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 WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## BRIEF OF FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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Date: August 20, 2021


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## INTEREST OF AMICI CURIAE[1]

*Amici* listed in the Appendix are law professors who teach and write in the fields of federal jurisdiction, civil procedure, and constitutional law. *Amici* have expertise in analyzing, and a strong interest in, a fair and coherent legal system. *Amici* believe this case involves an unauthorized attempt to manufacture appellate jurisdiction through intervention. *Amici* all agree the Sixth Circuit's decision should be affirmed or the writ should be dismissed as improvidently granted.

## SUMMARY OF ARGUMENT

Petitioner's Question Presented frames the dispute in this case as 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." *Amici* come together to explain why in this case the Court need not—and, therefore, should not—answer that important question. Rather, Petitioner's specific conduct in these proceedings, in which he agreed to be bound by the district court's final judgment in exchange for being dismissed as a defendant, and then failed to file a timely appeal before belatedly seeking to intervene, underscores why the Court of Appeals was correct to reject his intervention request. Whether there are any circumstances in which the Question Presented should be answered in

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[1] The parties have each consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

the affirmative, to do so here would be to allow Petitioner and any others contemplating a similar gambit to escape the consequences of their litigation conduct—and to thereby turn well-settled principles of appellate jurisdiction and finality on their heads.

"The taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Bowles* v. *Russell*, 551 U.S. 205, 209 (2007) (quoting *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (*per curiam*)). It is undisputed here that the Attorney General did not file a notice of appeal of the final judgment within the 30-day time period required by Federal Rule of Appellate Procedure 4, codified at 28 U.S.C. § 2107(a). Instead, the Attorney General agreed to be bound by the final judgment in exchange for his dismissal as a defendant, JA 28–30, then waited until the Sixth Circuit affirmed on the merits to contest the judgment, JA 152. Through appellate intervention, the Attorney General thus seeks to sidestep the obvious and insurmountable jurisdictional barrier to his challenge—the failure to timely appeal. Resolution of this matter should focus, as the Court has in past, on the longstanding, well-established rules that govern, and give order to, legal proceedings.

The jurisdictional bar the Attorney General seeks to evade is grounded in the separation of powers. Congress enjoys exclusive authority to define the jurisdiction of the Court of Appeals. Congress has long exercised this authority by limiting appellate jurisdiction to those appeals taken within a prescribed time period. Imposing this limitation, Congress intended to "set a definite point in time when litigation shall be at an end." *Browder* v. *Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (citation omitted). To

avoid "carr[ying] the courts beyond the bounds of authorized judicial action," *Steel Co.* v. *Citizens for Better Environment*, 523 U.S. 83, 94 (1998), the Courts of Appeals must dismiss appeals filed outside the required period.

The Attorney General's bid to intervene, if accepted, would undermine the will of Congress and violate the separation of powers. According to the Attorney General's position, a party bound by a final judgment need not meet Rule 4's deadline, for he could later seek intervention so long as another party has appealed. This would allow a party, as the Attorney General has done here, to simply sit on the sidelines while *other* parties litigate the judgment before the Court of Appeals. Then, the party could mount its 13th hour appeal through a purported "intervention."

That approach is likely to result in unfairness: parties litigate appeals in reliance on the deadlines that Congress prescribed, and should not face belated challenges from parties who miss them. This approach would also invite inefficiency: the parties and the court could be required to relitigate the appeal—particularly where, as here, the appeal has already been decided on the merits—and new arguments may necessitate remand and further appeals. Congress chose to foreclose these possibilities by imposing a clear jurisdictional deadline on the time to notice an appeal. The Court of Appeals, as a creature of Congress, was bound to respect that choice.

Beyond Congress, the Attorney General's position undermines courts' own interests in ensuring the finality of the judgments they render. "From the very foundation of our judicial system," courts have adhered to the final-judgment rule, pursuant to which "the whole case and every matter in controversy in it

[must be] decided in a single appeal." *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702, 1712 (2017) (internal quotation marks omitted). The final-judgment rule seeks, among other things, to avoid piecemeal appeals, yet that is just what the Attorney General's tactic would invite. A party may agree to be bound by a final judgment as a placeholder—making no argument to the district court and failing to appeal when others do, knowing that it could seek to challenge the judgment through intervention at some later date. That approach leaves the courts and other parties guessing as to the would-be intervenor's positions, likely resulting in needless remands and further appeals.

Federal courts have "no authority to create equitable exceptions to jurisdictional requirements." *Bowles*, 551 U.S. at 214. But even if courts had such authority, nothing in this case would warrant relaxing the bar Congress imposed. Although the Attorney General has emphasized a state's sovereign interest in defending its laws, adopting the Attorney General's position "would permit States to achieve unfair tactical advantages, if not in this case, [then] in others." *Lapides* v. *Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 621 (2002) (Eleventh Amendment). Moreover, Congress was well aware of state sovereignty when it established the rules for intervention and set the time limit for appealing a final judgment. But Congress did *not* provide the states or their representatives any different timeframe in which to appeal, as it did for the United States. And if the Attorney General assumed that the Secretary would protect his interests, he took the risk that their interests would ultimately diverge. This was hardly an unforeseen possibility, with a regularly scheduled election on the

horizon. Like any litigant, he must now face the consequences of his tactical choices. While the Attorney General no doubt has an interest in defending his state's law, he may not manufacture federal jurisdiction where Congress has provided none.

Nor did the Attorney General's dismissal excuse his failure to timely appeal. Even if the Attorney General were not a party at the time the district court entered judgment, the Courts of Appeals have long permitted nonparties to appeal when bound by an adverse final judgment, just as the Attorney General is here. Thus, nothing prevented him from timely pursuing an appeal.

Finally, the Attorney General may claim that the jurisdictional bar does not apply because he styled his challenge as a motion to intervene, rather than as an appeal. But a prior party bound by a final judgment has a ready and obvious mechanism for participating—filing its own appeal. Intervention, by contrast, has long been defined as a tool for *third parties* to enter a lawsuit for the first time. There is simply no precedent for intervention by a prior party, whose challenge—if any—belongs in the form of an appeal.

Thus, although the Attorney General's framing of the Question Presented invokes important issues regarding the separation of powers and federalism, under this Court's precedents the resolution of this specific case is simple. Bound by a final judgment, the Attorney General should have appealed but failed to comply with the deadline. This Court should affirm the Sixth Circuit's decision to deny the Kentucky Attorney General's motion to intervene—and save resolution of the question on which it granted certiorari for a case in which it is properly presented.

## ARGUMENT

### I. THE ATTORNEY GENERAL'S PROPOSED INTERVENTION WOULD VIOLATE THE SEPARATION OF POWERS AND UNDERMINE THE FINALITY OF FEDERAL COURT JUDGMENTS.

Although the Attorney General captioned his request for relief as a motion to intervene, he seeks reversal of a final judgment to which he was (and is) a party. Such relief is the essence of an appeal; intervention, by contrast, is available to third parties who have not previously appeared in the case. *See infra* § II.C. The jurisdictional limitations on appeals govern the Attorney General's attempt to contest the final judgment.

The Court of Appeals lacks jurisdiction to consider an appeal taken more than "thirty days after the entry of [final] judgment" in a civil case. *See* 28 U.S. § 2107.[2] As detailed below, this jurisdictional bar promotes the separation of powers: it mandates that the Judiciary accord respect to Congress, which has nearly exclusive authority over federal courts' jurisdiction. The limitation also protects the finality of a federal court's judgment, as exemplified by the final-judgment rule and this Court's precedents regarding Article III's requirements. These principles foreclose

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[2] While the Court of Appeals did not address the jurisdictional bar of Section 2107, a "litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance." *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004). Moreover, "courts are obliged to notice jurisdictional issues and raise them on their own initiative." *Hamer* v. *Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017).

the Attorney General's attempt to challenge through intervention the final judgment to which he is bound.

### A. The Attorney General's Approach Fails to Respect Congress' Limits on Federal Jurisdiction.

"Congress' power over federal jurisdiction is 'an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times.'" *Patchak* v. *Zinke*, 138 S. Ct. 897, 907 (2018) (quoting *Steel Co.*, 523 U.S. at 94–95). That principle has been settled since at least the nineteenth century: "Congress, having the power to establish the courts, must define their respective jurisdictions," and "[c]ourts created by statute can have no jurisdiction but such as the statute confers." *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448–49, (1850); *see also Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845) ("[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent . . . entirely upon the action of Congress."). This Court has reaffirmed this principle ever since. *See, e.g.*, *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction."); *Trainmen* v. *Toledo, P. & W.R. Co.*, 321 U.S. 50, 63–64 (1944) (Congress "exercis[es] its plenary control over the jurisdiction of the federal courts.").[3]

The time in which to appeal, in particular, provides a critical restraint on federal court jurisdiction.

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[3] *See also, e.g.*, *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 366 F. Supp. 51, 55 (D.D.C. 1973) ("When it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth, and the Congress taketh away.").

As the Court explained nearly two hundred years ago, Congress "gives the jurisdiction [and] has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions, nor to change or modify them." *United States* v. *Curry*, 47 U.S. (6 How.) 106, 113 (1848) (cited in *Bowles*, 551 U.S. at 210). Thus, when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it *must* be dismissed for want of jurisdiction." *Id.* (emphasis added); *see also, e.g.*, *Scarborough* v. *Pargoud*, 108 U.S. 567, 568 (1883) ("[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction."). "Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 212–13.

Through Section 2107(a), Congress intended "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands." *Browder*, 434 U.S. at 264 (quoting *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412, 415 (1943) (*per curiam*)). Otherwise, this Court has warned, "[w]ould-be appellants could prolong indefinitely the appeal period." *Matton Steamboat*, 319 U.S. at 415. Congress guarded against that possibility with clear jurisdictional limits on the time to appeal, which this Court has consistently respected. *See, e.g.*, *Bowles*, 551 U.S. at 209 ("[T]he taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" (quoting *Griggs*, 459 U.S. at 61)); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315

(1988); *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988); *Browder*, 434 U.S. at 264.

Congress' purpose operates with at least equal force when, as here, another party has appealed within the requisite time period. Jurisdictional obligations are *personal*: every party who seeks to contest a final judgment must do so within the time period Congress prescribed. *See Torres*, 487 U.S. at 317–18. When one party has satisfied these jurisdictional obligations, Congress provided no exception to other parties—like the Attorney General—who have not. *See id.* If federal courts allowed a party to appeal beyond the time period mandated by statute, on the ground that another party had timely appealed, they would necessarily enlarge the jurisdiction Congress granted them—which they lack the power to do. *See generally Bowles*, 551 U.S. at 214 ("[T]his Court has no authority to create equitable exceptions to jurisdictional requirements.").

To be sure, in certain instances "harsh result[s]" may follow. *Torres*, 487 U.S. at 318; *see also Hamer* v. *Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017) ("Failure to comply with a jurisdictional time prescription is a 'drastic' result." (quoting *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011))). In *Bowles*, for example, this Court held it lacked jurisdiction over a habeas petition filed by a prisoner within the time period allowed by the district court, after the district court gave the petitioner the wrong deadline. *See* 551 U.S. at 207. And in *Torres*, the Court found itself without jurisdiction to re-join a petitioner to his suit because the original notice of appeal—due to a "clerical error"—did not list

his name, instead stating "et al."[4] *See* 487 U.S. at 313–14. This "harshness . . . is imposed by the legislature and not by the judicial process." *Id.* at 318 (quoting *Schiavone* v. *Fortune*, 477 U.S. 21, 31 (1986)). The remedy, too, would have to come from the legislature. "If rigorous rules like [this] are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits." *Bowles*, 551 U.S. at 214.[5]

Permitting the Attorney General's challenge would instead "carr[y] the courts beyond the bounds of authorized judicial action and thus offend[] fundamental principles of separation of powers." *Steel Co.*, 532 U.S. at 94; *see also Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed."). Congress denied the Court of Appeals jurisdiction over appeals taken more than 30 days after final judgment. *See* 28 U.S.C. § 2107. Accordingly, "the only

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[4] *See also, e.g.*, *United States ex rel. Haight* v. *Catholic Healthcare West*, 602 F.3d 949, 953 (9th Cir. 2010) (affirming an "inequitable," but inevitable result where appellants filed notice of appeal within time period allowed by then-controlling Circuit precedent but outside the jurisdictional time period as construed by intervening Supreme Court decision (quoting *Bowles*, 551 U.S. at 214)).

[5] Since *Bowles* was decided in 2007, Congress has amended Section 2107(a) twice without a relevant change, and has promulgated no rules excusing non-compliance with its deadline. *See Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

function remaining to the court is that of announcing [the absence of jurisdiction] and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause.").

The Attorney General's framing of this case ignores not only the jurisdictional bar itself, but the principles behind it. Indeed, the Attorney General appears to recognize *no* limit on his time to contest the final judgment, so long as other parties continue to litigate. Agreeing to be bound by the district court's final judgment, the Attorney General necessarily put all parties on notice that his challenge to that judgment, if any, would come within the time period prescribed by Congress. *See* JA 29 (Attorney General "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"). When that challenge by the Attorney General did not materialize, Respondents reasonably inferred that their litigation would continue solely against the Secretary, and litigated the appeal accordingly. Then, *more than one year* after the statutory period had expired, the Attorney General sought to appeal through intervention. The Attorney General's proposed rule—a party may challenge final judgment through intervention, even after the statutory time period to appeal has passed—contravenes congressional intent. *See Browder*, 434 U.S. at 264.

From a practical perspective, the Attorney General's proposed rule would be far from "clear and easy to apply." *Hamer*, 138 S. Ct. at 20. Congress supplied that clarity and administrative efficiency with its straightforward provision: if a party seeks to challenge a final judgment, it must do so within 30

days, subject to limited exceptions that do not apply here. *See* 28 U.S.C. § 2107(a). The Attorney General's rule, by contrast, would create a new exception: a party need not appeal within this period—or within *any* period—so long as others do, for intervention provides a means to re-enter and belatedly make one's case. That exception also invites needless complexity. Intervention frequently involves a fact-intensive inquiry as courts balance multiple factors, none of which is dispositive, and endeavor to reach an equitable result. *Cf., e.g.*, *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 807 F.3d 472, 474 (1st Cir. 2015) ("Applying the[] requirements [of Rule 24(a)] calls for discretion in making a series of judgment calls—a balancing of factors that arise in highly idiosyncratic factual settings." (internal quotation marks omitted)). This inquiry would be all the more complicated where it is a prior party that seeks to intervene—distorting the equities courts traditionally weigh for third-party intervenors. *See* JA 228–51. To avoid this complexity, Congress selected a clear, uniform process for taking an appeal, and there is no warrant to disregard that process simply because the Attorney General failed to comply with it.

The Attorney General's proposed rule would also be unfair. All parties are aware of the deadline to notice an appeal; they rely on this deadline to identify their adversaries and form their strategies. In contrast, the Attorney General's approach undermines these reliance interests by allowing a belated appeal in the form of intervention. *See Tennial* v. *REI Nation, LLC* (*In re Tennial*), 978 F.3d 1022, 1028 (6th Cir. 2020) (noting parties' "reliance interests" and "expectations" with respect to deadlines to appeal). This approach also unfairly allows the prior party a preview of all other parties' arguments, as well as the

Court's reception of them—before putting its cards on the table. Such an approach is inequitable in any case, and all the more so when a party joins a matter, sits out a spell, then seeks to re-enter with a competitive advantage.[6]

### B. The Attorney General's Approach Would Undermine the Finality of Federal Court Judgments.

The Attorney General's tactic not only contravenes limits set by Congress, but also subverts the finality of judgments rendered by Article III courts. The Attorney General agreed to be bound by a "final judgment." JA 29. "[A] final judgment is one that is final and appealable." *Melkonyan* v. *Sullivan*, 501 U.S. 89, 95 (1991); *accord Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Finality "is the means for achieving a healthy legal system." *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940). As reflected by precedent concerning both the final-judgment rule and the requirements of Article III, a "final judgment" must be complete and conclusive.

The Attorney General's position would undermine the final-judgment rule. "'From the very foundation of our judicial system,' the general rule has been that 'the whole case and every matter in controversy in it [must be] decided in a single appeal.'" *Microsoft*, 137 S. Ct. at 1712 (quoting *McLish* v. *Roff*, 141 U.S. 661, 665–66 (1891)). "This final-judgment rule, now codified in [28 U.S.C.] § 1291, preserves the proper balance between trial and appellate courts,

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[6] Appellate intervenors, of course, may present their views after the parties have done so. But as discussed below, intervention is a mechanism for *third parties*, not parties bound by the final judgment on appeal. *See infra* § II.C.

minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice." *Id.*; *accord Ritzen Grp., Inc.* v. *Jackson Masonry, LLC*, 140 S. Ct. 582, 586 (2020) ("This understanding of the term 'final decision' precludes 'piecemeal, prejudgment appeals' that would 'undermine efficient judicial administration and encroach upon the prerogatives of district court judges.'" (alterations omitted) (quoting *Bullard* v. *Blue Hills Bank*, 575 U.S. 496, 501 (2015))); *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 429–30 (1985); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 (1981); *see generally* Crick, *The Final Judgment As A Basis for Appeal*, 41 Yale L.J. 539 (1932). A belated request to intervene improperly seeks to strip a "final judgment" of its finality.

Indeed, allowing the Attorney General's intervention would open the door to precisely the kind of "piecemeal" litigation the final-judgment rule seeks to prevent. According to the Attorney General, a party who has agreed to be bound by a final judgment could drop out of a lawsuit before that judgment is entered, sit on the sidelines as the Court of Appeals considers the appeal, and re-enter as an "intervenor" after the judgment is affirmed. But if the Attorney General wished to contest the final judgment, he should have defended against the suit in district court—thus providing the Court of Appeals with a complete record of the issues to be disputed on appeal. This case illustrates the inefficiency: the Attorney General staked its intervention, in part, on an argument that had already been waived by the parties that had continued litigating the case. Consideration of that argument on appeal may result in remand and further fact-finding before the district court, and potentially another

appeal. The final-judgment rule is designed to prevent such inefficiency, and this Court should reject the Attorney General's attempt to undermine it.[7]

Beyond the final-judgment rule, this Court has confirmed the importance of finality in considering the reopening of "final judgments" under Article III. As the Court explained in *Plaut* v. *Spendthrift Farm, Inc.*, "the judicial power unalterably includes the power to render final judgments." 514 U.S. 211, 231 (1995); *see also, e.g.*, *Gordon* v. *United States*, 117 U.S. App'x 697, 700–704 (1864) (opinion of Taney, C.J.) (explaining that judgments of Article III courts are "final and conclusive upon the rights of the parties"); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856) ("When [parties] have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it."). To exercise the "judicial Power" provided by Article III, federal courts must be capable of rendering "conclusive[]" final judgments. *See Plaut*, 514 U.S. at 239

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[7] Of course, the Court of Appeals may consider the positions of third-party intervenors, which may complicate any appeal. But that complexity is simply unnecessary when the prospective intervenor is, in fact, a prior party who had every opportunity to litigate before the district court and on appeal. *See generally* Wright & Miller, 7C Fed. Prac. & Proc. Juris. § 1916 (3d ed.) ("When the applicant appears to have been aware of the litigation but has delayed unduly seeking to intervene, courts generally have been reluctant to allow intervention."); *cf. United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("[W]hen cases arise, courts normally decide only questions presented by the parties." (cleaned up)).

(explaining that "the conclusiveness of judicial judgments is assuredly one" of the "major features" of the "the doctrine of separation of powers").

For that reason, *Plaut* cautions against the reopening of final judgments. *Plaut* itself concerned legislation that would have, in essence, required federal courts to reopen final judgments in certain private securities fraud actions. *See* 514 U.S. at 213.[8] Finding that the legislation violated separation of powers principles, the Court explained that, as envisioned by the Framers, Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them"—"'a judgment conclusively resolves the case' because 'a "judicial Power" is one to render dispositive judgments.'" 514 U.S. at 218–19 (emphasis in original) (quoting Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990)). But by directing the reopening of a class of final judgments, Congress encroached upon the unique province of the Judiciary to issue "judicial judgments" with "conclusive effect[s]." *Id.* at 225, 228.

The Attorney General's approach here raises comparable concerns to those in *Plaut*: intervention would allow a party to escape the "conclusive effect" of a "final judgment," even without making any argument to the trial court or taking a timely appeal. *Plaut*, 514 U.S. at 228. Such an approach invites

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[8] Specifically, *Plaut* concerned Section 27(a) of the Securities Exchange Act, which provided that any Section 10(b) suit initiated and dismissed prior to June 19, 1991—the day before the Court issued its decision in *Lampf, Pleva, Lipkind, Purpis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991)—could be reinstated upon plaintiff's motion made no later than 60 days after December 19, 1991. *Plaut*, 414 U.S. at 214–15 (citing 15 U.S.C. § 78aa-1 (1988 ed., Supp. V)).

more frequent, and less predictable, reopening of final judgments—at any time that others are litigating, a party could re-enter an action and seek reopening despite failing to appeal itself. That approach conflicts with *Plaut*: if parties may enter final judgments and urge their reopening with such ease, those judgments would lose the "dispositive" and "conclusive" character that has long defined them. *Id.* at 219, 228.

## II. THE ATTORNEY GENERAL HAS NO DEFENSE FOR FAILING TO TIMELY APPEAL THE FINAL JUDGMENT.

While the Attorney General's opening brief says little about his prior participation as a party, he may argue that the missed jurisdictional deadline to appeal does not bar his challenge to the final judgment. No such argument is persuasive.

### A. State Sovereignty Does Not Relieve the Attorney General of the Deadline to Appeal.

The Attorney General has framed this Petition as a matter of state sovereignty, pointing to his obligation to defend the constitutionality of state law. *See, e.g.*, Pet'r Br. at 6, 23, 32. But this Court has expressly cautioned against "permit[ting] States to achieve unfair tactical advantages, if not in this case, [then] in others." *Lapides*, 535 U.S. at 621 (Eleventh Amendment); *see also Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring) (arguing that the "law usually says a party must accept the consequences of its own acts," where the state of Wisconsin consented to removal then "turned around" and asserted an Eleventh Amendment bar to jurisdiction). Congress has provided state

Attorneys General with no excuse from the jurisdictional time limits on the time to appeal, and the Court of Appeals is without the power to create one.

Congress was not blind to "a State's sovereign ability to defend its laws." Pet'r Br. at 2. To the contrary, Congress expressly authorized intervention by a state's "attorney general" in any action "wherein the constitutionality of any statute of a State affecting the public interest is drawn in question"—but *only* when the "State, or any agency, officer, or employee thereof is *not* a party." 28 U.S.C. § 2403(b) (emphasis added); *see Nashville Cmty. Bail Fund* v. *Gentry*, 446 F. Supp. 3d 282, 296 (M.D. Tenn. 2020) (explaining that the "purpose" of Section 2403(b) "is to protect the interests of the state, regardless of the interests of the individual litigants"). Thus, while Congress recognized the "sovereign interests" of a state attorney general, it stopped short of permitting an attorney general's intervention in a case like this one—where a state officer (the Secretary) is *already* a party. Pet'r Br. at 28. That choice should be respected.

Similarly, Congress elected not to distinguish between states and other litigants in prescribing the time period to appeal. Congress could have done so: Section 2107(b) provides a different time period for the United States and other federal actors to appeal—without mentioning the states. *See* 28 U.S.C. § 2107. "That omission is telling." *Collins* v. *Yellen*, 141 S. Ct. 1761, 1782 (2021) (interpreting Housing and Economy Recovery Act). "[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman* v. *Maretta*, 569 U.S. 483, 496 (2013) (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616–17

(1980)). Section 2107's jurisdictional limit on appeals admits no exception for the Attorney General.[9]

More broadly, the Attorney General looks to *Virginia House of Delegates* v. *Bethune-Hill*, which noted that "a State has standing to defend the constitutionality of its statute." 139 S. Ct. 1945, 1951 (2019) (citations omitted). That is not contested here. The Attorney General may have had Article III standing to *litigate* this case, but Section 2107 nonetheless poses a statutory bar divesting the Court of Appeals of jurisdiction over his appeal. *Bethune-Hill*—like the other cases cited by the Attorney General—did not consider this jurisdictional bar, or intervention by a previously named party who exited the lawsuit. *Cf. Peruta* v. *County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Day* v. *Apoliona*, 505 F.3d 963 (9th Cir. 2007). Merely having standing is no warrant to disregard a jurisdictional time limit.

Furthermore, to the extent that the Attorney General's decision not to appeal the final judgment entailed a political judgment, that is not a basis for excusing the failure to meet jurisdictional deadlines. The Attorney General agreed to bind "the Office of the Attorney General," JA 29, regardless of the political party or persuasion of the individual who might ultimately lead that office. "[A] government official, sued in his representative capacity, cannot freely repudiate stipulations entered into by his predecessor in office during an earlier stage of the same litigation." *Morales Feliciano* v. *Rullan*, 303 F.3d 1, 8 (1st Cir. 2002);

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[9] *Cf. Utah ex rel. Utah Dep't of Env't Quality* v. *EPA*, 750 F.3d 1182, 1186 (10th Cir. 2014) (dismissing state of Utah's petition to review for lack of jurisdiction, where petition was filed after statutory deadline).

*see also, e.g.*, *Vann* v. *U.S. Dep't of Interior*, 701 F.3d 927, 929 (D.C. Cir. 2012) ("[A]n injunction entered against an officer in his official capacity is binding on the officer's successors."); 11A Fed. Prac. & Proc. Civ. § 2956 (3d ed. 2021) ("A decree binding a public official generally is valid against that official's successors in office."). That principle promotes fairness: plaintiffs know that a state officer, like any litigant, may be held to his stipulations. And while new administrations may make different, permissible litigation decisions (*e.g.*, dismissing appeals, declining to pursue certain arguments), they must comply with the binding rules of litigation—here, the obligation to file a notice of appeal, if any, on time.

### B. The Attorney General's Dismissal Does Not Authorize Appellate Intervention.

The Attorney General may argue that Section 2107 does not apply because he had (of his own volition) been dismissed at the time the district court entered final judgment. This would be a non-sequitur, because the Attorney General's dismissal did not preclude the Attorney General from pursuing an appeal. Although as a general rule "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment," *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (*per curiam*), this Court has "never [] restricted the right to appeal to named parties to the litigation," and a nonnamed party may appeal a judgment to which it is bound, *Devlin* v. *Scardelletti*, 536 U.S. 1, 10 (2002); *see also id.* (explaining that "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context").

In *Devlin*, for example, this Court held that nonnamed class members could appeal where "they are parties in the sense of being bound by the settlement." 536 U.S. at 2. And in a variety of other circumstances, the Courts of Appeals have confirmed that nonnamed individuals or entities may appeal the judgments that bind them. *See, e.g.*, *NML Cap., Ltd.* v. *Republic of Argentina*, 727 F.3d 230, 239 (2d Cir. 2013) (holding that nonparty bound by injunctions had standing to appeal); *United States* v. *Alisal Water Corp.*, 431 F.3d 643, 661 (9th Cir. 2005) (holding that nonparties bound by judgment "were required to file a separate appeal within 30 days of judgment"); *United States* v. *Kirschenbaum*, 156 F.3d 784, 794 (7th Cir. 1998) (holding that nonparty to criminal proceedings bound by injunction had standing to appeal); *Brown* v. *Bd. of Bar Examiners of State of Nev.*, 623 F.2d 605, 608 (9th Cir. 1980) (holding that dismissed parties could nevertheless apply for "appellate review of orders by which they were aggrieved").[10]

Likewise, courts have held that Rule 4's deadline applies to a party bound by final judgment, notwithstanding its prior dismissal as a named party. For example, in *Melendres* v. *Maricopa County*, the Ninth Circuit held that Rule 4's thirty-day deadline barred a party's appeal, even though the party had

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[10] *See also, e.g.*, *Bloom* v. *FDIC*, 738 F.3d 58, 62 (2d Cir. 2013) (explaining that "a nonparty may appeal a judgment by which it is bound," and "a nonparty may appeal if it has an interest affected by the judgment" (internal quotation marks omitted)); *AAL High Yield Bond Fund* v. *Deloitte & Touche LLP*, 361 F.3d 1305, 1310 (11th Cir. 2004) (explaining that "the point of *Devlin*" was "to allow appeals by parties who are actually bound by a judgment"); *Pediatric Specialty Care, Inc.* v. *Ark. Dep't of Hum. Servs.*, 364 F.3d 925, 932–33 (8th Cir. 2004) (similar).

previously been dismissed and was "not actively participating in the case at the time it would have needed to file its appeal." 815 F.3d 645, 650 (9th Cir. 2016). That is because "the Supreme Court has made abundantly clear that federal courts cannot 'create equitable exceptions to jurisdictional requirements.'" *Id.* at 651 (quoting *Bowles*, 551 U.S. at 214). The same reasoning applies here. If the Attorney General wished to contest the final judgment by which he was bound, the proper course was to notice an appeal within the time period Congress prescribed, not to seek intervention beyond it. No one has disputed that such an appeal, if timely filed, would have been procedurally appropriate.

At bottom, the Attorney General took a calculated risk, securing dismissal as a named party in exchange for an agreement to be bound by the final judgment. JA 29–30. Although he may well have hoped that the Secretary would contest that judgment on appeal, he assumed the risk that their views would ultimately diverge. "When a party decides to forego taking action in a lawsuit in the expectation that another party will protect its interests, it does so at its peril." *N.Y. Petroleum Corp.* v. *Ashland Oil, Inc.*, 757 F.2d 288, 292 (Temp. Emer. Ct. App. 1985); *see also, e.g.*, *United States* v. *County of Maricopa*, 889 F.3d 648, 653 (9th Cir. 2018) (holding that after stipulating to voluntary dismissal as a named defendant, county had "agreed to delegate responsibility for defense of the action to [other parties], knowing that it could be bound by the judgment later despite its formal absence as a party"). In short, the Secretary's presence on appeal does not relieve the Attorney General of his own obligation to appeal within the time period Congress prescribed. *See Torres*, 487 U.S. 312; *see also Kontrick*, 540 U.S. at 456 ("[A] court's subject-matter

jurisdiction cannot be expanded to account for the parties' litigation conduct."). Nor has the Attorney General provided any affirmative explanation as to why such an appeal could not have been pursued.

### C. The "Intervention" Label Cannot Overcome Congress' Jurisdictional Bar.

The Attorney General has identified no precedent for the proposition that a previously dismissed party may intervene on appeal. That makes sense: under common dictionary definitions, intervention is available only to *nonparties*. Whereas a "'party' to litigation is 'one by or against whom a lawsuit is brought,'" "intervention is the requisite method for a *nonparty* to become a party to a lawsuit." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 933 (2009) (emphasis added) (quoting Black's Law Dictionary 1154 (8th ed. 2004)). "Literally, to intervene means, as the derivation of the word indicates . . . to come between," and "[w]hen the term is used in reference to legal proceedings, it covers the right of one to interpose in, or *become a party* to, a proceeding already instituted." *Rocca* v. *Thompson*, 223 U.S. 317, 330 (1912) (emphasis added); *see also* Merriam-Webster's Dictionary, *Intervene* (defining "intervene" as, *inter alia*, "to become a third party to a legal proceeding begun by others for the protection of an alleged interest"); James WM. Moore & Edward H. Levi, *Federal Intervention I. the Right to Intervene and Reorganization*, 45 Yale L.J. 565, 565 (1936) ("[Intervention's] utility lies in offering protection to

*non-parties*." (emphasis added)).[11] Intervention is a tool designed for nonparties, rather than *former* parties, and is accordingly unavailable here.

Moreover, "[a]ppellate intervention is not a means to escape the consequences of noncompliance with traditional rules of appellate jurisdiction and procedure." *Hutchison* v. *Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000); *see also Richardson* v. *Flores*, 979 F.3d 1102, 1105 (5th Cir. 2020) (cautioning against "procedural gamesmanship" in "allowing intervention on appeal"); *see generally Kozak* v. *Wells*, 278 F.2d 104, 113 (8th Cir. 1960) (Blackmun, J.) ("[C]ourts must be on guard against the improper use of the intervention process."). Nor could a motion to intervene overcome Section 2107(a)'s jurisdictional bar: "it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 370 (1978); *see also* Fed. R. Civ. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts[.]"). Thus, when an appeal is jurisdictionally prohibited as untimely, "intervention" provides no back door to challenging a final judgment. *See, e.g.*, *Hutchison*, 211 F.3d at 519 (denying appellate inter-

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[11] *See also* Note, *The Requirement of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure*, 37 Va. L. Rev. 863, 863 (1951) ("[T]he right to intervene is an outgrowth of the early courts' interest in the rights of *third parties*, which rights might be adversely affected by the courts' processes." (emphasis added)).

vention that "is, in effect, an attempt to obtain appellate review lost by [putative intervenor's] failure to timely appeal"); *SEC* v. *Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (same where, "[r]ather than appeal the district court's injunction . . . [defendant] has instead elected to wait and attempt to 'intervene' [in co-defendant's] appeal"); *cf. Birdsong* v. *Wrotenbery*, 901 F.2d 1270, 1272 (5th Cir. 1990) (noting that even if motion is "functional equivalent" of notice of appeal, movant must still comply with jurisdictional requirements of the rules).[12]

As a prior party bound by the final judgment, the Attorney General was required to contest the judgment, if at all, within the time period Congress prescribed. Given that courts have no power to directly excuse his failure to timely notice an appeal, see *Bowles*, 551 U.S. at 209, there is no basis for distorting the doctrine of appellate intervention to allow him to do so. Where a party—including a government actor—voluntarily leaves proceedings and foregoes an otherwise available appeal, courts have neither the obligation nor the power to create, and hold open, a back door to the courthouse.

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[12] Courts routinely reject motions to intervene designed to evade other jurisdictional hurdles, such as complete diversity in a diversity action, *see Reinschmidt* v. *Exigence LLC*, 2014 WL 2047700, *3 (W.D.N.Y. May 19, 2014), or the "three strikes" rule against abusive litigation under the Prison Litigation Reform Act, *see Gumm* v. *Jacobs*, 2017 WL 4106240, at *2 (M.D. Ga. July 20, 2017) (R. & R.), *adopted*, 2017 WL 4102742 (M.D. Ga. Sept. 15, 2017).

## CONCLUSION

For the foregoing reasons, the decision below should be affirmed or the writ should be dismissed as improvidently granted.

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# APPENDIX

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