No. 20-601

IN THE

Supreme Court of the United States

DANIEL CAMERON, ATTORNEY GENERAL 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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion in concluding that the Kentucky Attorney General's motion to intervene was not timely filed, where the Attorney General had previously agreed to be dismissed from the case and to be bound by the judgment, and sought to intervene only after the court of appeals had resolved the case, for the principal purpose of raising a claim that had previously been waived.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No respondent has a parent corporation and no publicly held company owns 10% or more of any respondent corporation's stock.

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INTRODUCTION

Petitioner asks this Court to review a decision rejecting a motion to intervene as untimely, where the motion was filed after the court of appeals had issued its decision, by a party that had previously successfully sought to be dismissed from the case, and primarily for the purpose of raising a claim that the Commonwealth had previously waived. Despite the Petition's sweeping rhetoric, this case does not implicate the sovereign authority of a state to defend its laws, but merely the routine application of the rules governing intervention, which apply equally to all parties. Indeed, the Sixth Circuit expressly disclaimed any ruling on the legal interest of the Attorney General, and has granted him intervention in other recent cases where, unlike here, the motion was timely filed.

The decision below does not warrant certiorari. It is nothing more than a fact-specific application of the undisputed rules governing intervention. There is no split in the circuits. The only two cases Petitioner cites for its purported split applied the *same legal standard* and simply found materially distinguishable circumstances. Whether a motion to intervene is timely in the particular circumstances presented here is not an important or recurring federal question.

The Attorney General seeks this Court's intervention because it believes that *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), decided after the panel ruled, might support a different result on the merits. But if the Attorney General so believes, he can seek to intervene in the district court to alter the judgment under Federal Rule of Civil Procedure 60(b). There is no need to

involve this Court. In any event, *June Medical* does not alter the outcome of this case.

The conclusion that the motion to intervene was untimely was a sound exercise of the court of appeals' discretion where: the Attorney General had previously agreed to be dismissed from the case and to be bound by the judgment; the motion was filed after the court of appeals rendered its decision; the motion sought to interject an issue into the litigation that the Commonwealth had previously waived; and the Attorney General could have sought to intervene earlier. The petition should be denied.

STATEMENT OF THE CASE

While the merits of this case concern the constitutionality of an abortion law, the issue presented by this petition is only whether a motion to intervene was timely filed.

District Court Proceedings

On April 10, 2018, Kentucky enacted H.B. 454 (the "Act"), which effectively prohibits the standard second-trimester abortion method, dilation and evacuation ("D&E"). Ky. Rev. Stat. § 311.787. Plaintiffs EMW Women's Surgical Center ("EMW") and its two obstetrician-gynecologists, Dr. Ashlee Bergin and Dr. Tanya Franklin, filed suit, contending that the Act imposes an undue burden on the right to pre-viability abortion, in violation of the Fourteenth Amendment.

The complaint named four defendants, each in their official capacity only: the Kentucky Attorney General, the Interim Secretary ("Secretary") of Kentucky's Cabinet for Health and Family Services (the "Cabinet"), the Executive Director of the

Kentucky Board of Medical Licensure, and the Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky (the "Commonwealth's Attorney"). The defendants filed three separate responses to the plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction, including one solely on behalf of the Attorney General arguing that his office was not a proper party and should be dismissed as a defendant. D.Ct.Dkt. 42. A few weeks later, the parties stipulated to the entry of a court order voluntarily dismissing the Attorney General. The stipulation provides in relevant part:

> Defendant Beshear, in his official capacity as Attorney General of the Commonwealth of Kentucky, agrees that any final judgment in this action concerning the constitutionality of HB 454 (2018) will be binding on the Office of the Attorney General, subject to any modification, reversal or vacation of the judgment on appeal.

D.Ct.Dkt. 51 ¶ 3(d). The parties also stipulated to the dismissal of the Executive Director of the Kentucky Board of Medical Licensure. D.Ct.Dkt. 52. The remaining defendants, the Secretary and the Commonwealth's Attorney, were represented by lawyers from the Cabinet and from the Office of the Governor.

The district court conducted a five-day bench trial in November 2018, during which both sides presented extensive expert testimony and documentary evidence. After the close of the plaintiffs' case, the Commonwealth made an oral motion that included a cursory argument that the

plaintiffs lacked third-party standing. (The argument takes up about one page of the transcript. D.Ct.Dkt. 108 at 104–05.) The district court rejected it:

> Well, if that last argument had any merit, given the state of the law, you should have made it a long time ago. . . . And I don't think that this will come as a big surprise to you that I'm going to overrule your motion and make you put on a case.

Id. at 105.

On May 10, 2019, the district court issued a permanent injunction. The court held that the plaintiffs had standing, App. 73–74, and that, by criminalizing the standard second-trimester abortion method, the Act would effectively prohibit abortion in Kentucky after the first weeks of the second trimester. The court found, based on extensive expert testimony, that there were no feasible, safe means to continue performing D&E abortions under the Act. App. 96. The court accordingly concluded that the Act would impose "a substantial obstacle to the constitutionally protected right" to a pre-viability abortion, and was therefore unconstitutional. *Id.*

Court of Appeals Proceedings

The Secretary appealed on May 15, 2019. 6thCir.Dkt. 1. The Commonwealth's Attorney chose not to appeal. Prior to appellate argument, on November 5, 2019, Kentucky held elections, and then-Attorney General Andrew Beshear was elected Governor. Daniel Cameron was elected Attorney General. Beshear's views on abortion generally—and Kentucky's 2017 laws restricting abortion access in particular—were a topic of public debate during the

campaign; Beshear called himself "pro choice," and vowed not to defend abortion laws that he believed were unconstitutional.[1] Governor Beshear was sworn into office on December 10, 2019. Attorney General Cameron was sworn in on December 17, 2019.

On December 9, 2019, four lawyers who had appeared as counsel for the Secretary moved to withdraw from the case, explaining "they no longer will be employed in their current positions with the Office of the Governor of Kentucky." 6thCir.Dkt. 37. A few weeks later, these same four lawyers filed notices of appearance as counsel for the Secretary, but now from the Office of the Attorney General. 6thCir.Dkt. 41, 44–47. Attorney General Cameron also entered his appearance in the case as counsel for the Secretary. 6thCir.Dkt. 48. He did not, however, seek to intervene as a party. The case was argued before the Sixth Circuit on January 29, 2020. 6thCir.Dkt. 49. One of the lawyers who had moved from the Office of the Governor to the Office of the Attorney General, and who had represented the Secretary throughout the litigation, argued the case. *Id.*

On June 2, 2020, the court of appeals affirmed the district court's judgment by a 2-1 vote. The panel majority held that the plaintiffs had standing to sue on their own behalf, noting that "physician plaintiffs unquestionably have standing to sue on their own behalf when a law threatens them with criminal prosecution." App. 11–12 n.2 (internal quotation

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[1] *See, e.g.*, Bruce Schreiner & Dylan Lovan, *Democratic Candidates Stake Out Stances on Abortion*, Associated Press (Apr. 30, 2019), https://apnews.com/8943d79e37724da6ab0f370c312f9a50.

marks omitted). Responding to the dissent, which *sua sponte* maintained that the plaintiffs lacked third-party standing to raise the claims of their patients, the court noted that the Secretary had not pursued that argument on appeal, and had therefore waived it. *Id.* "In any event," the court went on, "we need not answer that question now because this case does not present any third-party standing issue," in light of the plaintiffs' standing to sue on their own behalf. *Id.*

On the merits, the court concluded that the "thorough judicial record [compiled] over the course of a five-day bench trial," App. 10, amply supported the district court's factual findings. App. 21–38. Like the district court, the court of appeals determined that the Act "effectively prohibits the most common second-trimester abortion method." App. 41. Such a prohibition, the court of appeals held, "poses a substantial obstacle to abortion access prior to viability and is an undue burden." App. 19. The court noted that at least ten other states had passed similar laws "requiring fetal demise prior to the performance of a D&E" and "in every challenge brought to date, the court has enjoined the law." App. 8–9. Judge Bush dissented, maintaining that the plaintiffs lacked third-party standing. App. 50–68. The Secretary did not file a motion for rehearing en banc. App. 108.

Attorney General Moves to Intervene

After the Sixth Circuit issued its decision, the Attorney General for the first time moved to intervene in the case as a party and tendered a petition for rehearing en banc. 6thCir.Dkt. 56, 60. This was nearly two years after the Attorney General had stipulated to his dismissal from this lawsuit and to be bound by the outcome. D.Ct.Dkt. 51 ¶ 3(d). It was

also six months after Governor Beshear took control of the Cabinet, and nearly six months after the Attorney General entered an appearance as counsel on behalf of the Acting Secretary of the Cabinet in the case. 6thCir.Dkt. 48. The motion stated that he sought to intervene at this late date because "the Secretary had chosen not to pursue rehearing en banc or petition for a writ of certiorari." App. 108.

As the court of appeals explained, "the foremost argument that the Attorney General [sought] to advance on rehearing [was] 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." App. 111. The Attorney General's motion failed to acknowledge that he had been aware for at least several months that Secretary Eric Friedlander, in his official capacity as Acting Secretary of Kentucky's Cabinet for Health and Family Services, was the sole party on appeal, and thus would have decision-making authority over litigation matters, including whether to pursue en banc rehearing or to petition for certiorari. Nor did the Attorney General acknowledge that the decision to not pursue the third-party standing argument at any prior stage of the appeal was made by counsel who had themselves briefed and argued the appeal, and who prior to argument entered appearances as attorneys from the Attorney General's own office.

The court of appeals denied the motion to intervene as untimely, applying established standards governing intervention at the appellate stage. App. 109–15. The court considered five factors. First, as to "the point to which the suit has progressed," App. 109, the court noted that intervention after a court of appeals has decided the

appeal is disfavored. "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." App. 110.

Second, with respect to "the purpose for which intervention is sought," App. 109, the court noted that the Attorney General sought to intervene principally to contest third-party standing, an issue not pressed on appeal by lawyers in his office, and not "flesh[ed] out before the district court" by the same lawyers when they were in the Governor's office, App. 111.

Third, regarding "the length of time preceding the [motion] during which the proposed intervenors knew or should have known of their interest in the case," App. 109, the court concluded that the Attorney General had "ample opportunity to seek further review" because he "could have sought to intervene at an earlier date," App. 111 n.2. Attorney General 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" and "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." App. 111–12.

Fourth, regarding "prejudice to the original parties," App. 109, the court concluded that "granting the Attorney General's motion would significantly prejudice Plaintiffs," as the "third-party standing argument [was] not raised before this Court and not argued in any particulars before the district court," App. 113. The court of appeals noted that, even after certiorari was granted in *June Medical Services, LLC v. Gee*, 140 S. Ct. 35 (Oct. 4, 2019), the Attorney

General did not use any available procedural mechanisms, such as a letter pursuant to Federal Rule of Appellate Procedure 28(j), to raise the issue of third-party standing before the panel ruled. App. 113.

Finally, the court did not find "the existence of unusual circumstances militating . . . in favor of intervention." App. 110; *see also id.* at 114.

Accordingly, the court concluded that the intervention motion was untimely. Because timeliness is a necessary element for intervention, the court determined that it "need not reach the remaining elements a proposed intervenor must show." App. 115. Thus, it did "not reach the issue of whether Attorney General Cameron has a substantial legal interest in the subject matter of this case." App. 115 n.4. And it did not "question whether states' attorneys general may appropriately intervene to defend their states' laws in some—or indeed, even in many—situations." *Id.* Judge Bush dissented. App. 116.

On July 7, 2020, Attorney General Cameron tendered a second petition for en banc rehearing. 6thCir.Dkt. 64. The second petition was rejected for filing, over a dissent. App. 130–32. Although the Sixth Circuit's rules allow that "any member of the en banc court may sua sponte request a poll for hearing or rehearing en banc," 6 Cir. I.O.P. 35(e), the Sixth Circuit did not vote to hear the case en banc. *See Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020) (noting that "[a] member of the en banc court sua sponte requested a poll in this case pursuant to 6 Cir. I.O.P. 35(e)").

The Attorney General filed a petition for certiorari asking this Court to reverse the Sixth

Circuit's decision to deny his post-judgment motion to intervene as untimely. He also asks this court to "vacate the judgment below and remand for further consideration in light of *June Medical*." Pet. 32.

REASONS TO DENY THE PETITION

I. THE COURT OF APPEALS' ROUTINE, FACT-SPECIFIC DECISION THAT A MOTION TO INTERVENE WAS NOT TIMELY FILED PRESENTS NO CIRCUIT SPLIT AND DOES NOT MERIT REVIEW.

The petition for certiorari asks this Court to review whether the Attorney General's motion to intervene after appeal, after briefing, after oral argument, and after the panel issued its decision, was untimely. The lower court's routine, fact-specific application of an undisputed legal standard to conclude that the motion was untimely does not warrant this Court's review. There is no split in the circuits; the issue is peculiar to this case and unlikely to recur; and the Petitioner does not dispute the standard the court applied, only its application in this case.

Moreover, the decision below does not question or in any way undermine the Attorney General's authority as a general matter to defend Kentucky statutes. Rather, applying the same standards of procedure to the Attorney General as it would to anyone else, the court of appeals "simply conclude[d] that the Attorney General's intervention in this particular case would be untimely." App. 115 n.4. By contrast, as the Attorney General concedes, Pet. 31, less than two months after intervention was denied as untimely in this case, the Sixth Circuit granted the

Attorney General's intervention motion in another matter in which the Secretary is the sole party, where the motion was filed prior to any panel opinion and did not seek, at the eleventh hour, to inject previously waived issues into the litigation.[2]

There is no dispute about the legal standard here; like other courts of appeals, the court below applied a multi-factor test generally applicable for intervention at the district court level. Pet. 22; *see* App. 109–10. Nor is there any dispute about the standard for reviewing such decisions. Whether a motion is timely "is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP v. New York*, 413 U.S. 345, 366 (1973). And if a motion to intervene is untimely, "intervention must be denied." *Id.* at 365.

Petitioner does not contend that there is any disagreement, much less a split, among the circuits on the legal standard for deciding the timeliness of motions to intervene. The factors applied by the Sixth Circuit are consistent with those applied by other courts of appeals. The timeliness considerations are grounded in case law interpreting Federal Rule of Civil Procedure 24. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-*

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[2] *See* Mot. to Intervene at 7, *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020) (No. 18-6161), Dkt. No. 89 (dated July 24, 2020); Order, *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020) (No. 18-6161), Dkt. No. 92-2 (granting intervention on August 6, 2020); *see also EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020) (explaining Attorney General Cameron's motion to intervene was granted on August 6 "so that he could submit a Rule 28(j) letter on behalf of the Commonwealth").

CIO, Local 283 v. Scofield, 382 U.S. 205, 217 n.10 (1965) (explaining "the policies underlying intervention" in the district courts pursuant to Federal Rule of Civil Procedure 24 "may be applicable in appellate courts").[3] Nor does Petitioner argue that the legal standard applied by the Sixth Circuit, App. 109 (quoting *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011)), is erroneous. *See* Pet. 22 (citing *Scofield*, 382 U.S. at 217 n.10, and noting "the Court has not yet established many clear rules about when appellate intervention is appropriate or permissible" but not arguing that the standard the Sixth Circuit applied was erroneous).

The courts of appeals also agree that intervention on appeal, and especially after the court of appeals has ruled, is strongly disfavored. "There is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment . . . There is even more reason to deny an application made . . . after the judgment has been affirmed on appeal." 7C Charles Alan Wright &

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[3] *See Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 558 (7th Cir. 2014), *cert. granted, judgment vacated on other grounds sub nom. Univ. of Notre Dame v. Burwell*, 575 U.S. 901 (2015) (agreeing that intervention on appeal is governed by "federal common law, with Rule 24 supplying the standard for determining whether to permit intervention in a particular case"); *Floyd v. City of New York*, 770 F.3d 1051, 1054–55, 1057 (2d Cir. 2014) (denying unions' motion to intervene on appeal); *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1102 (10th Cir. 2005) ("[A] party seeking intervention on appeal must satisfy the prerequisites of Rule 24(a)."); *Massachusetts Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) ("[W]e have held that intervention *in* the court of appeals is governed by the same standards as in the district court." (emphasis original)).

Arthur R. Miller, Federal Practice and Procedure § 1916 (3d ed. 2020).[4]

Given the settled state of the law, the court of appeals' fact-specific, discretionary determination that the Attorney General's motion was untimely does not warrant certiorari. *See* S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *see also* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions

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[4] *See, e.g.*, *Richardson v. Flores*, 979 F.3d 1102, 1104 (5th Cir. 2020) ("[M]otions to intervene on appeal are reserved for truly exceptional cases."); *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997) ("A court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court." (quoting *McKenna v. Pan Am. Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir.1962)); *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) ("Intervention at the appellate stage is, of course, unusual and should ordinarily be allowed only for 'imperative reasons.'" (quoting *Landreth Timber Co. v. Landreth,* 731 F.2d 1348, 1353 (9th Cir. 1984)); *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1552–53 (D.C. Cir. 1985) ("A court of appeals may allow intervention . . . 'only in an exceptional case for imperative reasons.' Where, as 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." (emphasis in original) (quoting *Landreth Timber Co.*, 731 F.2d at 1353)); *In re Grand Jury Investigation Into Possible Violations of Title 18, U. S. Code, Sections 201, 371, 1962, 1952, 1951, 1503, 1343 & 1341*, 587 F.2d 598, 601 (3d Cir. 1978) ("[W]hile a court of appeals has power to permit intervention that power should be exercised only in exceptional circumstances for imperative reasons.").

and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.").

For this very reason, the Court has previously denied certiorari on just such questions. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) ("[W]e decline to review the propriety of the Court of Appeals' denial of intervention."). The reasons for denying certiorari are equally applicable here:

> While the decision on any particular motion to intervene may be a difficult one, it is always to some extent bound up in the facts of the particular case. Should we undertake to review the Court of Appeals' decision on intervention, it is unlikely that any new principle of law would be enunciated.

Id. at 33.

Petitioner attempts to conjure a split by citing two Ninth Circuit cases in which a state official was allowed to intervene after a panel's decision. But the outcomes in those cases merely reflect the discretionary application of the same legal standard to different factual contexts. In neither case did the Ninth Circuit articulate any rule or principle with which the court below disagreed. On the contrary, both Ninth Circuit decisions considered the same factors as the Sixth Circuit: the stage of the proceeding, the prejudice to other parties, and the reason for and length of delay. *See* App. 109; *Peruta*

v. Cty. of San Diego, 824 F.3d 919, 940 (9th Cir. 2016) (en banc).[5]

Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc), involved consolidated Second Amendment challenges to two counties' requirements for obtaining "conceal and carry" firearms licenses. In reversing the district court's grant of the county's summary-judgment motion, the court of appeals expanded the scope of the case by deeming it to challenge not only the *counties'* rules, but the *state's* law on the same subject. *Id.* at 924 (quoting *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1171 (9th Cir. 2014) (panel decision)). Because the panel decision put the state's own law into question for the first time in the litigation, the state moved to intervene. The en banc court granted the motion, noting both that the plaintiffs did not oppose intervention, and that the panel opinion had changed the subject matter of the case: "While Plaintiffs' original challenge to the county policies did not appear to implicate the entirety of California's statutory scheme, the panel opinion unmistakably did." *Id.* at 940. Thus, "California had no strong incentive to seek intervention in *Peruta* at an earlier stage, for it had little reason to anticipate either the breadth of the panel's holding or the decision of Sheriff Gore not to seek panel rehearing or rehearing en banc." *Id.*

Here, by contrast, the panel decision did not raise any new issue on appeal. The appeal concerned exactly the same legal issue that was presented in the

[5] The Sixth Circuit's test considers two additional factors—the purpose of intervention and existence of unusual circumstances. App. 109. Petitioner does not argue that it was inappropriate for the Sixth Circuit to consider these factors.

district court, when the Attorney General had successfully sought to have his office dismissed as a party: the constitutionality of H.B. 454. App. 112 ("[T]here 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."). Moreover, the panel concluded that Attorney General Cameron was on notice of his interest in the case since December 2019, *before* oral argument and seven months before the panel's decision. App. 111–12. And unlike in *Peruta*, there was reason for the Attorney General to anticipate the Secretary's "decision regarding petitioning for rehearing en banc and certiorari, given that he himself represented the Secretary." App. 113; *see also* App. 112 ("[T]here 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.").

Day v. Apoliona, 505 F.3d 963 (9th Cir. 2007), is also distinguishable. There, the state of Hawaii had appeared as amicus curiae in proceedings before the district court and on appeal, and had presented a potentially dispositive argument on which the defendants took no position. *Id.* at 964. The district court agreed with amicus Hawaii's argument, but the panel reversed. The state then filed a motion to intervene because none of the parties would file a petition for rehearing or for rehearing en banc. *Id.*

The court determined that Hawaii's motion to intervene was timely, emphasizing that the state had participated as amicus throughout the litigation, "and—singlehandedly—argued a potentially

dispositive issue in this case to the district court and this panel." *Id.* at 966. As a result, the state's intervention would not "interject new issues into the litigation," and would not prejudice any party. *Id*.

Here, by contrast, the Attorney General, far from participating all along, successfully sought to be *dismissed* from the case at the outset. Moreover, he sought to intervene to raise third-party standing, which the "Attorney General's own office chose not to raise" on appeal, even though it represented the Secretary and could have raised the issue at oral argument or by a Rule 28(j) letter alerting the Sixth Circuit that this Court had granted certiorari on third-party standing in *June Medical Services L.L.C. v. Gee*, 140 S. Ct. 35 (Oct. 4, 2019). App. 113. *See also* Brief for Respondent/Cross-Petitioner at i, *June Med. Servs. L.L.C.*, 140 S. Ct. 2103 (Nos. 18-1323, 18-1460), 2019 WL 7372920 (dated Dec. 26, 2019); *see also* Brief for United States as Amicus Curiae Supporting Vacatur for Lack of Third-Party Standing or Affirmance on the Merits, *June Med. Servs. L.L.C.*, 140 S. Ct. 2103 (Nos. 18-1323, 18-1460), 2020 WL 58244 (dated Jan. 2, 2020).[6]

Accordingly, the only two cases Petitioner cites as evidence of a purported split are fully reconcilable

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[6] As *June Medical* reaffirmed, the rule against third-party standing is "prudential. It does not involve the Constitution's case-or-controversy requirement. And so, we have explained, it can be forfeited or waived." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. at 2117 (plurality opinion with Chief Justice concurring on this point and in judgment); *id.* at 2139 n.4 (Roberts, C.J. concurring) ("For the reasons the plurality explains, *ante,* at 2117–2120, I agree that the abortion providers in this case have standing to assert the constitutional rights of their patients.").

with the decision below. All three decisions applied the same legal standard. That the courts, in the exercise of their discretion, reached different outcomes on materially different facts does not constitute a split. The factors supporting intervention in *Peruta* (a new issue created by the panel decision implicating the state's interests for the first time, and no objection to intervention), and *Day* (no prejudice and no new issue because the state had participated as amicus raising the issue all along), are simply not present here.

Nor does the decision below present an important federal question. The petition suggests that the decision calls into question a state sovereign's ability to defend the validity of its own laws. Pet. 11–21. It does not. Kentucky's law has been defended from the outset, and indeed by the same lawyers—first in their capacity as lawyers from the Office of the Governor, and later in their capacity as lawyers from the Attorney General's office. The Attorney General was originally a defendant, and at his own request was dismissed from the case and agreed to be bound by the judgment. And because the intervention motion was untimely, the court below expressly did not reach the Attorney General's authority to file the motion, or the Commonwealth's legal interest in the subject matter of the case—the issues to which the bulk of the petition for certiorari is addressed. *See* App. 115 n.4 ("[W]e 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.").

The finding of untimeliness here does not implicate the state's authority to defend its laws in any way. It merely holds that, like everyone else, a state official must satisfy the general standards for intervention, including timeliness. Indeed, as Petitioner acknowledges, Attorney General Cameron has been granted intervention on appeal in other cases challenging the constitutionality of different Kentucky abortion laws when his intervention motions were timely filed.[7]

In short, there is no circuit split, nor any important federal question, for this Court to resolve. The legal standard for evaluating motions to intervene is well-established and uncontested. By its nature, the inquiry into whether a motion to intervene is timely is fact-specific. That the Ninth Circuit has twice allowed a state to intervene after an appellate decision reflects the different factual circumstances the court considered in an exercise of discretion—not a disagreement on the law.

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[7] *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 428 (6th Cir. 2020) (granting Attorney General's motion to intervene after argument but before the court issued a decision); *see* Mot. to Intervene at 7, *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020) (18-6161), Dkt. No. 89 (arguing that "unlike in the H.B. 454 case, the present Motion to Intervene is being filed before issuance of the panel's decision"); *cf. EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 3:19-cv-178-DJH (W.D. Ky. Nov. 30, 2020), Dkt. No. 60 (granting Attorney General's motion to intervene).

II. THIS IS AN INAPPROPRIATE VEHICLE BOTH BECAUSE PETITIONER HAS FAILED TO PURSUE AVAILABLE REMEDIES IN THE COURTS BELOW AND BECAUSE GRANTING PETITIONER'S REQUEST WOULD NOT AFFECT THE ULTIMATE OUTCOME OF THE CASE.

Petitioner seeks this Court's review of the denial of his intervention motion in order to have the panel's decision on the merits reconsidered in light of *June Medical*, 140 S. Ct. 2103. Pet. 32, 17–21. That was not the principal basis of his original motion to intervene, which focused on third-party standing, and was filed before *June Medical* was decided.[8] In any event, the petition for certiorari is an inappropriate vehicle to pursue such relief for two independently sufficient reasons. First, if Petitioner believes that *June Medical* justifies relief from the judgment, the appropriate way to raise that issue is to seek to intervene in the district court to file a motion for relief from the judgment. Certiorari is not appropriate where the Petitioner has not even exhausted the lower court avenues potentially available to him. Second, *June Medical* does not alter the analysis in any way that helps Petitioner, and therefore the dispute about the motion to intervene will not affect the ultimate outcome of this case.

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[8] Attorney General Cameron did seek to file a second en banc petition, approximately two weeks after his motion to intervene had been denied, and after *June Medical* had been decided. 6th.Cir.Dkt. 64. That petition was also rejected.

A. This Court Should Not Grant Certiorari Where the Attorney General Has Not Sought to Intervene to Seek Relief from Judgment in the District Court.

The Attorney General contends that the Sixth Circuit's decision is "no longer good law" after *June Medical*. Pet. 18. That is wrong, as we show below. *See* Point II.B., *infra.* But in any event, a petition for certiorari from the denial of an untimely intervention motion is not the appropriate vehicle to raise that assertion. The issue should first be raised in district court, and as such it is inappropriate to seek this Court's intervention to resolve it in the first instance. Where a party believes that the law or facts have changed to such a degree that equitable relief is no longer appropriate, the Federal Rules of Civil Procedure provide a mechanism for litigating that claim: a motion to modify the injunction pursuant to Rule 60(b)(5). And "[i]ntervention in the original action is . . . generally the proper mechanism for a nonparty to seek relief from an existing judgment." *Wilson v. Minor*, 220 F.3d 1297, 1301 (11th Cir. 2000) *abrogated on other grounds by Dillard v. Chilton Cty. Comm'n*, 495 F.3d 1324 (11th Cir. 2007).[9]

[9] *See also see Hines v. Rapides Par. Sch. Bd.*, 479 F.2d 762, 765 (5th Cir. 1973) ("[T]he proper course for parental groups seeking to question current deficiencies in the implementation of desegregation orders is for the group to petition the district court to allow it to intervene in the prior action."); *see also St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 273 (8th Cir. 2011) (reversing denial of motion by intervenor homeowners' association to vacate consent judgment under Rule 60(b)(2) based on claim that

Federal Rule of Civil Procedure 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)). A "significant change" in intervening law that renders continued enforcement of the judgment "onerous" or "detrimental to the public interest" can be the basis for such relief. *Rufo*, 502 U.S. at 384; *see also id.* at 388 ("[M]odification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent."); *accord Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 650 n.6 (1961).

Thus, if the Attorney General believes this Court's opinion in *June Medical* constitutes a significant change in the law, he may move to intervene in the district court to seek "relief from a judgment," and argue that "applying [the permanent injunction] prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). To be clear, we think such a motion

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consent judgment, which permitted issuance of a conditional use permit to one of the original parties, violated state law); *Karsner v. Lothian*, 532 F.3d 876, 887 (D.C. Cir. 2008) (reversing denial of intervention by Securities Commissioner in arbitration confirmation settlement that recommended expungement of licensed broker's disciplinary record and remanding to permit intervenor to bring Rule 60(b)(4) motion challenging the expungement order as void); *Pittston Co. v. Reeves*, 263 F.2d 328, 329–30 (7th Cir. 1959) (reversing denial of intervention by an unnamed class member seeking to vacate the voluntary dismissal of a class action based on allegedly deficient class notice).

should be denied for multiple reasons. But there is no need to involve this Court where a party has not exhausted his avenues for relief below.

B. *June Medical* Does Not Change the Outcome of this Case.

This case is also inappropriate for certiorari because this Court's decision in *June Medical* has no effect on the validity of the Kentucky law. This Court does not grant certiorari to resolve legal questions that would not change the result below. *See Sommerville v. United States*, 376 U.S. 909 (1964) (certiorari denied where the resolution of a circuit split could not change the outcome); *see also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192 (1997) (declining to resolve split among circuits where doing so would not affect the outcome of the case); Shapiro et al., *supra*, at 249. That is the case here; even if Petitioner were entitled to intervene, the result in the underlying litigation would not change.

Petitioner argues that application of Chief Justice Roberts's concurring opinion in *June Medical* would change the outcome of this case for three reasons. But even assuming that the concurrence is controlling, none of Petitioner's arguments withstand scrutiny.

First, Petitioner argues that the panel's application of a balancing test is "irreconcilable with the Chief Justice's opinion," contending that the panel should only have considered whether the Act imposed a substantial obstacle and not whether its burdens outweighed its benefits. Pet. 18–19. But the court of appeals considered Petitioner's burdens-only argument and held that the Act would be unconstitutional based on its burdens alone, expressly

finding that the law imposes a substantial obstacle—as Chief Justice Roberts would require. App. 17–18 n.3.

Moreover, the Kentucky law is even more clearly invalid under the standard the Chief Justice articulated. Under that approach, if an abortion restriction satisfies the "threshold requirement that the State have a 'legitimate purpose' and that the law be 'reasonably related to that goal,'" then "the only question for a court is whether a law has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" *June Medical*, 140 S. Ct. at 2138 (Roberts, C.J., concurring) (quoting *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 878, 882, 877 (1992)). That standard is plainly met here. The court of appeals held that "[b]ecause none of the fetal-demise procedures proposed by the Secretary provides a feasible workaround to H.B. 454's restrictions, it effectively prohibits the most common second-trimester abortion method, the D&E." App. 41; *see also id.* at 96 ("[I]f the court were to allow the Act to go into effect, Kentucky women would lose their right to pre-viability abortion access at or after 15 weeks.").

In *June Medical*, Chief Justice Roberts found a substantial obstacle where "the new law would reduce the number of clinics to one, or at most two, and the number of physicians in Louisiana to one, or at most two, as well . . . [and e]ven in the best case, the demand for services would vastly exceed the supply." 140 S. Ct. at 2140 (Roberts, C.J., concurring) (quotation marks and citations omitted). The Sixth Circuit's conclusion that Kentucky's law effectively prohibits the most common method of second-trimester abortions is at least as substantial an

obstacle. *Stenberg v. Carhart*, 530 U.S. 914, 949 (2000) ("By proscribing the most commonly used method for previability second trimester abortions [D&E], the statute creates a 'substantial obstacle to a woman seeking an abortion.'" (quoting *Casey*, 505 U.S. at 884)). Indeed, every court to consider a law similar to Kentucky's has agreed that it unduly burdens the right to elect abortion before viability. *See, e.g.*, *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1327, 1329–30 (11th Cir. 2018) (concluding similar law would "place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" (quoting *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016))), *cert denied sub nom. Harris v. W. Ala. Women's Ctr.*, 139 S. Ct. 2606 (2019); *see also* App.8–9 (collecting cases); *cf. Glossip v. Gross*, 576 U.S. 863, 882 (2015) ("Our review is even more deferential where . . . multiple trial courts have reached the same finding, and multiple appellate courts have affirmed those findings.").

Under the test laid out in the Chief Justice's concurring opinion, if a law imposes a substantial obstacle, whether the law provided some benefits would be irrelevant. Here, the court below found just such an obstacle and thus any balancing inured to the Commonwealth's benefit, affording it an opportunity to argue that the Act is constitutional even though it imposes a substantial obstacle. Indeed, the court of appeals expressly considered a burdens-only test—and concluded that the Act "would fail that test, too." App. 17–18 n.3.

Second, Petitioner points to the Chief Justice's statement that "state and federal legislatures have wide discretion to pass legislation in areas where there is medical and scientific uncertainty." Pet. 20

(quoting *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007))). But the Chief Justice quoted this statement from *Gonzales* only as a reason not to apply a balancing test, positing that weighing benefits and burdens in the face of uncertainty is a job for legislatures. *See June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring). This Court's precedent makes clear that blind deference to the legislature is inappropriate here. Unlike in *Gonzales*, where the statute at issue contained extensive Congressional findings, 550 U.S. at 155, Kentucky's legislature made no relevant factual findings, and therefore there was nothing to which to defer. App. 17. Moreover, even where the legislature has made findings, *Gonzales* warns that "[u]ncritical deference to [the legislature's] factual findings in these cases is inappropriate," because courts "retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake." *Gonzales*, 550 U.S. at 165–66.[10]

The Chief Justice left no doubt that when considering the evidence in the record, it is the district court's findings that are entitled to deference:

> While we review transcripts for a living, they listen to witnesses for a living.

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[10] The *Gonzales* Court, moreover, emphasized that the "three District Courts that considered the Act's constitutionality appeared to be in some disagreement on this central factual question" of whether a ban on a little-used procedure would ever subject patients to significant health risks. 550 U.S. at 162. The opposite is true here—every fact-finder to have addressed the question has found that D&E bans impose a substantial obstacle because the procedures proposed by Petitioner are infeasible and would subject women to significant health risks. App. 9–10 (collecting cases).

> While we largely read briefs for a living, they largely assess the credibility of parties and witnesses for a living. We accordingly will not disturb the factual conclusions of the trial court unless we are left with the definite and firm conviction that a mistake has been committed.

June Medical, 140 S. Ct. at 2141 (Roberts, C.J., concurring) (internal quotation marks and citations omitted). Thus, contrary to Petitioner's assertion, Pet. 19–20, the Chief Justice did not mean that the state wins whenever the district court resolves conflicting evidence *against* a state.

Third, Petitioner argues that, whereas Chief Justice Roberts noted that the Louisiana abortion providers had "attempted in good faith to comply with the law by applying for admitting privileges," *June Medical*, 140 S. Ct. at 2141 (Roberts, C.J., concurring) (internal quotation marks omitted), here the court of appeals "blessed EMW's refusal to make a good-faith effort to utilize one of the three-fetal demise techniques," Pet. 20. That is wrong. The court determined, based on record evidence, that none of the fetal-demise procedures affords a feasible means to provide D&E abortions under the Act, affirming the district court's well-supported findings: (1) that the procedures are unreliable and risk-enhancing; (2) that no amount of good-faith effort can transform an unreliable procedure into a reliable one; and (3) that no effort could erase the significant health risks

(including cardiac arrest and hemorrhage) inherent in the procedures. App. 21–38.[11]

In sum, consideration of the Chief Justice's concurrence in *June Medical* would not change the outcome of this case, and that fact affords an independent basis to deny review.[12]

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[11] With respect to the specific procedure at which Petitioner's good-faith-attempts arguments were pressed below, potassium chloride injection, the panel held that the record supports the district court's conclusion that "Plaintiffs 'have no practical way to learn how to perform this procedure safely,' due to 'the length of time it would take to learn the procedure and the lack of training available within the Commonwealth.'" App. 34 (internal quotation marks omitted). That finding, the court of appeals noted, was undisputed. *Id.*

[12] For the same reasons, Petitioner's request to grant, vacate, and remand in light of *June Medical*, Pet. 35, is unfounded. *June Medical* does not "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Because the court below found a substantial obstacle irrespective of any burdens-benefits balancing, this case is unlike the two cases Petitioner cites in which this Court granted, vacated, and remanded in light of *June Medical*. Pet. 17 (citing *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 141 S. Ct. 184 (2020) (challenge to Indiana statute requiring ultrasound at least 18 hours before abortion); *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 141 S. Ct. 187 (2020) (challenge to Indiana's parental notification statute)).

Should it wish to do so, this Court will have ample opportunity to consider *June Medical*'s impact on D&E laws in cases not presenting the question of intervention presented here. *Hopkins v. Jegley*, No. 4:17-CV-00404-KGB, 2021 WL 41927 (E.D. Ark. Jan. 5, 2021), *appeal pending* 21-1068 (8th Cir. Jan

III. THE DECISION BELOW IS CORRECT.

The court of appeals found that the Attorney General's motion to intervene was untimely under the established and undisputed standard governing intervention. That decision, which "is to be determined by the court in the exercise of its sound discretion," would be reversible only if it amounted to an abuse of discretion. *NAACP*, 413 U.S. at 366. It is plainly correct.

The court of appeals found that all five factors weighed against intervention. First, the late stage of the litigation cut "decisively against intervention" because the "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." App. 110. Motions to intervene after a court of appeals has decided a case are disfavored, because "[o]therwise, we provide potential intervenors every incentive to sit out litigation until we issue a decision

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11, 2021); *Whole Woman's Health v. Paxton*, 978 F.3d 896 (5th Cir. 2020), *reh'g en banc granted, opinion vacated,* 978 F.3d 974 (5th Cir. Oct. 30, 2020); *Planned Parenthood Southwest Ohio Region v. Yost,* 375 F. Supp. 3d 848 (S.D. Ohio 2019) (granting preliminary injunction); Minute Entry, *Planned Parenthood Southwest Ohio Region v. Yost*, 1:19-CV-00118-MRB (Aug. 26, 2020) (directing parties to "submit a simultaneous calendar for the Court to consider"); *Bernard v. Individual Members of Indiana Medical Licensing Board*, 392 F. Supp. 3d 935 (S.D. Ind. 2019) (granting preliminary injunction); Scheduling Order, *Bernard v. Individual Members of Indiana Medical Licensing Board*, 1:19-cv-01660 (Dec. 9, 2019) (setting trial for June 21, 2021); *June Medical Services LLC v. Gee*, 280 F. Supp. 3d 849 (M.D. La. 2017) (holding "Plaintiffs have sufficiently pleaded that a ban on D & E abortions could impose an undue burden"); Minute Entry/Order, *June Medical Services LLC v. Gee*, 3:16-cv-00444-BAJ-RLB (Aug. 30, 2018) (suspending discovery deadlines pending resolution of pending motions).

contrary to their preferences, whereupon they can spring to action." *Id*.

Second, the court considered the purpose of the motion to intervene, and found that it was principally to raise third-party standing, an issue Kentucky had previously waived. App. 111 &111 n.2. The Attorney General was not "picking up where Secretary Friedlander left off," as he argued below. 6th.Cir.Dkt 56 11–12. He was picking up what Secretary Friedlander (and attorneys from the Attorney General's office representing him) left out. The attempt to interject an issue previously waived was plainly prejudicial. *See*, *e.g.*, *Day*, 505 F.3d at 966 ("interject[ing] new issues into the litigation" at this stage would be prejudicial); *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1232 (1st Cir. 1992) (attempted intervention causing "last minute disruption" is prejudicial).

Third, the court correctly reasoned that "the length of time preceding the [motion] during which the proposed intervenors knew or should have known of their interest in the case," App. 109, counseled against intervention. The Attorney General had "ample notice of his interest in this case." App. 111. His office was originally named as a defendant and had agreed to be dismissed and bound by the judgment. *Id.* Cameron himself took office seven months before the court issued its decision, and Cameron and other attorneys from his office represented the Secretary on appeal. App. 111–12.

Fourth, the court found it "clear that granting the Attorney General's motion would significantly prejudice the Plaintiffs." App. 113. As noted, the principal argument on which the Attorney General

sought to intervene—that of third-party standing—was waived, and its emergence after the panel decision would have prejudiced the plaintiffs. *Id.* Indeed, "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*," did not address it at "oral argument except in response to judges' questioning," and did not raise it "via a notice of supplemental authorities filed pursuant to Federal Rule of Appellate Procedure 28(j)." App. 113. After the Commonwealth waived the third-party standing issue in the court of appeals, interjecting it after the panel decision would plainly prejudice the plaintiffs. App. 114.

Finally, the court concluded that no unusual circumstances militated in favor of intervention; in fact, "given the unusual stage at which the Attorney General seeks to intervene, we think just the opposite." App. 114. The court expressed skepticism that the Court in *June Medical* would overturn decades of precedent on third-party standing, but also noted that, if it did, "the Supreme Court's decision will prevail as a matter of course." *Id.* As explained above, if *June Medical* had indeed changed the law so as to render the injunction no longer valid, that is what Rule 60(b) is for.

Petitioner objects to the Commonwealth being treated like every other party regarding timeliness. Pet. 25. But the text of Federal Rule of Civil Procedure 24 requires no less: all intervenors, including "a Government Officer or Agency," must submit a "timely motion." Fed. R. Civ. P. 24(b)(2); *see id.* 24(a) (intervention as of right permitted "[o]n timely motion").

CONCLUSION

The petition for a writ of certiorari should be denied.

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Date: February 5, 2021