No. 20-601

In the
Supreme Court of the United States

DANIEL CAMERON, ATTORNEY GENERAL, ON BEHALF OF THE COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

EMW WOMEN'S SURGICAL CENTER, P.S.C., ON BEHALF OF ITSELF, ITS STAFF, AND ITS PATIENTS, ET AL.,
Respondents.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....................................ii

INTRODUCTION.. 1

ARGUMENT.. 2

I. The Court has jurisdiction.................................. 2

II. The Attorney General should have been permitted to intervene on behalf of the Commonwealth.. 10

A. Kentucky's sovereign interests cannot be irrelevant to the timeliness inquiry.............. 10

B. The ordinary timeliness factors overwhelmingly favor the Attorney General.................. 15

III. EMW's other arguments provide no basis to deny intervention.. 21

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Acree v. Republic of Iraq,
370 F.3d 41 (D.C. Cir. 2004) 11

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982)................................... 12

Amador Cnty. v. U.S. Dep't of the Interior,
772 F.3d 901 (D.C. Cir. 2014) 12

Bender v. Williamsport Area Sch. Dist.,
475 U.S. 534 (1986) 3

Brnovich v. Democratic Nat'l Comm.,
141 S. Ct. 2321 (2021) 4, 13, 14

Cameron v. Beshear,
--- S.W.3d ---, 2021 WL 3730708
(Ky. Aug. 21, 2021) 5

Day v. Apoliona,
505 F.3d 963 (9th Cir. 2007) (order)......... 12, 14, 19

Devlin v. Scardelletti,
536 U.S. 1 (2002) 7, 8, 9

Diamond v. Charles,
476 U.S. 54 (1986) 12

EMW Women's Surgical Ctr., P.S.C. v. Friedlander,
No. 18-6161 (6th Cir. Aug. 3, 2020)...................... 15

Ex parte Young,
209 U.S. 123 (1908) 2, 12

Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51 (1984)... 24

Hispanic Soc'y of N.Y. City Police Dep't Inc. v. N.Y. City Police Dep't, 806 F.2d 1147 (2d Cir. 1986)...... 7

Hollingsworth v. Perry,
570 U.S. 693 (2013) 4

Horne v. Flores,
557 U.S. 433 (2009) 22

June Med. Servs. L.L.C. v. Russo,
140 S. Ct. 2103 (2020) 21, 22, 23

Karcher v. May,
484 U.S. 72 (1987) 3

Lawrence on behalf of Lawrence v. Chater,
516 U.S. 163 (1996) (per curiam).......................... 23

Maine v. Taylor,
477 U.S. 131 (1986) 11, 13

Marino v. Ortiz,
484 U.S. 301 (1988) (per curiam).................... 5, 6, 7

Maryland v. King,
567 U.S. 1301 (2012) 11, 17

Melendres v. Maricopa Cnty.,
815 F.3d 645 (9th Cir. 2016) 9

Nat'l Ass'n for the Advancement of Colored People v. New York,
413 U.S. 345 (1973) 16, 17, 18, 19

New Hampshire v. Maine,
532 U.S. 742 (2001) 24

New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,
434 U.S. 1345 (1977) 11

Peruta v. Cnty. of San Diego,
824 F.3d 919 (9th Cir. 2016) (en banc) 14

Reed Elsevier, Inc. v. Muchnick,
559 U.S. 154 (2010) 24

Republic of Iraq v. Beaty,
556 U.S. 848 (2009) 11

Rufo v. Inmates of Suffolk Cnty. Jail,
502 U.S. 367 (1992) 22

Taylor v. Sturgell,
553 U.S. 880 (2008) 7

United Airlines, Inc. v. McDonald,
432 U.S. 385 (1977) 11, 16, 19, 20

U.S. ex rel. Eisenstein v. City of N.Y.,
556 U.S. 928 (2009) 5, 7, 8

Va. House of Delegates v. Bethune-Hill,
139 S. Ct. 1945 (2019) 3, 4, 5

Whole Woman's Health v. Paxton,
--- F.4th ---, 2021 WL 3661318
(5th Cir. Aug. 18, 2021) (en banc)......................... 23

Zenith Radio Corp. v. Hazeltine Rsch., Inc.,
395 U.S. 100 (1969) 6

CONSTITUTION AND STATUTES

Ky. Const. § 81 15

Ky. Rev. Stat. § 15.020(3) 5

Ky. Rev. Stat. § 15.090 5

Ky. Rev. Stat. § 15.241 24

Ky. Rev. Stat. § 15.241(1) 3

Ky. Rev. Stat. § 15.243(1) 3

RULES

Fed. R. Civ. P. 60(b)(5) 6, 21, 22, 23

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004) 5

F. James & G. Hazard, *Civil Procedure* § 11.6 (3d ed. 1985) 3

Emily Myers, *Status in State Government, in State Attorneys General Powers & Responsibilities* (Emily Myers 4th ed. 2018) 4

1 Restatement (Second) of Judgments § 40 (1980) 7

David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, & Arbitrators*, 81 Harv. L. Rev. 721 (1968) 12

INTRODUCTION

EMW is doing all it can to prevent the Court from reviewing the decision below. For the first time, EMW claims that the Court lacks jurisdiction because the Attorney General did not appeal the district court's judgment. EMW's theory is that the Attorney General, who despite being dismissed at the outset of this case without prejudice, was a "party" for purposes of an appeal because he agreed to be bound by the district court's judgment. That argument is wrong for any number of reasons. Most importantly, it suffers from the same flaw that permeates the rest of EMW's arguments: EMW ignores that the Attorney General moved to intervene in his capacity as the Commonwealth of Kentucky's chosen agent to represent its sovereign interests in court. EMW's jurisdictional argument unravels once that capacity distinction is properly understood.

On the merits, EMW provides no reason to uphold the Sixth Circuit's decision to "prematurely cut[] short the adversarial process." *See* JA 238 (Bush, J., dissenting). The Sixth Circuit expressly refused to consider the Commonwealth's sovereign interests in defending its law. It wrongly treated the Attorney General like a newcomer to this suit, rather than as the representative of the real party in interest. And it confusingly held that the Attorney General should have intervened while his office represented the Secretary in this very case. The Court should reverse and remand to allow the Attorney General to defend HB 454.

ARGUMENT

I. The Court has jurisdiction.

EMW did not contest jurisdiction in its brief in opposition. Its new jurisdictional theory goes something like this: A "party" cannot use intervention to avoid filing a timely notice of appeal. And a "party," EMW continues, includes all individuals who are bound by a judgment, no matter why they are bound. So because the Attorney General agreed to be bound by the judgment here, he should have filed a notice of appeal.

This last-minute attempt to avoid the question presented comes up short for two overarching reasons. First, the Attorney General moved to intervene in a different capacity than he participated in district court, and so EMW's jurisdictional theory does not apply here. And second, EMW is wrong that being bound by the judgment here turned the Attorney General into a party who could file a notice of appeal.

1. The Attorney General moved to intervene in a different capacity than he participated in district court. EMW sued the Attorney General in his capacity as a state official who can enforce HB 454. D.Ct.Dkt. 1 ¶ 9. EMW did not sue the Commonwealth. As EMW admits, it could not have done so. EMW Br. 40. Nor did EMW sue the Attorney General as a "representative of the state." *See Ex parte Young*, 209 U.S. 123, 157 (1908). Again, EMW could not have done so. *See id.* So when the Attorney General participated in district court, he was a party only in his capacity as a

state officer who can enforce HB 454. By contrast, the Attorney General moved to intervene in the Sixth Circuit on behalf of the Commonwealth of Kentucky. JA 152, 169; *see also* AG Br. ii.

This distinction matters. "Acts performed by the same person in two different capacities 'are generally treated as the transactions of two different legal personages.'" *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 n.6 (1986) (quoting F. James & G. Hazard, *Civil Procedure* § 11.6, p. 594 (3d ed. 1985)). This means that a party who participates in one capacity cannot appeal in a different capacity. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019); *Karcher v. May*, 484 U.S. 72, 77–78, 81 (1987). If a party desires to participate in a different capacity, the party must move to intervene. *Karcher*, 484 U.S. at 78; *Bender*, 475 U.S. at 548 n.9. It follows that a party's failure to appeal in one capacity is not a jurisdictional bar to the party later intervening in a different capacity. *Cf. Karcher*, 484 U.S. at 78 (noting that the appealing parties did "not seek leave to intervene" in new capacities before the Court).

Under Kentucky law, the Attorney General wears two different hats. On the one hand, he has the power to enforce certain state laws. *See, e.g.*, Ky. Rev. Stat. §§ 15.241(1), 15.243(1). This is the capacity in which EMW sued the Attorney General. D.Ct.Dkt. 1 ¶ 9. On the other hand, the Attorney General also has the authority to represent the Commonwealth in court. AG Br. 4–7. It is this representative capacity in which the

Attorney General moved to intervene. JA 152, 169. And he was not "silen[t]" about it. *See Bethune-Hill*, 139 S. Ct. at 1953. The Attorney General's motion to intervene stated—more than a dozen times—that he was intervening on behalf of the Commonwealth. JA 152–69.

The notion that a single official can represent a State is well established. *Hollingsworth v. Perry*, 570 U.S. 693, 709–10 (2013); *see also* Emily Myers, *Status in State Government, in State Attorneys General Powers & Responsibilities* 46, 48 (Emily Myers 4th ed. 2018) (explaining that a state attorney general can "protect[] the interests of the state as a whole as a unitary client, rather than any one of the many potential agency manifestations of the state"). Just last term, the Court recognized that Arizona's Attorney General had "Article III standing to appeal" because, under Arizona law, he "is authorized to represent the State in any action in federal court." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2336 (2021). Kentucky law similarly grants Attorney General Cameron the power to act here on the Commonwealth's behalf.[1] Ky.

[1] EMW suggests certifying this issue to the Supreme Court of Kentucky. EMW Br. 39 n.13. But there is nothing unsettled about the Attorney General's authority to speak for the Commonwealth here. EMW cites no Kentucky authority to the contrary. Instead, it mischaracterizes the Attorney General's position. The Attorney General is not arguing, as EMW claims, that a state official must get approval from the Attorney General before forgoing or dismissing an appeal. AG Br. 4–7.

Rev. Stat. §§ 15.020(3),[2] 15.090. In fact, Kentucky's high court reaffirmed only weeks ago that the Attorney General—not Kentucky's Governor—speaks for Kentuckians in court. *Cameron v. Beshear*, --- S.W.3d ---, 2021 WL 3730708, at *10 & n.21 (Ky. Aug. 21, 2021).

The bottom line is this: Whatever jurisdictional rules apply to the Attorney General in his capacity as a state official who can enforce HB 454, those rules do not apply to the Attorney General in his capacity as the representative of the Commonwealth itself. If a state official cannot switch hats on appeal, *Bethune-Hill*, 139 S. Ct. at 1953, neither can he be jurisdictionally prohibited from intervening to wear a different hat.

2. Even setting the capacity distinction aside, EMW is wrong that the Attorney General could have appealed the district court's judgment. "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). "A 'party' to litigation is 'one by or against whom a lawsuit is brought.'" *U.S. ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 933 (2009) (quoting Black's Law Dictionary 1154 (8th ed. 2004)). Although EMW sued the Attorney General, he was dismissed without

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[2] After the Attorney General filed his merits brief, the Kentucky legislature revised this statute so that the relevant language now appears in paragraph three.

prejudice early in this case. JA 29. The Attorney General therefore was not a party who could appeal the district court's judgment. *See Marino*, 484 U.S. at 304.

EMW resists this commonsense conclusion by emphasizing that the order dismissing the Attorney General, which adopts the terms of his agreement with EMW, states 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."[3] JA 29–30. This provision, EMW says, automatically makes the Attorney General a party who could file a notice of appeal. *But see* BIO 22 (arguing that the Attorney General would need to intervene in district court before seeking post-judgment relief under Federal Rule of Civil Procedure 60(b)(5)).

But the Attorney General will be bound by the judgment here not because he was a party when it was entered, but because of the agreement he reached with EMW. JA 28–32. And so it matters what that agreement says. For example, EMW agreed that the Attorney General reserved "all rights, claims, and defenses relating to whether he is a proper party in this action and in any appeals arising out of this action." *Id.* at 29. The parties' agreement thus protects, without qualification, the Attorney General's ability to participate in

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[3] This order does not purport to bind the Commonwealth. *See Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 110 (1969).

any appeal. The agreement also allows, again without limitation, the Attorney General to benefit from any alteration of the judgment on appeal. *Id.* at 29–30. The agreement also provides that it "shall not be considered in any way to be an admission or concession by Defendant Beshear that he is a proper party to this action." *Id.* at 29. Because "party status depends on 'the applicability of various procedural rules that may differ based on context,'" *Eisenstein*, 556 U.S. at 934 n.3 (citation omitted), the terms of the parties' agreement show that the Attorney General was not a party who could appeal the district court's judgment.

Any other result would vitiate EMW's and the Attorney General's agreement. When a nonparty "agrees to be bound by the determination of issues in an action between others," the nonparty is "bound in accordance with the terms of his agreement." *See Taylor v. Sturgell*, 553 U.S. 880, 893 (2008) (quoting 1 Restatement (Second) of Judgments § 40, p. 390 (1980)). EMW's attempt to bind the Attorney General to the judgment while nullifying some of their agreed-to terms should be rejected. *See Hispanic Soc'y of N.Y. City Police Dep't Inc. v. N.Y. City Police Dep't*, 806 F.2d 1147, 1153 (2d Cir. 1986), *aff'd sub nom. Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) ("Just as the settlement cannot divest a plaintiff or defendant of party status in the litigation, it cannot confer party status on a nonparty.").

EMW relies on *Devlin v. Scardelletti*, 536 U.S. 1 (2002), to argue otherwise. *Devlin* held that a

nonnamed class member who objected to a class settlement can appeal the district court's decision to disregard his objections. *Id.* at 10–11. EMW extrapolates from that narrow holding a broad rule that all nonparties who are bound by a judgment—for any reason—can appeal it. But *Devlin* stands for no such thing. Its holding, this Court later clarified, "was premised on the class-action nature of the suit." *Eisenstein*, 556 U.S. at 934 n.3. And the Court has since rejected the suggestion that *Devlin* allows every nonparty who is bound by a judgment to appeal. *See id.* at 936. That is because "nonparties may be bound by a judgment for a host of different reasons." *Id.* So the reason a nonparty is bound by the judgment matters. And here, the Attorney General is only bound because of his negotiated agreement with EMW that expressly protects his ability to participate in any appeal and to benefit from any favorable appellate decision.

This case also differs from *Devlin* in several key respects. The nonnamed class member there could appeal only because he objected to the proposed settlement. *Devlin*, 536 U.S. at 9. *Devlin*'s rule therefore depended on the class-action process providing a mechanism by which a nonnamed class member could raise objections. *Id.* at 8–9. Here, by contrast, the Attorney General could not participate after he was dismissed without prejudice unless he intervened. *Devlin* also turned on the nonnamed class member's disagreement with the class representative's decision to accept a settlement, which meant that an appeal of that issue could not be "effectively accomplished through the

named class representative." *Id.* at 9. Here, however, the Secretary appealed the district court's judgment. So an appeal by the Attorney General was not his "only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate." *See id.* at 10–11. For these reasons, to hold that the Attorney General could appeal the district court's judgment would extend *Devlin* well beyond its facts, and even further beyond its reasoning.

EMW otherwise identifies no case law in which this Court, or any court, has found jurisdiction lacking in circumstances like these. The closest EMW gets is *Melendres v. Maricopa County*, 815 F.3d 645 (9th Cir. 2016). The plaintiff there sued a county and later stipulated to its dismissal without prejudice to rejoining it as a party later in the case. *Id.* at 648. Upon an appeal by two remaining parties, the Ninth Circuit ordered the county to be substituted as a party, after which the county exhausted its appellate rights (like the Attorney General wishes to do here) by petitioning for rehearing and seeking certiorari. *Id.* Rather than focus on this procedural history, EMW emphasizes the Ninth Circuit's holding that the county, after exhausting all appeals, could not go back and file a new appeal after the deadline had passed. *Id.* at 649. The Attorney General, of course, is not trying to do that here.

II. The Attorney General should have been permitted to intervene on behalf of the Commonwealth.

EMW's arguments for why the Attorney General's motion to intervene was untimely fare no better. Just like it did in its brief in opposition, EMW ignores the sovereign interests at stake and waves away the Sixth Circuit's errors as "well within" its discretion. EMW Br. 21.

A. Kentucky's sovereign interests cannot be irrelevant to the timeliness inquiry.

Kentucky law spells out exactly how the Commonwealth's interests are represented in court. Under Kentucky law, a state official can decide whether to defend state law, but the Attorney General speaks for the Commonwealth. AG Br. 4–7. The Attorney General tried to do that here, and he did so quickly enough that his participation would not have delayed this case. Against this backdrop, EMW argues that Kentucky's sovereign interests are a "red herring." EMW Br. 3. How can that be? No delay would have resulted from granting the Attorney General's motion to intervene, and he sought only to pick up where the Secretary left off. Under these circumstances, the only way a court could find the Attorney General's motion to be untimely would be to disregard Kentucky's sovereign choice to empower the Attorney General to represent its interests when no other state official will.

That is exactly the error that the Sixth Circuit made. Although EMW asserts that the panel "considered the purpose" of the Attorney General's motion to intervene, *id.* at 26, not one word of its decision accounted for the Commonwealth's sovereign interests. In fact, the panel expressly disclaimed any consideration of this issue. JA 237 n.4.

The panel's willful blindness to Kentucky's sovereign interests cannot be justified. The permanent injunction against the enforcement of HB 454 is a "grave matter" for Kentucky. *See Maine v. Taylor*, 477 U.S. 131, 135 (1986). That is because "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). These stakes cannot be irrelevant to the timeliness inquiry; they should have predominated it. *See Acree v. Republic of Iraq*, 370 F.3d 41, 50–51 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009) (reversing timeliness holding where the district court overlooked the government's sovereignty interests).

EMW counters that the States are subject to the same intervention standard as everyone else. But the timeliness of a motion to intervene is circumstance-driven. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395–96 (1977). And one circumstance that demands emphasis here, which the court of appeals refused to consider, is that the Attorney General

sought to intervene on behalf of the Commonwealth to defend its law all the way through this Court. This fact cannot be extraneous to the analysis. At the very least, the Sixth Circuit should have had "discomfort" about prohibiting the Commonwealth from seeking further appellate review.[4] *See Day v. Apoliona*, 505 F.3d 963, 966 (9th Cir. 2007) (order); *see generally* David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, & Arbitrators*, 81 Harv. L. Rev. 721, 735 (1968) (stating that the "expansion of government intervention seems plainly desirable").

EMW discounts the Commonwealth's interests by emphasizing that it did not sue the Commonwealth. EMW Br. 35. But this misses the Attorney General's point. While EMW sued the Secretary under *Ex parte Young*, the real party in interest has always been the Commonwealth. After all, it is the Commonwealth—and it "alone"—that has "the power to create and enforce a legal code." *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)). The Secretary has the power to enforce HB 454 (and thus was sued) only because Kentucky gave him enforcement authority in the first instance. So even though EMW did not sue the Commonwealth, its "stake in the outcome of this litigation is substantial"

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[4] *Amador County v. United States Department of the Interior*, 772 F.3d 901 (D.C. Cir. 2014), is not to the contrary. For one thing, that case did not involve the constitutional defense of a sovereign's law. *Id.* at 902. For another, the lower court there specifically considered the intervenor's sovereignty concerns. *Id.* at 904.

because it "clearly has a legitimate interest in the continued enforceability of its own statutes." *See Maine*, 477 U.S. at 137.

Because the real party in interest has always been the Commonwealth, and because Kentucky law empowers the Attorney General to stand in for the Commonwealth here, the Sixth Circuit should not have treated the Attorney General like a latecomer to this case. Until the Attorney General moved to intervene, the interest he sought to represent—that of the Commonwealth—had been defended by the Secretary (for some of that time with the Attorney General's office as his counsel). This being so, the Attorney General's motion to intervene can only be understood as a handoff of the defense of state law from one state official to the agent of the real party in interest. It was not, as the Sixth Circuit seemed to believe, a tardy attempt to bring to bear a new, previously unrepresented interest. And because granting the Attorney General's motion would not have delayed this litigation by even one day, it is hard to understand the decision below as anything but a rejection of Kentucky's right to choose who defends its interests in court.

EMW does not dispute that intervention, even after an appellate decision, can be game-changing for a State. In *Brnovich*, intervention enabled Arizona to defend its sovereign interests all the way through this

Court.[5] *Brnovich*, 141 S. Ct. at 2336. In *Day*, intervention allowed Hawaii to defend its "protectable interest in the lands granted to it." *Day*, 505 F.3d at 965. And in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), intervention empowered California to contest a panel decision that "substantially impaired [its] ability to regulate firearms." *Id.* at 940. No matter the issue, and even late in an appeal, intervention is a crucial way for States to protect their sovereign interests in federal court.

One final point on this issue. EMW argues that intervention after an appellate decision should only be sparingly allowed. EMW Br. 23. But the problem with the Sixth Circuit's decision is that it makes intervention by a State impossible once a federal court of appeals upholds an injunction against state law. To reach a contrary conclusion, the Court need not greenlight appellate intervention in all or even in many circumstances. The Court needs only to rule that intervention should be allowed when the agent of a State simply seeks to exhaust all appeals in defense of state law and does so without delaying the matter.

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[5] EMW distinguishes the Ninth Circuit's 10–1 vote to allow Arizona to intervene in *Brnovich* because an existing party "was already seeking further appellate review." EMW Br. 26 n.7. But a State's interest in intervening only grows when, as here, no other party is defending its interests.

B. The ordinary timeliness factors overwhelmingly favor the Attorney General.

EMW marches through the rest of its timeliness argument by rehashing the same points made before. Although the Attorney General stands on his opening brief, AG Br. 32–44, a few points of rebuttal are in order.

1. EMW argues that the Attorney General should have intervened upon taking office in December 2019 because he knew of a "potential misalignment" between his position and the Secretary's.[6] EMW Br. 27. As evidence, EMW cites news articles reporting on statements now-Governor, then-candidate, Beshear made on the campaign trail. *Id.* at 29. But campaign statements are not litigation positions about the legality of a state law that the Governor has sworn to enforce. *See* Ky. Const. § 81. And it is not uncommon for an official to defend the constitutionality of a law even if he or she objects to it. Indeed, less than three weeks after Governor Beshear took office, his new Secretary hired the Attorney General's office to represent him in this case. JA 74–75. And at oral argument before the

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[6] One of the Respondents (the EMW clinic) took a different position when, after the ruling here, the Attorney General moved to intervene on behalf of the Commonwealth in an appeal in which the Sixth Circuit had yet to rule. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, No. 18-6161, Dkt. 90 at 2 (6th Cir. Aug. 3, 2020) (opposing intervention because "[a]t most, the Attorney General can only point to a *potential* disagreement with Secretary Friedlander's *potential* litigation strategy for further discretionary appellate review *if* Plaintiffs prevail on appeal").

Sixth Circuit, the new Secretary made the same arguments as his predecessor. So whatever the Attorney General might have initially predicted about Governor Beshear's administration, the new Secretary dispelled any such concern when he kept pressing the same vigorous defense of the law as had his predecessor.

Still, EMW reiterates the Sixth Circuit's conclusion that the Attorney General should have asked the new Secretary about his litigation plans without knowing how the Sixth Circuit would rule and then should have moved to intervene based on the Secretary's answer (assuming he gave one). Like the panel, EMW identifies no authority that requires a potential intervenor to look over his shoulder constantly while another party represents his interests—especially while the potential intervenor serves as counsel of record in the case. Such a rule would prompt those who would be only "superfluous spectator[s] in the litigation" to file "protective motions to intervene to guard against the possibility" that their interests may someday be unrepresented. *See McDonald*, 432 U.S. at 394 n.15.

To support its contrary argument, EMW relies on *National Association for the Advancement of Colored People v. New York*, 413 U.S. 345 (1973). But *New York* was a case in which time was truly of the essence, and so it is hard to compare to the situation here. In denying intervention in *New York*, the Court emphasized that allowing it "possessed the potential for seriously

disrupting the State's electoral process." *Id.* at 369. No comparable concern exists here.[7]

In any event, *New York* does not support EMW's contention that candidate Beshear's statements required the Attorney General to file a preemptive intervention motion after the new Secretary decided to keep defending HB 454 with the Attorney General's office as his counsel. EMW points to *New York*'s discussion of a newspaper article about the case and "public comment by community leaders," which allowed the district court to conclude that the intervenors "knew or should have known" of the lawsuit. *Id.* at 366–67. But the Court did not "confine [its] evaluation" to just those facts. *Id.* at 367. Instead, the Court focused on the legal filings in the case to pinpoint exactly when the intervenors should have known of their need to intervene. Key to the Court's analysis was the filing of the government's answer, which contained a statement that showed a "strong likelihood that the United States would consent to the entry of judgment." *Id.* Rather than acting to protect their interests

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[7] *New York* also upheld the district court's ruling, in part, because the intervenors did not allege a "personal" injury. *New York*, 413 U.S. at 368. The same cannot be said here. *See Maryland*, 567 U.S. at 1303 (Roberts, C.J., in chambers). The *New York* intervenors also made an "unsubstantiated" claim of inadequate representation and had another route for raising their concerns. *New York*, 413 U.S. at 368. In these ways as well, this matter differs from *New York*.

at such a “critical stage,” the intervenors delayed acting because of alleged statements made by the government’s attorneys.[8] *Id.* at 367–68.

Nothing like that occurred here. The Attorney General did not sit on his hands after the Secretary informed the Attorney General’s office of his decision to accept the Sixth Circuit’s ruling. Within two days, the Attorney General moved to intervene, JA 152–69, and five days later, he tendered a petition for rehearing and replied in support of his intervention motion, *id.* at 197–227. Thus, even if the Court overlooks the time-sensitive environment in which *New York* arose, the Attorney General did what the intervenors there failed to do.

2. EMW’s claims of prejudice also fail. To begin with, EMW does not contend that the Attorney General’s intervention motion, if granted, would have delayed this matter. Nor could EMW make such a claim, given how quickly the Attorney General moved to intervene and tendered his petition for rehearing. Instead, EMW argues that the lack of delay is irrelevant because merely having to litigate further is prejudicial. EMW Br. 31.

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[8] EMW analogizes the *New York* intervenors’ reliance on these alleged statements to the Attorney General’s reliance on the Secretary’s continued defense of HB 454. This comparison fails. Unlike in *New York*, the Attorney General did not rely on assurances purportedly made behind closed doors, but on the Secretary’s official actions.

McDonald rejected this very argument. It held that a party is not "unfairly prejudiced simply because an appeal on behalf of the putative class members was brought by one of their own, rather than by one of the original named plaintiffs." *McDonald*, 432 U.S. at 394. This reasoning translates perfectly to this case. EMW is not prejudiced because the Attorney General, rather than the Secretary, is defending the Commonwealth's interests going forward.

Another way to think about prejudice is to ask whether the timing of the Attorney General's intervention motion prejudiced EMW. *See New York*, 413 U.S. at 369; *Day*, 505 F.3d at 965. EMW seems to acknowledge that the Attorney General's motion would have been timely if made before the panel decided the merits. EMW Br. 28–29, 35. But how was EMW prejudiced by the Attorney General moving to intervene when he did rather than before the panel ruled? EMW has no answer. Instead, it argues that prejudice arose because it had a "reasonable expectation" that Governor Beshear's election would help it win this case. *Id.* at 31. But missing out on a hoped-for litigation windfall is not prejudicial, especially given that Kentucky law allows the Attorney General to speak for the Commonwealth if another state official accepts an adverse decision. And in any event, whatever "reasonable expectation" EMW may have had after the 2019 election disappeared when the new Secretary decided to press forward with the defense of HB 454.

Rather than try to reconcile its position with *McDonald*, EMW writes it off as a decision about intervention before a district court. *Id.* at 32–33. But at the same time, EMW acknowledges that the principles underlying Federal Rule of Civil Procedure 24—the civil rule applied in *McDonald*—serve as a "guide" to inform whether appellate intervention is proper. EMW Br. 23. After all, the Sixth Circuit's decision, which EMW defends, relied on Rule 24. JA 230–31. In fact, using Rule 24 as a guidepost for appellate intervention is one of the few issues on which there is any agreement between the parties. AG Br. 16–17.

EMW has good reason for wanting the Court to disregard *McDonald*'s rationale for reversing the district court's timeliness holding. *McDonald* undercuts EMW's assertion of prejudice. *McDonald*, 432 U.S. at 394. *McDonald* shows that the Attorney General acted reasonably by relying on the Secretary's decision to keep defending HB 454. *See id.* And *McDonald* demonstrates the importance of moving to intervene promptly enough that the case is not delayed, as the Attorney General did. *See id.* at 394–96; *see also id.* at 398 (Powell, J., dissenting) (recognizing this holding). On issue after issue, *McDonald* provides reason after reason to reverse.

III. EMW's other arguments provide no basis to deny intervention.

EMW makes two further arguments for why the Sixth Circuit's denial of intervention should be upheld.[9] Neither is persuasive.

1. EMW contends that Federal Rule of Civil Procedure 60(b)(5) "fully protect[s]" Kentucky's sovereign interests because it gives the Attorney General a post-judgment route to argue that the district court's judgment conflicts with *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). But Kentucky's sovereign interests are not "fully protected" by prohibiting the Attorney General from seeking en banc rehearing and certiorari now.

EMW's argument rests on the mistaken premise that the Attorney General's only defense of HB 454 is that *June Medical* renders it constitutional. One needs only to read the Attorney General's petition for rehearing, which was tendered before *June Medical*, to see how wrong that is. JA 210–26; *see also* JA 160. With or without *June Medical*, the Attorney General's position remains that HB 454 is perfectly constitutional. *June Medical* no doubt helps the Attorney General's

[9] EMW also contends that if the Court reverses the Sixth Circuit's timeliness holding, it should remand for the panel to resolve whether to allow the Attorney General to intervene on behalf of the Commonwealth. EMW Br. 41 n.14. But the Court granted certiorari to resolve this issue, and EMW offers no other valid basis to affirm the denial of intervention.

position a great deal, Pet. 18–21, but it is not the only basis on which he seeks to defend HB 454.

This shows why Rule 60(b)(5) does not "fully protect[]" the Commonwealth's sovereign interests. If the Attorney General can only pursue Rule 60(b)(5) relief, the general rule is that he "may not . . . challenge the legal conclusions" on which the judgment rests. *See Horne v. Flores*, 557 U.S. 433, 447, 453 (2009). But that is a not-insignificant part of what the Attorney General desires to do. By contrast, Rule 60(b)(5) allows the Attorney General to argue that *June Medical* constitutes "a significant change . . . in law" that makes the permanent injunction against the enforcement of HB 454 "detrimental to the public interest." *See id.* at 447 (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)). And in the meantime, EMW will be able to seek attorneys' fees and costs. D.Ct.Dkt. 131. Rule 60(b)(5), then, does far more to protect EMW than the Commonwealth's sovereign interests.

EMW's argument also diminishes this Court's role as the final arbiter of the meaning of the Constitution. It requires concluding that a State's sovereign interests are "fully protected" even though the State cannot ask this Court in the ordinary course to review whether the lower courts correctly enjoined its law. This is true, EMW claims, even if the Court issues an intervening decision about the legal issues at stake. The Sixth Circuit justified boxing the Court out in this way by emphasizing the Attorney General's high bar for securing certiorari. JA 232–33. The Sixth Circuit's

apparent point was that the Court (in the panel's estimation) would not grant certiorari if the Attorney General were allowed to intervene.[10] With good reason, EMW makes no effort to defend this part of the Sixth Circuit's decision.

EMW claims that intervening decisions from this Court are best dealt with by a Rule 60(b)(5) motion. EMW Br. 37. That is true sometimes. But for cases that remain open, the Court can grant plenary review or GVR the case in light of its recent decision. *Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam) (describing GVRs as an "integral part of this Court's practice"). As the Attorney General has explained, the Court granted GVRs in two cases in the wake of *June Medical*, both of which the Sixth Circuit relied on. AG Br. 44. These GVRs refute any suggestion that Rule 60(b)(5) "fully protect[s]" Kentucky's sovereign interests. In fact, EMW's Rule 60(b)(5) argument is in tension with the Court's GVR practice.

2. Nor is EMW's judicial-estoppel argument about the Attorney General's enforcement authority a sound basis to affirm. Whatever the status of the Attorney General's ability to enforce HB 454, the Commonwealth's interests in defending its law persist.

In any event, judicial estoppel does not apply here. EMW points to the Attorney General's response to its

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[10] For reference, the Fifth Circuit recently upheld a law like HB 454. *Whole Woman's Health v. Paxton*, --- F.4th ---, 2021 WL 3661318 (5th Cir. Aug. 18, 2021) (en banc).

motion for a temporary restraining order or preliminary injunction, which stated the Attorney General's then-position that HB 454 did not give him enforcement authority. D.Ct.Dkt. 42. But the Attorney General never sought dismissal on that basis, and the district court never ruled on the issue. In fact, the order dismissing the Attorney General without prejudice included an agreement that he would not enforce HB 454 throughout this litigation. JA 29.

That the district court never ruled on the Attorney General's enforcement authority undercuts EMW's judicial-estoppel argument. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170 (2010) (noting that the court below "did not adopt" the party's position); *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001) (holding that "[a]bsent success in a prior proceeding," there is "little threat to judicial integrity"). On top of that, EMW overlooks that judicial estoppel applies differently when it "would compromise a government interest in enforcing the law." *See id.* at 755 (citing *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984)). Thus, judicial estoppel does not apply here.[11] Even still, the Court need not rule on the Attorney General's enforcement authority to conclude

[11] This discussion is ultimately beside the point because the Kentucky legislature recently amended Ky. Rev. Stat. § 15.241 to eliminate any potential ambiguity about the Attorney General's enforcement authority. Applying estoppel here thus would not prevent any alleged unfairness to EMW. *See New Hampshire*, 532 U.S. at 751.

that the Commonwealth's sovereign interests justify intervention.

CONCLUSION

The Sixth Circuit's decision denying the Attorney General's motion to intervene on behalf of the Commonwealth should be reversed, and this matter should be remanded for further proceedings.

Respectfully submitted,

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