenting). The panel, however, blessed EMW's refusal to make a good-faith effort to utilize one of the three-fetal demise techniques, concluding that "Supreme Court precedent does not support such a requirement." App.34.

But Chief Justice Roberts's opinion in *June Medical* says otherwise. He noted that the district court "[i]mportantly" found that the abortion providers "have attempted *in good faith* to comply with the law by applying for admitting privileges, yet have had very

little success." *June Medical*, 140 S. Ct. at 2141 (Roberts, C.J., concurring in the judgment) (cleaned up). "This finding," the Chief Justice emphasized, "was necessary to ensure that the physicians' inability to obtain admitting privileges was attributable to the new law rather than a halfhearted attempt to obtain privileges." *Id.* This conclusion cannot coexist with the panel's holding below. *See Friedlander*, 2020 WL 6111008, at *19–*20 (applying the Chief Justice's good-faith holding).

* * *

In sum, the Sixth Circuit's decision to sideline the Attorney General harms the Commonwealth's sovereign interests by prematurely ending this constitutional challenge to Kentucky law. This more than warrants review by this Court.

II. The Sixth Circuit Created a Circuit Split That Undermines the Right of Each State to Ensure its Laws Are Defended in Federal Court.

The panel majority's decision created a circuit split with profound implications. Until now, the only courts addressing the unique nature of a State intervening to defend its sovereignty have recognized the compelling need to liberally allow such intervention. The Ninth Circuit, in particular, has adopted a strong rule favoring state intervention, but the decision below departed from that line of cases. In doing so, it created a circuit split as to how federal courts should analyze a State's sovereign interest in ensuring that its laws receive a full defense in the face of a constitutional

challenge. This Court should grant certiorari to resolve this split. *See* S. Ct. R. 10(a).

A. In the trial courts, parties seeking to intervene must comply with Rule 24. *See* Fed. R. Civ. P. 24(a), (b). Strictly speaking, however, Rule 24 applies "only in the federal district courts." *Scofield*, 382 U.S. at 217 n.10. Thus, while this Court has recognized that "the policies underlying intervention [under Rule 24] may be applicable in appellate courts" as well, *id.*, the Court has not yet established many clear rules about when appellate intervention is appropriate or permissible.

Moreover, the Court has never addressed how the "policies underlying intervention" during an appeal, *id.*, interact with each State's right to "designate agents to represent it in federal court," *Bethune-Hill*, 139 S. Ct. at 1951 (quoting *Hollingsworth*, 570 U.S. at 710). There is no doubt that "post-judgment intervention for the purpose of appeal" is proper so long as the intervenor, "in view of all the circumstances, . . . acted promptly." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395–96 (1977). And 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. But when the non-party is a State and the interest it seeks to protect is a core part of its sovereignty, how must federal courts treat such requests for late-stage intervention? The Ninth Circuit and Sixth Circuit have now split on this important question.

B. The Ninth Circuit has adopted a strong rule in favor of allowing States to intervene when a change in

circumstances leaves the State with no one "that can fully represent its interests." *Peruta v. Cty. of San Diego*, 824 F.3d 919, 941 (9th Cir. 2016) (en banc). In *Peruta*, the State of California found itself in a difficult position when the Court of Appeals issued a decision that "would have substantially impaired [its] ability to regulate firearms," but the county official defending the litigation announced he would no longer do so. *Id.* at 940. California moved to intervene. And even though it did so "at a relatively late stage in the proceeding" (after the panel's opinion), *id.*, the en banc Ninth Circuit allowed California to intervene "to fill the void created by the late and unexpected departure" of the county official previously defending the suit, *id.* at 941.

Peruta built on the Ninth Circuit's prior decision in *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007), a Section 1983 case with far-reaching implications about how to interpret the Hawaiian Admission Act. *See* Pub. L. No. 86-3, 73 Stat. 4 (1959). The State of Hawaii participated in the case only as an *amicus curiae*, but it successfully persuaded the district court to adopt an argument that neither party endorsed—one that would have "long term impact on the State." *Id.* at 965–66. Because neither party pursued Hawaii's argument on appeal, however, they had no incentive to press the issue further when the Court of Appeals eventually reversed. *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 to protect its interest in a case with significant implications. *Id.*

The same panel that rejected Hawaii's argument on the merits nevertheless allowed the State to intervene

so that it could seek further appellate review. The court did so *even though* Hawaii's request to intervene came late in the proceedings and *even though* the court found Hawaii's explanation for its delay "less than entirely persuasive." *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.* Thus, "even though Hawaii could have and should have intervened earlier, [the court would] not foreclose further consideration of an important issue" that would have a significant impact on a State's sovereign interests. *Id.*

Neither *Peruta* nor *Day* gave carte blanche to the States to sit idly by only to disrupt the orderly judicial process late in the game. Both decisions balanced the State's interest against the potential for prejudice to the existing parties. But when a State seeks only to exhaust the existing appellate options available in defense of its sovereign interests, no prejudice exists. *See Day*, 505 F.3d at 965 (finding no prejudice where "the practical result of [the State's] intervention—the filing of a petition for rehearing—would have occurred whenever the state joined the proceedings"). That's because it is not prejudicial to require parties simply to litigate a case to its ordinary conclusion.

More recently, this Court granted certiorari in a case in which the Ninth Circuit allowed a State to intervene after an en banc decision. *See Brnovich v. Democratic Nat'l Comm.*, No. 19-1257. *Brnovich* involves a challenge to a pair of Arizona's election

rules. The Arizona Secretary of State defended its laws in briefing before the Ninth Circuit, but declined to continue doing so after the en banc court ruled against the State. At that point, Arizona's Attorney General, who was already a party in the suit, moved to intervene on behalf of the State of Arizona to ensure that he could continue defending every aspect of the State's interest. *Democratic Nat'l Comm. v. Hobbs*, Case No. 18-15845, Dkt. 128 (9th Cir. 2020). Just as in this case, Arizona's Attorney General only sought to exhaust the State's available options for appellate review in light of the Secretary of State's about-face. *See id.* The Ninth Circuit granted the request, which allowed Arizona—through its Attorney General—to petition this Court for certiorari. *Id.*, Dkt. 137. And this Court granted that petition. No matter the final result from this Court in *Brnovich*, the Ninth Circuit's recognition of the important interests that States have in defending their own laws has ensured that Arizona can do so fully through the end of the appellate process.

C. In breaking with the Ninth Circuit, the panel gave no hint that it even recognized the unique interests at stake when a State seeks to intervene in defense of its own laws. As discussed above, this is a core part of State sovereignty. But to the panel, the Attorney General's request to intervene was no different than a run-of-the-mill motion filed by a third party at the last minute of litigation. And so the panel denied intervention based only on its conclusion that the Attorney General's motion was untimely.

In doing so, the panel majority deliberately chose not to address "the issue of whether Attorney General

Cameron has a substantial legal interest in the subject matter of this case." App.115 n.4. That is confounding, considering that the "subject matter of this case," *id.*, is whether the State will be "enjoined by a court from effectuating statutes enacted by representatives of its people," *See King*, 133 S. Ct. at 3 (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal.*, 434 U.S. at 1351) (Rehnquist, J., in chambers)). The panel did not merely weigh a complex set of factors against the State in this particular case—it treated the State's ability to defend its laws as *irrelevant* to the inquiry. And in that way, the panel broke sharply with the Ninth Circuit.

The panel's attempt to distinguish *Peruta* and *Day* illustrates this profound error. The court criticized Attorney General Cameron for waiting too long to intervene when he allegedly should have known of "his interest" in the case at an earlier time. App.112. This, the panel reasoned, was unlike *Peruta*, in which the State of 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." *Id.* But that, of course, is *exactly* the situation the Attorney General faced here. Until the panel's decision on the merits, the Secretary had not only defended HB 454 with vigor—he had retained the Attorney General to lead the effort at oral argument before the appeals court. *See* App.116 (Bush, J., dissenting) ("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 . . . ."). Then, two days after learning the Secretary would no longer defend the law through the final stages of appeal, the Attorney General moved to intervene on behalf of the Commonwealth.

Yet not even those facts satisfied the panel. In denying the Attorney General's motion, the court surmised that the Attorney General should have predicted that the Secretary would reverse course and abandon his defense of HB 454 after the panel's decision. App.113 ("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."). Never mind that the Secretary chose to continue defending HB 454 with the Attorney General's office as his chosen counsel after Kentucky's new governor appointed the Secretary. Never mind that the Attorney General represented to the Sixth Circuit that the Secretary did not inform him of the decision until after the panel's decision. 6thCir.Dkt. 56 at 1. And never mind that not even ordinary litigants must predict unknowable future events when weighing whether to intervene. *See McDonald*, 432 U.S. at 394 (allowing intervention when a non-party moved "as soon as it became clear . . . that [her] interests . . . would no longer be protected"). The panel's decision here effectively denied Kentucky an opportunity to exhaust its appellate remedies in defense of the constitutionality of state law because the Attorney General did not foresee that the defendant representing the State's interests would no longer do

so. Imposing such a burden on a sovereign State is remarkable.

The panel's conclusion is only possible because it ignored the elephant in the room. The issue in this case is not about the personal interest of the Secretary. Nor is it about the personal interest of the Attorney General. Rather, the issue here—and in all cases in which a State's laws have been challenged as unconstitutional—is whether the *Commonwealth's* interest is adequately represented as a sovereign State. In many respects, it should make no difference to a federal court what the name of an official-capacity defendant is when the issue is simply the defense of a state law's constitutionality. *See Bethune-Hill*, 139 S. Ct. at 1951. So long as the State has authorized the party to defend its interests in court, what reason does a federal court have to focus on the identity of the official party who represents the *State* and its interests in this kind of litigation? Yet the panel majority treated the Attorney General's request as some kind of last-minute gamesmanship, ignoring the sovereign interest that the Attorney General represents in merely attempting to ensure continuity in defense of the Commonwealth's duly enacted laws.

The Ninth Circuit has recognized this distinction, which is why it allowed Hawaii to intervene in *Day* late in the proceedings even though Hawaii had no good explanation for failing to do so earlier. *See Day*, 505 F.3d at 966. Here, of course, the Attorney General had plenty of good reasons for not intervening earlier: The Secretary fully represented the Commonwealth's interest in defending HB 454 through trial and up until

the point when he decided not to seek rehearing or petition this Court for certiorari.

Nor did the Attorney General sit idly by. His office represented the Secretary as counsel of record on appeal, fulfilling his duty under Kentucky law to ensure that the Commonwealth's sovereign interest had a voice in court. Then, shortly after learning that the Secretary would no longer defend against the constitutional challenge, the Attorney General moved to intervene, asking the court below to effectively substitute one official-capacity party for another to "fill the void created by the late and unexpected departure" of the Secretary "from the litigation." *See Peruta*, 824 F.3d at 941. The Attorney General's motion came "as soon as it became clear . . . that the interests of [Kentucky] would no longer be protected by [the Secretary]." *See McDonald*, 432 U.S. at 394. And the Attorney General tendered his petition for rehearing on the day that the Secretary's petition would have been due, ensuring that his request to "stand in for the State" would not result in even one day of delay. *See Bethune-Hill*, 139 S. Ct. At 1951. That should have been enough.

The panel's approach to this problem is not simply a difference of degree from the Ninth Circuit in weighing the facts of a particular case. As the Ninth Circuit has recognized, even where the ordinary factors weigh against intervention, the court will "not foreclose further consideration of an important issue" to the State's sovereign interests. *Day*, 505 F.3d at 966. The Sixth Circuit split from the Ninth Circuit below by failing to recognize this unique factor when a State

moves to intervene in defense of its own laws. As the panel majority saw it, such interests were irrelevant. *See* App.115 n.4.

D. Adding to the confusion, the panel majority's decision "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). In *Associated Builders & Contractors, Saginaw Valley Area Chapter v. Perry*, 115 F.3d 386 (6th Cir. 1997), the court allowed Michigan's Attorney General to intervene following a final judgment in the district court after learning that the state official who previously defended the state's law would not seek appellate review. *Id.* at 389–91. Likewise, in *City of Pontiac Retired Employees Association v. Schimmel*, 751 F.3d 427 (6th Cir. 2014) (per curiam) (en banc), the Sixth Circuit allowed the Michigan Attorney General to intervene "on behalf of the State of Michigan," *id.* at 430, even though the motion was made after oral argument, *see City of Pontiac Retired Emps. Ass'n v. Schimmel*, 726 F.3d 767, 773 (6th Cir. 2013). In fact, the panel majority in *Schimmel* first denied the Michigan Attorney General's request (over a dissent) before the en banc Court overruled that decision. *See id.*; *see also N.E. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1002, 1007–09 (6th Cir. 2006) (granting the Ohio Attorney General's motion to intervene "to represent the interests of the people of Ohio and the General Assembly in defending the constitutionality of [a] statute").

Inexplicably, just a few months ago, a different panel of the Sixth Circuit granted Attorney General Cameron's motion to intervene into a challenge to another of Kentucky's abortion laws almost one year after the court heard oral arguments in the matter. *See Friedlander*, 2020 WL 6111008, at *5. The Commonwealth thus can defend its sovereign interests with respect to that particular law, should further appellate review be necessary, but cannot do so here. The lack of guidance from this Court has caused not only a split among the circuits, but an *intra*-circuit conflict as well.[3]

[3] Nor should this Court take comfort in the Sixth Circuit's ability to sort out its own disagreements and align itself with the Ninth. Attorney General Cameron was not even permitted to seek rehearing en banc as to the panel's decision denying intervention in this case. App.131.

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,

BARRY L. DUNN
Counsel of Record
Deputy Attorney General

VICTOR B. MADDOX
Assistant Deputy Attorney General

CARMINE G. IACCARINO
Assistant Attorney General

Office of the Kentucky
Attorney General
700 Capitol Ave., Suite 118
Frankfort, KY 40601
(502) 696-5300
Barry.Dunn@ky.gov

Counsel for Petitioner