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., *et al.*,
Respondents.

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

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Through more than two years of litigation, the Secretary of Kentucky's Cabinet for Health and Family Services led the Commonwealth's defense of one of its laws regulating abortions. While this matter was before the Sixth Circuit, the Secretary retained lawyers from the Kentucky Attorney General's office to represent him. After the court of appeals upheld the permanent injunction against Kentucky's law, the Secretary decided not to seek rehearing or a writ of certiorari.

As a matter of Kentucky law, the final say on whether to accept a decision enjoining state law does not belong to the Secretary, but rests with Kentucky's Attorney General. Upon learning of the Secretary's decision, Attorney General Daniel Cameron promptly moved to intervene to pick up the defense of Kentucky's law where the Secretary had left off. The Sixth Circuit denied this motion as untimely.

The question presented is:

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Rules, Regulations and Order

Other Authorities

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INTEREST OF *AMICUS CURIAE*

Amicus Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than forty years, EFELDF has defended federalism and supported states' autonomy from federal intrusion in areas—like public health and the allocation of enforcement authority within state government—that are of traditionally state or local concern. Further, EFELDF has a longstanding interest in protecting unborn life. For these reasons, EFELDF has direct and vital interests in the questions presented.

[1] *Amicus* files this brief with all parties' written consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

STATEMENT OF THE CASE

EMW Women's Surgical Center, P.S.C. and two abortion doctors (collectively, "EMW" or "Plaintiffs") sued the Secretary of Kentucky's Cabinet for Health and Family Services and other Kentucky officers in their official capacities to enjoin enforcement of KY. REV. STAT. § 311.787 ("HB 454"). HB 454 bars the live "dismemberment" of unborn children of eleven or more weeks of probable post-fertilization age. *Id.* § 311.787(2)(b). EMW argues that HB 454 poses an undue burden on EMW's future patients' rights under *Roe v. Wade*, 410 U.S. 113 (1974), *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992), and their progeny.

A divided panel of the Sixth Circuit upheld the district court's injunction in EMW's favor, and the current Secretary—Eric Friedlander—decided not to seek further appellate review. Kentucky's Attorney General moved to intervene to defend HB 454 and timely petitioned the Sixth Circuit for rehearing *en banc*, but the same divided Sixth Circuit panel denied leave to intervene, thereby mooting the petition for rehearing without effect.

EMW's complaint asserts a civil-rights action under 42 U.S.C. § 1983:

> Plaintiffs bring this civil rights action, on behalf of themselves and their patients seeking abortions, under the U.S. Constitution and pursuant to 42 U.S.C. § 1983, to challenge the constitutionality of the Act and to seek immediate, emergent relief from this Court to enjoin its enforcement.

Compl. at 2 (¶ 2), No. 3:18-cv-0224-JHM-RSE (W.D. Ky. filed Apr. 10, 2018) (ECF #001). Similarly, EMW

alleges not only federal-question jurisdiction, but also jurisdiction under the civil rights statutes: "The Court has subject matter jurisdiction over Plaintiffs' federal claims under 28 U.S.C. §§ 1331 and 1343." *Id.* (¶ 3). In all other respects, *amicus* EFELDF adopts the facts as stated by Attorney General Cameron. Pet.'s Br 3-13.

SUMMARY OF ARGUMENT

EMW cannot dispute that Kentucky law allows the Attorney General to intervene to defend Kentucky law. Not only is Kentucky law itself clear, as Attorney General Cameron argues but the federal Constitution does not require otherwise (Section I.A); further, EMW would suffer no prejudice from the substitution of one nominal defendant for another under the pleading fiction of suing an officer to avoid a state's sovereign immunity under the Eleventh Amendment (Section I.B).

As an alternative to analogizing to intervention under FED. R. CIV. P. 24, this Court could simply—"on its own"—add Attorney General Cameron as a party by analogy to FED. R. CIV. P. 21. This Court added parties on appeal in *Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952), and the same circumstances apply here: (1) the addition would not prejudice the other parties, and (2) not doing so would lead to needless waste of litigation resources (Section II.A). Indeed, the case for adding the Attorney General is even stronger here because the original complaint named that office as a defendant, and the office was dismissed subject to being added back (Section II.B).

Finally, this Court should determine whether EMW can sue under 42 U.S.C. § 1983 to *assert federal rights* versus merely under the officer-suit pleading fiction to *enjoin ongoing violations of federal law*.

Because EMW does not possess the rights that EMW seeks to enforce—purportedly asserting those rights instead on behalf of EMW's future abortion patients—this Court should recognize that this suit proceeds under the pleading fiction of naming a state official to avoid Kentucky's sovereign immunity; recognizing this as a mere swap of nominal parties—rather than a release of a defendant who actually injured EMW—makes the change more equitable (Section III).

ARGUMENT

I. ATTORNEY GENERAL CAMERON HAS THE AUTHORITY TO INTERVENE TO REPRESENT KENTUCKY.

As Attorney General Cameron explains, Kentucky authorizes his intervening to defend Kentucky law, without regard to the wishes of the Secretary against whom EMW litigated through the Sixth Circuit panel decision. *See* Pet.'s Br 18-21. The Attorney General *can* intervene as a matter of state law, and neither the federal Constitution nor the equities pose any bar to this Court's *allowing* his intervention.

A. The federal Constitution does not impose a unitary executive on the states.

Although federal executive officers serve a unitary executive headed by the President, U.S. CONST. art. II, § 3, the same is not true for the states. *See* Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 344 (2016). States can and do have attorneys general who are independent power centers from their governors. *Harbison v. Bell*, 556 U.S. 180, 186-87 (2009) (clemency); *Graddick v. Newman*, 453 U.S. 928, 942 (1981) (opinion of Rehnquist, J.); *Commonwealth ex rel. Conway v.*

Thompson, 300 S.W.3d 152, 169 n.55 (Ky. 2009) ("although elected independently of the Governor, the Attorney General is also a member of the Executive Branch"). Indeed, the entire "doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States." *Whalen v. U.S.,* 445 U.S. 684, 689 (1980); *accord Dreyer v. People of State of Illinois,* 187 U.S. 71, 84 (1902). In short, if Kentucky has allowed its Attorney General to defend state law, independent of the Governor of Kentucky and officers like the Secretary, the U.S. Constitution does not hold otherwise.

B. EMW suffers no prejudice from the Attorney General's defending HB 454 as a nominal party on Kentucky's behalf.

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Sovereign immunity arises also from the Constitution's structure and antedates the Eleventh Amendment, *Alden v. Maine,* 527 U.S. 706, 728-29 (1999), applying equally to suits by a State's own citizens. *Hans v. Louisiana,* 134 U.S. 1 (1890). The pleading fiction of suing an officer arose in equity to allow suing the sovereign's officers in the sovereign's courts to force them to account for their misconduct. Louis L. Jaffe, *The Right to Judicial Review I,* 71 HARV. L. REV. 401, 433 (1958); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 165 (1803) ("the law… entertains no respect or delicacy [for the Crown's officers]; but furnishes various methods of detecting the errors and

misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice") (*quoting* 3 WILLIAM BLACKSTONE, COMMENTARIES *255). The theory is that, "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer,* 29 CHI. L. REV. 435, 453-54 (1962). But it is fiction:

> Under the *longstanding officer suit fiction* …, … suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity.

A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law,* 54 ADMIN. L. REV. 1, 46 (2002) (emphasis added). Fiction aside, EMW is suing Kentucky to enjoin state law.

Equity practice has long allowed pleading by or against a state through its executive officers: "In the case of *Madraso v. the Governor of Georgia*, 1 Pet., 110, it was decided, that in a case where the chief magistrate of a State is sued, not by his name as an individual, but by his style of office, and the claim made upon him is entirely in his official character, *the State itself may be considered a party on the record.*" *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 97 (1860), *overruled in part on other grounds*, *Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987) (emphasis added). As in these earlier cases, Attorney General Cameron pleads, though his office, on behalf of Kentucky.

If EMW prevails, it would not matter whether it prevailed against Secretary Friedlander or Attorney General Cameron. The name of the officer captioned in the complaint serves only to complete the fiction of *Ex parte Young*, 209 U.S. 123 (1908), that EMW is not suing the Commonwealth of Kentucky, contrary to its Eleventh Amendment immunity from suit in federal court. When the Attorney General's predecessor was, in fact, a party to the original complaint, the office was included because of its ability to enforce HB 454,[2] and the dismissal of the prior Attorney General does not prejudice the ability of the current Attorney General to intervene.

II. FEDERAL RULE 21—RATHER THAN, OR IN ADDITION TO, RULE 24—SHOULD GUIDE THIS COURT.

Attorney General Cameron justifies intervening under the standards set out in FED. R. CIV. P. 24. *See* Pet.'s Br. 21-32. While that alone would justify allowing his intervention, this Court has an easier path to the same result: "On motion or on its own, the court may at any time, on just terms, add or drop a party." FED. R. CIV. P. 21. While neither Rule 24 nor Rule 21 apply here by their terms, this Court has applied—and clearly *can* apply—those rules here by analogy.

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[2] That is not to say that *any* Commonwealth officer will do as a nominal defendant. The University of Kentucky's basketball coach, for example, is a high-ranking state officer, but he has nothing to do with the challenged law. By contrast, the Attorney General has the right to intervene not only as an official who would enforce HB 454 *specifically* but also as the Commonwealth official charged with defending Commonwealth law *generally*.

A. *Mullaney* represents a commonsense approach to appellate intervention to allow suits to proceed.

In *Mullaney*, the Court allowed union members to intervene when the government defendant challenged the union's (and sole plaintiff's) standing for the first time on appeal. In doing so, *Mullaney* relied on Rule 21 by analogy to allow the addition of union members as plaintiffs at the appellate stage for two primary reasons: (1) earlier joinder would not have changed the course of the litigation (*i.e.,* late joinder did not prejudice the other party), and (2) requiring the new parties to start over in district court would constitute a "needless waste" of resources:

> To grant the motion merely puts the principal, the real party in interest, in the position of his avowed agent. The addition of these two parties plaintiff can in no wise embarrass the defendant. *Nor would their earlier joinder have in any way affected the course of the litigation. To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration*—the more so since, with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below. Rule 21 will rarely come into play at this stage of a litigation. We grant the motion in view of the special circumstances before us.

Mullaney, 342 U.S. at 416-17 (emphasis added). The same reasons apply here, only more so.

B. The Attorney General's intervention meets the *Mullaney* factors.

The same reasons that led the *Mullaney* court to add two union members—who held the equal-protection rights at issue there—should lead the Court to allow Attorney General Cameron to join this litigation to defend Kentucky law.

First, the Attorney General's joinder would not prejudice or "embarrass" EMW: EMW even named the Attorney General as a defendant in the original complaint, and the prior Attorney General sought dismissal without prejudice to rejoining the suit if it later were necessary or desirable. *See* Pet.'s Br 8. EMW can hardly be heard to complain of something EMW itself did earlier in the litigation.

Second, if this Court were to deny intervention, the Attorney General could sue EMW for declaratory relief on the validity of HB 454, which—unless there are supervening developments—would go quickly through the district court, based on *res judicata*, and the Attorney General could seek initial hearing *en banc* in the Sixth Circuit, FED. R. APP. P. 35(c), thus returning the case to the point where it should now be, after the "needless waste" of relitigating the case up through the Sixth Circuit.

Third, having the Attorney General intervene on behalf of Kentucky as a nominal defendant *vis-à-vis* having the Secretary as a nominal defendant has far less significance here than having the union versus the members as parties in *Mullaney*. There, the members held rights that the union did not. Here, by contrast, either the Secretary or the Attorney General are mere nominal parties for Kentucky under the pleading fiction of *Young*. *See* Section I.B, *supra*.

Important cases should not hinge on such trivial distinctions.

III. THIS SUIT'S LYING UNDER THE *YOUNG* PLEADING FICTION—AND NOT UNDER § 1983—EMPHASIZES THE NOMINAL NATURE OF THE ATTORNEY GENERAL'S INTERVENTION.

In deciding whether to allow the Attorney General to intervene, the Court's task would be easier if this suit were under the *Young* fiction than under § 1983. Under § 1983, EMW must assert a federal *right*, whereas *Young* requires only a violation of federal *law*. And if the nominal defendant serves only to make a pleading fiction to bypass the Eleventh Amendment, *see* Section I.B, *supra*, less hinges on the identity of the nominal defendant. Accordingly, in deciding whether to allow the Attorney General to intervene, this Court could decide whether this suit properly lies under the *Young* exception to sovereign immunity or under § 1983. That distinction has real-world implications in addition to facilitating this Court's decision on whether to allow intervention.

By way of background, a plaintiff lacking a statutory right of action who seeks to enforce federal law in federal court against a conflicting state law can consider two alternate paths, § 1983 and the *Young* exception to sovereign immunity:

> [T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte Young,* established the modern framework for federal protection of constitutional rights from state interference.

Perez v. Ledesma, 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided

what now are 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. § 1331. *Id.* Thus, even a plaintiff who lacks a right to enforce under § 1983 can nonetheless challenge a state law as an ongoing violation of federal law under federal-question jurisdiction, third-party standing, and *Young*.

By its terms, "§1983 permits the enforcement of '*rights,* not the broader or vaguer 'benefits' or 'interests.'" *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119-20 (2005) (*quoting Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002) (emphasis in *Gonzaga*)). As such, "[i]n order to seek redress through §1983, ... a plaintiff must assert the violation of a federal *right,* not merely a violation of federal *law*." *Blessing v. Freestone,* 520 U.S. 337, 340 (1997) (emphasis in original). By contrast, a plaintiff under *Young* need only allege an ongoing violation of federal law, *Verizon Md. Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 638 (2002), and Article III and prudential standing. Abortion providers like EMW do not have rights under the Court's abortion precedents, but they may have third-party standing to assert the rights of EMW's future abortion patients.

For state defendants in official-capacity suits like this, the practical difference between officer suits under *Young* and § 1983 suits is the availability of an attorney-fee award for § 1983 suits. *See* 42 U.S.C. § 1988(b); *Kentucky v. Graham*, 473 U.S. 159, 170-71 (1985) (*citing Hutto v. Finney*, 437 U.S. 678 (1978)). This Court should recognize that this suit lies under *Young* because EMW cannot itself assert abortion-related rights to enforce under § 1983. When

recognized as an officer suit under the *Young* fiction, this Court easily can recognize that it would not prejudice EMW to have Attorney General Cameron substitute for Secretary Friedlander as the nominal defender of the challenged Kentucky law.

CONCLUSION

For the foregoing reasons and those argued by the Attorney General, this Court should reverse the Sixth Circuit's denial of the Attorney General's motion to intervene.

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Respectfully submitted,

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