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

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QUESTIONS PRESENTED

The Kentucky Attorney General was one of four named defendants in this action, but rather than join in the defense of H.B. 454, he procured his dismissal by agreeing that the Office of the Attorney General would be bound by the final judgment. When the district court entered final judgment in May 2019, the Attorney General did not appeal the judgment to which he was bound. Instead, more than one year after the statutory deadline for appealing had lapsed—and *after* a Sixth Circuit panel affirmed the judgment—the Attorney General moved to intervene on appeal, asserting that he now wished to contest the judgment to which he had long been bound.

The questions presented are:

1. Whether the Attorney General is barred from intervening in an appeal filed by a different party, where the Attorney General was bound by the district court's final judgment but chose not to appeal.

2. Whether the court of appeals acted within its discretion by concluding that the motion to intervene was untimely when the Attorney General, who had previously procured his own dismissal from the suit, moved to intervene only after the court of appeals had affirmed the judgment below and sought to raise arguments that were either waived or based on speculation about a future Supreme Court decision that could be addressed through a Fed. R. Civ. P. 60(b)(5) motion.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

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

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STATUTORY PROVISIONS INVOLVED

The Kentucky law at issue in this lawsuit is codified in relevant part at Ky. Rev. Stat. § 311.787. Pet. App. 135-36.

28 U.S.C. § 2107 is reproduced in relevant part below:

> **(a)** Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> . . .
>
> **(c)** The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—
>
> > **(1)** that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
> >
> > **(2)** that no party would be prejudiced,
>
> the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from

the date of entry of the order reopening the time for appeal.

. . .

INTRODUCTION

While the merits of this case concern the constitutionality of a state abortion restriction, the issues before this Court are solely jurisdictional and procedural. The Attorney General agreed to bind himself to the final judgment below but did not appeal that judgment. Instead, more than one year after the statutory deadline for appeals had lapsed, he attempted to intervene in another party's appeal.

The Attorney General's untimely attempt to contest a judgment to which he is bound is jurisdictionally barred because he did not file a notice of appeal, and the courts have no authority to create equitable exceptions to jurisdictional requirements. To allow the Attorney General to intervene on appeal would create an impermissible end-run around Congress's express statutory limits on appellate jurisdiction.

Even if the Attorney General's belated attempt to intervene were not jurisdictionally barred, the court of appeals acted within its discretion in rejecting his motion as untimely. The Attorney General did not seek to intervene until after the panel had ruled, even though he was on notice of the potential divergence between his position and that of the remaining party long before he decided to intervene. And his motion was based on arguments that were either waived or premised on speculation about a future decision by this Court.

The Attorney General's invocations of state sovereignty are a red herring. The Sixth Circuit expressly recognized that state attorneys general may appropriately intervene to defend their states' laws, and merely applied the ordinary rule that they must do so, like anyone else, in a timely fashion. And because the arguments the Attorney General sought to advance on intervention rested on the possibility that this Court might change the governing law in *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020), he could (and still can) pursue those arguments in district court under Federal Rule of Civil Procedure 60(b)(5). Thus, the court of appeals' decision did not preclude the Attorney General from defending the validity of the statute at issue on the grounds he asserted in his motion to intervene. Any sovereign interest in the defense of Kentucky's laws remains fully intact.

STATEMENT OF THE CASE

District Court Proceedings

On April 10, 2018, Kentucky enacted H.B. 454, which prohibits the standard second-trimester abortion method, known as "dilation and evacuation." EMW Women's Surgical Center and its two obstetrician-gynecologists ("Plaintiffs" or "Respondents") filed suit pursuant to 42 U.S.C. § 1983, contending that the law violates the Fourteenth Amendment by imposing an undue burden on the right to pre-viability abortion.

The complaint named four defendants, each in their official capacity: the Kentucky Attorney General, the Interim Secretary ("Secretary") of

Kentucky's Cabinet for Health and Family Services ("Cabinet"), the Executive Director of the Kentucky Board of Medical Licensure ("KBML"), and the Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky ("Commonwealth's Attorney"). D.Ct.Dkt. 1.

Three defendants—the Attorney General, the Secretary, and the Executive Director of the KBML—filed separate responses to Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction. D.Ct.Dkt. 42, 43, 44. The Commonwealth's Attorney did not file a response. The Attorney General's response asserted solely that his office lacked authority to enforce H.B. 454. D.Ct.Dkt. 42. Specifically, the Attorney General stated:

> The Attorney General takes the position that the requested Restraining Order enjoining his enforcement of Kentucky House Bill 454 (hereinafter "H.B. 454") would be a nullity with no operative legal effect. H.B. 454 does not confer upon the Attorney General the authority or duty to enforce the provisions as enacted. Moreover, H.B. 454 does not provide the Attorney General with any regulatory responsibility or other authority to take any action related to the Act.
>
> Therefore, there is no act of the Attorney General or his Office for the Court to enjoin.

D.Ct.Dkt. 42, at 1; *but see* JA 168 (later seeking intervention on the basis of Attorney General's enforcement authority under H.B. 454).

Three days later, the Attorney General filed a Proposed Agreed Order and Stipulation of Dismissal of Attorney General Beshear on Conditions, pursuant to Federal Rule of Civil Procedure 41(a)(2), D.Ct.Dkt. 46, which the district court granted on May 21, 2018, JA 29. In exchange for being released as a defendant, "Defendant Beshear, in his official capacity as Attorney General of the Commonwealth of Kentucky, agree[d] that any final judgment in this action concerning the constitutionality of H.B. 454 (2018) will be binding on the Office of the Attorney General, subject to any modification, reversal or vacation of the judgment on appeal." JA 29-30 ¶ 3(d). The dismissal was without prejudice to Plaintiffs reinstating their claims against the Attorney General, who in turn "reserve[d] all rights, claims, and defenses that may be available to him, and specifically reserve[d] 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." JA 29 ¶¶ 3(a), (b). Upon entry of the order, the Attorney General was dismissed and did not participate in any further proceedings before the district court.

The parties also stipulated to the dismissal of the Executive Director of the KBML. D.Ct.Dkt. 52. Neither the Commonwealth's Attorney nor the Secretary sought dismissal. The Secretary took the lead in defending the law in the district court.

The district court conducted a five-day bench trial in November 2018, during which Plaintiffs and the Secretary presented extensive testimony and documentary evidence. After the close of the Plaintiffs' case, the Secretary made an oral motion for

a directed verdict that included a cursory argument that Plaintiffs lacked third-party standing. (The argument covers about one page of the transcript. D.Ct.Dkt. 108, at 104-05.) The district court denied the motion in full and noted as to third-party standing that if the "argument had any merit, given the state of the law, you should have made it a long time ago." D.Ct.Dkt. 108, at 105.

On May 10, 2019, the district court issued a permanent injunction, declared H.B. 454 unconstitutional, and entered final judgment in Plaintiffs' favor. JA 15-16.

Court of Appeals Proceedings

Only the Secretary filed a notice of appeal. JA 16, 19. None of the other parties bound by the judgment, including the Attorney General, chose to appeal.

After the appeal was fully briefed, but before argument, then-Attorney General Andrew Beshear was elected Governor. Daniel Cameron was elected Attorney General. Beshear's views on abortion generally—and on Kentucky's laws restricting abortion access in particular—were a topic of public debate during the campaign, with Beshear's opponents criticizing his support for abortion during the campaign and his refusal to defend abortion restrictions while Attorney General.[1] Shortly after the election, on December 9, 2019, four of the

[1] Rachana Pradhan, *Abortion Could Decide Kentucky's Close Governor's Race*, Politico (Nov. 4, 2019), https://www.politico.com/news/2019/11/04/abortion-could-decide-kentuckys-close-governors-race-065382#.

Secretary's lawyers moved to withdraw from the case, explaining "they no longer will be employed in their current positions with the Office of the Governor of Kentucky." JA 71. A few weeks later, these same four lawyers, now working in the Office of the Attorney General, filed notices of appearance as counsel for the Secretary. JA 74-81. Attorney General Cameron also entered his appearance in the case as counsel for the Secretary. JA 82-83. The Attorney General did not, however, seek to intervene at that point. The case was argued before the Sixth Circuit on January 29, 2020.

On June 2, 2020, the court of appeals affirmed the district court's judgment. Regarding standing, the court noted that the Secretary waived any argument that Plaintiffs lack third-party standing by not pursuing it on appeal. JA 94-95. It further stated that, in any event, it "need not answer that question now because this case does not present any third-party standing issue," given Plaintiffs' standing to sue on their own behalf. JA 94-95.

On the merits, the Sixth Circuit concluded that the "thorough judicial record [compiled] over the course of a five-day bench trial," JA 93, amply supported the district court's factual findings, JA 104-21; *see also* JA 92 (noting multiple courts had enjoined similar laws). On the basis of those findings, the court of appeals concluded that H.B. 454 "effectively prohibits the most common second-trimester abortion method," thereby violating the Fourteenth Amendment "under any version of the undue burden analysis." JA 124 & n.9.

Judge Bush dissented. He would have held that the Plaintiffs lacked third-party standing and stated

that the panel should have delayed issuing an opinion pending this Court's disposition of *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020) ("*June Medical*"), because "one of the questions raised [in that case] is whether abortion providers have third-party standing," JA 136-51. Although he thought that the evidence showed the plaintiffs lacked third-party standing, he did not conclude that the district court's factual findings were clearly erroneous, or that its holding that the law imposed a substantial obstacle was wrong as a matter of law.

Motion to Intervene

On June 11, 2020, Attorney General Cameron and the lawyers from his office who had appeared as counsel for the Secretary moved to withdraw as counsel for the Secretary. 6thCir.Dkt. 54. The same day, the Attorney General moved to intervene as a party, notwithstanding his prior dismissal and failure to appeal. JA 152. Five days later, the Attorney General tendered a petition for rehearing en banc. JA 210.

The motion to intervene stated that the Attorney General sought intervention for three reasons: Because "[i] the Supreme Court's imminent decision in *June Medical* may fundamentally alter the standing analysis required in abortion litigation and [ii] may clarify the meaning and scope of [*Whole Woman's Health v. Hellerstedt*], and [iii] because of Secretary Friedlander's decision not to pursue this case further." JA 156. The Attorney General invoked two state laws that authorize, but do not obligate, the Attorney General to represent the Commonwealth's interest in litigation. JA 164 (citing Ky. Rev. Stat. §§

15.020, 418.075(1)). The Attorney General also asserted, contrary to his previous representations, that his Office "has specific authority to administer H.B. 454," including to "seek injunctive relief to prevent violations of [H.B. 454]." JA 168.

On June 24, 2020, the court of appeals denied the motion to intervene and dismissed the petition for rehearing en banc. JA 237. The court did not "question whether states' attorneys general may appropriately intervene to defend their states' laws in some—or indeed, even in many—situations." JA 237. But it found the motion untimely and denied intervention because the Attorney General could not satisfy this "necessary element." JA 236-37.

The court identified five considerations supporting its conclusion. First, intervention after a panel has decided the appeal is disfavored. "Otherwise, we provide potential intervenors every incentive to sit out litigation until we issue a decision contrary to their preferences, whereupon they can spring to action." JA 232. Second, "the foremost argument that the Attorney General [sought] to advance on rehearing [was] a third-party standing argument that the Secretary elected not to present to this Court on appeal." JA 233. Third, the Attorney General had "ample opportunity" to intervene earlier because he "was put on notice of his interest when he swore his oath of office in December 2019, before this Court heard oral argument in the case and seven months before its decision." JA 233-34. Fourth, "granting the Attorney General's motion would significantly prejudice Plaintiffs," as the third-party standing argument he sought to raise "[was] not raised before

this Court and not argued in any particulars before the district court." JA 235-36. Finally, it noted that the motion was predicated on speculation that this Court's still-pending decision in *June Medical* would change the law. The court of appeals explained that if the Attorney General's prediction was correct, "the Supreme Court's decision will prevail as a matter of course." JA 236. Judge Bush dissented. JA 238-51.

On July 7, 2020, Attorney General Cameron tendered a second en banc petition, this time for review of the order denying intervention. JA 252. The second petition was rejected for filing, again over Judge Bush's dissent. JA 270-72.

Although the Sixth Circuit's rules allow any of the judges on that court to call for rehearing en banc sua sponte, no judge did so at any point in this case. 6th Cir. I.O.P. 35(e); *see also Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020).

The Attorney General filed a petition for certiorari asking this Court to reverse the Sixth Circuit's decision to deny his post-judgment motion to intervene as untimely. He also asked the Court to "vacate the judgment below and remand for further consideration in light of *June Medical*." Pet. 32. The Court granted the petition limited to the intervention question.

SUMMARY OF ARGUMENT

I. The Attorney General agreed to be bound by final judgment and did not file a timely appeal of that judgment. He cannot now invoke the equitable practice of appellate intervention as an end-run around his jurisdictional failure to appeal. The filing

of a timely appeal under 28 U.S.C. § 2107 "is mandatory and jurisdictional." *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (quotation marks and citation omitted). And this jurisdictional requirement is personal: Federal courts have no power to extend appellate jurisdiction properly invoked by another party to one who fails to satisfy jurisdictional prerequisites. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). Because courts have "no authority to create equitable exceptions to jurisdictional requirements," *Bowles*, 551 U.S. at 214, the Attorney General's failure to file a timely appeal of the final judgment means his belated attempt to join the Secretary's appeal is jurisdictionally barred.

II. Even if the Attorney General's motion to intervene were not jurisdictionally barred, the denial of a request to intervene after an appeal has run its course through panel decision can be set aside only if the denial constitutes an abuse of discretion. There was no abuse here. Intervention on appeal is permissible only in exceptional cases for imperative reasons, and intervention sought after a panel decision is especially disfavored. The Sixth Circuit carefully applied the factors that courts routinely consider in evaluating the timeliness of intervention motions to the circumstances of this case and correctly determined that the Attorney General's belated attempt to intervene was untimely.

The Attorney General's characterization of the Sixth Circuit's decision as frustrating the Commonwealth's sovereign interest in defending its laws is wrong. Kentucky's interest in defending its law remains fully protected by Federal Rule of Civil

Procedure 60(b)(5). The Attorney General sought to intervene to be in a position to argue that this Court's then-forthcoming decision in *June Medical* changed the governing law and rendered the injunction invalid. But the proper vehicle for such an argument is a Rule 60(b)(5) motion in district court, *after* the law has changed, not a belated motion to intervene on appeal, before the Supreme Court has even ruled. If the Attorney General believes that a change in law renders prospective injunctive relief inequitable, he is free to file that motion.

Nor, as the Attorney General contends, did the Sixth Circuit close the courthouse door to the agent designated to represent Kentucky in court. The Attorney General closed the door himself. As a named defendant, he affirmatively sought and obtained his dismissal, agreed to be bound by the final judgment, and ceded defense of H.B. 454 to other officials. He cannot evade the ordinary rules of intervention by casting this case as a suit against the Commonwealth and deeming his attempted intervention as mere substitution of one of the state's alter egos for another. Under *Ex parte Young*, 209 U.S. 123, 157 (1908), and 42 U.S.C. § 1983, this case is and always has been a case against individual *persons* (in their official capacities), not the state itself, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997).

III. The Attorney General's about-face concerning the defense of the statute at issue further supports the court of appeals' decision. Whatever interests the Attorney General has in defending state laws in general, in *this* case he renounced any enforcement authority under H.B. 454, ceded the ability to defend

the statute to other state officials, and induced the district court to dismiss him on condition that he would be bound by its final judgment. After the Sixth Circuit resolved the appeal, the Attorney General reversed his position: He sought to defend H.B. 454, and he asserted as a basis for intervention the very enforcement authority under H.B. 454 he had previously renounced. The Attorney General should not be permitted to re-enter the suit on appeal after having procured his own dismissal, particularly on the basis of a justification that directly contradicts the position he advanced to secure his dismissal in the first place.

ARGUMENT

I. THE ATTORNEY GENERAL IS JURISDICTIONALLY BARRED FROM INTERVENING BECAUSE HE WAS BOUND BY FINAL JUDGMENT AND FAILED TO TIMELY APPEAL.

The Attorney General's belated effort to intervene on appeal is an impermissible attempt to evade the laws governing appellate jurisdiction. The Attorney General was a party to the final judgment by virtue of the conditions he agreed to in order to secure his dismissal from the suit at the outset. Yet he did not appeal from that final judgment within the jurisdictional thirty-day time limit. A party that fails to appeal a final judgment by which he is bound cannot evade the consequences of that jurisdictional defect by seeking to obtain the same benefits through intervention.

A. The Attorney General's Failure to Appeal a Judgment to Which He Was Bound Deprived the Court Below of Jurisdiction.

Pursuant to 28 U.S.C. § 2107(a), and subject to exceptions not relevant here, any party that seeks to appeal a final judgment must file a notice of appeal within thirty days after the entry of such judgment. Unless a party to a judgment is named or otherwise described in a timely notice of appeal, a court of appeals cannot exercise jurisdiction over their appeal. *Torres*, 487 U.S. at 315.

These requirements are "'mandatory and jurisdictional,'" *Bowles*, 551 U.S. at 209 (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982)); *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 (2017) ("If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional."); *Gonzales v. Thaler*, 565 U.S. 134, 159 (2012) (Scalia, J., dissenting). And by implementing these statutory limitations, Federal Rules of Appellate Procedure 3 and 4 create "a single jurisdictional threshold" for a party to a judgment seeking to contest that judgment on appeal. *Torres*, 487 U.S. at 315; *accord Gonzales*, 565 U.S. at 147. Respondents did not raise this argument previously, but because the Attorney General's failure to appeal the final judgment "is one of jurisdictional magnitude," *Bowles*, 551 U.S. at 213, it may be raised by any party or the Court itself at any stage in the litigation, *see, e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006).

Courts have "no authority to create equitable exceptions to [these] jurisdictional requirements." *Bowles*, 551 U.S. at 214; *accord Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). "Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former." *Torres*, 487 U.S. at 315. This is true even when strict adherence to the jurisdictional requirements results in harsh outcomes. *See, e.g.*, *Bowles*, 551 U.S. at 207 (holding Court was powerless to grant relief to petitioner facing life sentence who failed to file timely appeal because district court "inexplicably" gave petitioner wrong deadline); *Torres*, 487 U.S. at 313-14 (holding Court was powerless to re-join petitioner to his suit because his name had been omitted from notice of appeal, even though it was "undisputed" that omission was a clerical error).

Here, the Attorney General stipulated as a condition of his dismissal from the suit that the Office of the Attorney General would be bound by the final judgment. JA 29-30. The Attorney General, like any other "person who agrees to be bound by the determination of issues in an action between others[,] is bound in accordance with the terms of his agreement." *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008) (quoting 1 Restatement (Second) of Judgments § 40, at 390 (1980)); *see e.g., California v. Texas*, 459

U.S. 1096, 1097 (1983).[2] As a party bound by final judgment, the Attorney General was obligated to file a timely appeal if he wished to contest that judgment. *See Melendres v. Maricopa County*, 815 F.3d 645, 650, 651 (9th Cir. 2016) (quoting *Bowles*, 551 U.S. at 214) (holding party bound by judgment was subject to thirty-day deadline for filing notice of appeal even though it was dismissed as named party and "not actively participating in the case at the time it would have needed to file its appeal" because "the Supreme Court has made abundantly clear that federal courts cannot 'create equitable exceptions to jurisdictional requirements'"). Yet the Attorney General did not file an appeal.

The Secretary's timely filing of an appeal does not relieve the Attorney General of the consequences of this jurisdictional defect. Each party who seeks to appeal must do so within the applicable time frame. *Torres*, 487 U.S. at 315, 317; *Gonzales*, 565 U.S. at 147; *accord* Fed. R. App. P. 3 advisory committee's notes to 1993 amendments (explaining amended rule will sustain appeal from unnamed party only if "it is objectively clear [from notice of appeal] that a party intended to appeal"). And "this Court recognizes no

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[2] "[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); *see also* 18A Fed. Prac. & Proc. Juris. § 4458 (3d ed. 2021); 11A Fed. Prac. & Proc. Civ. § 2956 (3d ed. 2021); *City of New Orleans v. Citizens' Bank of La.*, 167 U.S. 371, 388-89 (1897) ("[T]he mere fact that there has been a change in the person holding the office does not destroy the effect of the thing adjudged.").

general equitable doctrine . . . which countenances an exception to the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 400-01 (1981).

Nor does the Attorney General's voluntary dismissal as a defendant under Federal Rule of Civil Procedure 41 excuse his failure to appeal. *Cf. Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1715 (2017) (litigants cannot use Rule 41 dismissal as end-run around 28 U.S.C. § 1291's finality requirement for appellate jurisdiction). As this Court has explained, "[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," and this Court "never [] restricted the right to appeal to named parties to the litigation." *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002); *see also id.* at 7-11; *Bloom v. F.D.I.C.*, 738 F.3d 58, 62 (2d Cir. 2013) (a nonnamed party "may appeal a judgment by which it is bound" (internal quotations and citations omitted)); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Hum. Servs.*, 364 F.3d 925, 932-33 (8th Cir. 2004) (non-party agency bound by injunction could appeal directly without first intervening in district court); *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1309-10 (11th Cir. 2004) (nonnamed parties who are "actually bound by a judgment" may file appeal without first intervening in district court).[3] Those who have the right to appeal

[3] The Attorney General's agreement to be bound by the final judgment thus differentiates this case from those where a nonnamed party is not so bound, but is merely in privity with a

must exercise that right within the jurisdictional limits. To permit the Attorney General to intervene in an appeal that he could have but did not pursue would be "equivalent to permitting courts to extend the time for filing a notice of appeal." *Torres*, 487 U.S. at 315.

In short, "a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct." *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004). "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 United States v. County of Maricopa*, 889 F.3d 648, 653 (9th Cir. 2018) (holding that, by jointly moving for dismissal under Rule 41, former defendant "agreed to delegate responsibility for defense of the action to [remaining parties], knowing that it could be bound by the judgment later despite its formal absence as a party"), *cert. denied*, 139 S. Ct. 1373 (2019). By the terms of his dismissal, the Attorney General was bound by the final judgment, and had thirty days to appeal. Having failed to do so, his belated attempt to join the Secretary's appeal is jurisdictionally barred. *Bowles*, 551 U.S. at 214; *Torres*, 487 U.S. at 315.

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named party or has an interest in the subject matter of the case. *See Marino v. Ortiz*, 484 U.S. 301 (1988); 5 Am. Jur. 2d *Appellate Review* § 235 (2021); *AAL High Yield Bond Fund*, 361 F.3d at 1310 ("[T]he point of *Devlin* . . . was to allow appeals by parties who are actually bound by a judgment, not parties who merely *could* have been bound by the judgment" or that are "*effectively* bound by judgment.").

B. Appellate Intervention Affords No End-Run Around These Jurisdictional Limits.

It is no answer to the failure to appeal that the Attorney General is merely seeking permissive intervention in an existing appeal. The equitable practice of "[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) (denying appellate intervention that "is, in effect, an attempt to obtain appellate review lost by [putative intervenor's] failure to timely appeal the denial of her motion to intervene in district court"); *S.E.C. v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (denying appellate intervention where, "[r]ather than appeal the district court's injunction [o]rder . . . [defendant] has instead elected to wait and attempt to 'intervene' [in co-defendant's] appeal"); *cf. Melendres*, 815 F.3d at 649 (no exception to jurisdictional failure to appeal district court's judgment "allows a party to appeal from *an appellate decision* with which it disagrees" instead). None of the intervention cases relied upon by the Attorney General, including the handful of orders it cites by this Court granting intervention at the certiorari stage, Pet'r Br. 27, 38, are to the contrary, as none of them involved attempted intervention on appeal by a party to the judgment who could have appealed, but failed to do so.

Intervention is not an optional alternative to following the rules for filing an appeal. Intervention is "the procedure by which a *third party not originally a party to the suit,* but claiming an interest in the

subject matter, comes into the case." *Dunlap*, 253 F.3d at 774 n.11 (quoting Black's Law Dictionary 820 (6th ed. 1990)); *see also Intervention*, Black's Law Dictionary (11th ed. 2019) (defining "Intervention" as "[t]he entry into a lawsuit by a third party who, *despite not being named a party to the action*, has a personal stake in the outcome" (emphasis added)); 7C Fed. Prac. & Proc. Civ. § 1901 (3d. ed. 2021) (defining "Intervention" as "a procedure by which an *outsider* with an interest in a lawsuit may come in as a party *though the outsider has not been named as a party by the existing litigants*" (emphasis added)). If a plaintiff fails to name the appropriate officials to a suit, appellate intervention by such an "outsider" may be appropriate. But where, as here, Plaintiffs satisfied their obligation to name all parties against whom relief was sought and secured binding judgments against each of them, *cf. Martin v. Wilkes*, 490 U.S. 755, 761-65 (1989), appellate intervention cannot be used as a revolving door to evade statutory limits on appellate jurisdiction, *Hutchison*, 211 F.3d at 519; *Dunlap*, 253 F.3d at 774.

This Court has never sanctioned the use of appellate intervention as an end-run around a failure to file a timely appeal—and with good reason. Permitting a party to a judgment who chooses not to appeal the judgment to avoid the jurisdictional consequences of that choice by using intervention would "vitiate[]" the "mandatory nature" of these jurisdictional limits. *Torres*, 487 U.S. at 315. This Court reached a similar conclusion in *Microsoft Corp. v. Baker* when it held that a plaintiff could not evade 28 U.S.C. § 1291's finality requirement by using

voluntary dismissal with prejudice to transform an otherwise interlocutory order into a final judgment. 137 S. Ct. at 1715. Here, as in *Microsoft*, "Congress's [statutory time limit for appealing a civil judgment] would end up a pretty puny one" if it could be skirted any time "a litigant persuades [an appellate] court to issue an order [granting intervention]." *Id.* Like voluntary dismissal, appellate intervention is not a solution to a jurisdictional bar. *Id.* at 1714.

Accordingly, while courts of appeals have discretion to permit outsiders or strangers to the action to intervene on appeal, *see infra* Section II, including where existing parties do not intend to continue the appeal, *see, e.g.*, *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007); *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016), statutory limits on appellate jurisdiction prohibit named parties who agreed to be bound by the final judgment from using appellate intervention to escape the jurisdictional consequences of their failure to appeal. For this reason, the Court should affirm the denial of intervention on these alternate grounds or dismiss the Attorney General's petition as improvidently granted.

II. THE SIXTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN DENYING INTERVENTION.

Even if the Attorney General's intervention motion were not jurisdictionally barred, it was well within the Sixth Circuit's discretion to deny it as untimely. In reviewing the court of appeals' decision, "[t]he question . . . is not whether this Court . . . would as an original matter" have reached the same

conclusion, but whether the court below "abused its discretion in so doing." *NHL v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976); *NAACP v. New York*, 413 U.S. 345, 347 n.3 (1973). "[D]eference . . . is the hallmark" of the abuse-of-discretion review applicable here. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). In the analogous context of appellate review of district court denials of permissive intervention, reversal is fleetingly rare, and is generally limited to situations where the lower court failed to exercise its discretion at all. 7C Fed. Prac. & Proc. Civ. § 1923 (3d ed. 2021); *see, e.g.*, *Amador County v. U.S. Dep't of Interior*, 772 F.3d 901, 904 (D.C. Cir. 2014) (where "the district court considered all the relevant [intervention] factors, . . . we will not disturb its judgment"). Here, the denial of intervention was not an abuse of discretion, but a considered application of the undisputed factors that guide the timeliness of appellate intervention.

A. The Sixth Circuit's Conclusion That the Attorney General's Motion to Intervene Was Untimely Was Not an Abuse of Discretion.

Intervention on appeal is committed to the appellate court's discretion. *Cf. International Union, United Auto., Aerospace & Agric. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 216 n.10 (1965); *Utah v. United States*, 394 U.S. 89, 92 (1969) (denying intervention "in the exercise of our discretion" based on "sound judicial administration"). Unlike the rules governing district court proceedings, "[t]here is no appellate rule allowing intervention generally." *Richardson v. Flores*, 979 F.3d 1102, 1104

(5th Cir. 2020). Apart from Rule 15(d), which permits intervention in petitions for review of agency actions, the Federal Rules of Appellate Procedure do not mention intervention. Accordingly, the principles underlying district court intervention in Federal Rule of Civil Procedure 24 may be relevant to consider, *see Scofield*, 382 U.S. at 216 n.10, but serve only as a guide to inform the appellate court's discretion.

"[I]n part because there is no rule allowing them, motions to intervene on appeal are reserved for truly exceptional cases." *Richardson*, 979 F.3d at 1104. "[O]nly in an exceptional case for imperative reasons[] may a court of appeals permit intervention where none was sought in the district court." *York v. Fed. Bureau of Prisons*, 379 F. App'x 737, 739 (10th Cir. 2010) (Gorsuch, J.) (quotation marks and citation omitted).[4] And where "the motion for leave to intervene comes *after* the court of appeals has decided a case, it is clear that intervention should be even more disfavored." *Amalgamated Transit*, 771 F.2d at 1552-53 & n.3; *accord Alleghany Corp. v. Kirby*, 344 F.2d 571, 572, 573-74 (2d Cir. 1965), *cert. dismissed as improvidently granted*, 384 U.S. 28 (1966); 7C Fed.

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[4] *Accord Richardson*, 979 F.3d at 1104-05 & n.3; *In re Syntax-Brillian Corp.*, 610 F. App'x 132, 135 n.6 (3d Cir. 2015); *Craig v. Simon*, 980 F.3d 614, 618 n.3 (8th Cir. 2020); *Hutchinson*, 211 F.3d at 519; *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997); *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1552-53 (D.C. Cir. 1985); *Landreth Timber Co. v. Landreth*, 731 F.2d 1348, 1353 (9th Cir. 1984), *rev'd on other grounds*, 471 U.S. 681 (1985); *Spring Constr. Co. v. Harris*, 614 F.2d 374, 377 n.1 (4th Cir. 1980); *In re Grand Jury Investigation*, 587 F.2d 598, 601 (3d Cir. 1978); *Morin v. City of Stuart*, 112 F.2d 585, 585 (5th Cir. 1939).

Prac. & Proc. Civ. § 1916 (3d ed. 2021) ("There is even more reason to deny an application to intervene made while an appeal is pending or after the judgment has been affirmed on appeal."). Circuit courts frequently deny intervention following a panel's decision—including, contrary to the Attorney General's contention, *see* Pet'r Br. 37, when states seek to intervene. *Cf. Amador County*, 772 F.3d at 904 (rejecting argument that denial of intervention was abuse of discretion because it "undervalued" sovereign interests and holding "[w]e have never held that a district court must give extra weight or special consideration to a sovereign's purpose for intervention").[5]

In evaluating the timeliness of the Attorney General's motion, the Sixth Circuit carefully considered the specific facts of this case, *see Koon v. United States*, 518 U.S. 81, 99 (1996), guided by the five factors routinely considered when evaluating the timeliness of a motion to intervene, which the Attorney General concedes are appropriate to apply, JA 158. The Sixth Circuit's conclusion that the Attorney General's motion to intervene was untimely was not an abuse of discretion, as the court did not

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[5] *See, e.g.*, *City & County of San Francisco v. U.S. Citizen & Immigr. Servs.*, No. 19-17213 (9th Cir. Apr. 8, 2021), ECF No. 157 (denying states' motion to intervene following panel decision); *Chamber of Com. v. United States*, No. 17-10238 (5th Cir. May 2, 2018) (same); *see also Lewis v. City of Chicago*, No. 07-02052 (7th Cir. July 18, 2011), ECF No. 114 (denying post-panel-decision intervention motion); *accord United States v. Cvinar*, No. 97-1359 (1st Cir. July 30, 2009); *Baranowski v. Hart*, No. 05-20646 (5th Cir. June 8, 2007); *Rosser-El v. United States*, No. 02-1627 (4th Cir. Dec. 31, 2002), ECF No. 38.

"base[] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

First, the court properly noted that "the point to which the suit ha[d] progressed," JA 231, weighed against intervention because, as noted above, intervention in the court of appeals is rare, and intervention after a court of appeals has decided the case is "even more disfavored," JA 232 (quoting *Amalgamated Transit*, 771 F.2d at 1552).[6] When the Attorney General sought to intervene, the Sixth Circuit had already issued its decision. It was nearly two years after the Attorney General had agreed to be bound by final judgment and procured his dismissal, JA 29-30 ¶ 3(d); more than one year after the statutory deadline for the Attorney General to appeal the final judgment had lapsed, JA 68; 28 U.S.C.

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[6] Contrary to the Attorney General's suggestion, *see* Pet'r Br. 27, 38, this Court also routinely denies intervention at the certiorari stage. *See, e.g., EEOC v. Catastrophe Mgmt. Sols.,* 138 S. Ct. 2015 (2018) (denying motion to intervene by Chastity Jones, who filed the complaint to the EEOC that was the basis of the case, after the EEOC declined to seek certiorari); *NCAA v. Keller,* 134 S. Ct. 980 (2014) (denying motion to intervene of party-defendant in district court proceedings who participated only as amicus on appeal); Mot. for Leave to Intervene 2, 9, *NCAA v. Keller,* No. 13M54 (U.S.) (Oct. 25, 2013); *see also JPMorgan Chase & Co. v. Fed. Hous. Fin. Agency,* 134 S. Ct. 372 (2013) (denying motion for leave to intervene to file a petition for certiorari); *accord Ohio v. Foust,* 565 U.S. 1233 (2012); *Am. Forest & Paper Ass'n v. League of Wilderness Defs./Blue Mountains Biodiversity Project,* 540 U.S. 805 (2003); *ACLU v. United States,* 538 U.S. 920 (2003); *Alaska State Legislature v. United States,* 534 U.S. 1038 (2001).

§ 2107; and nearly eight months after the Secretary's briefing waived the issue of third-party standing, JA 20. The handful of court of appeals cases the Attorney General identifies granting post-appellate judgment intervention only illustrate that such intervention is the rare exception. *Compare* Pet'r Br. 37-38, *with* n.5 *supra* (listing court of appeals decisions denying intervention after panel decision).[7]

Second, the Sixth Circuit considered the purpose of the motion to intervene, noting that "the foremost argument that the Attorney General seeks to advance on rehearing is a third-party standing argument that the Secretary elected not to present . . . on appeal." JA 232-33 & n.2. The Attorney General was not "pick[ing] up where the Secretary left off." Pet'r Br. 26. He was attempting to pick up what the Secretary left *out*. That the panel could have granted intervention but prohibited the Attorney General from pursuing this argument does not mean the court

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[7] Indeed, each of the decisions cited by the Attorney General is easily distinguishable. These cases involved intervention where, *e.g.*, the panel decision had injected new issues in the litigation implicating state interests, *see Peruta*, 824 F.3d at 940; Motion to Intervene at 3, *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427 (6th Cir. 2014) (No. 12-2087), ECF No. 46; where the intervenor was an amicus who had been singularly responsible for presenting the argument adopted below, *Day*, 505 F.3d at 964; or where an existing party was already seeking further appellate review, irrespective of intervention, *see* Motion to Intervene at 4, *Democratic Nat'l Comm. v. Hobbs*, No. 18-15845 (9th Cir. Mar. 3, 2020), Dkt. 128; Motion to Intervene, *Igartúa v. United States*, No. 09-2186 (1st Cir. Jan. 10, 2011). Certainly, none of the cases involved a party who had previously agreed to be bound by final judgment but failed to appeal that judgment.

abused its discretion in denying intervention that was sought for the "foremost" purpose of litigating a waived issue. JA 233; *see NHL*, 427 U.S. at 642.

That is all the more true because, as the Sixth Circuit properly concluded, the secondary purpose of the motion—to address the potential impact of a future decision by this Court in *June Medical*—fared no better. JA 156. At the time, *June Medical* had not been decided, so it plainly afforded no basis for reconsideration. And, as discussed below, *see infra* Section II.B, had *June Medical* in fact altered the law in a way that affected the judgment, the Attorney General was free to pursue that claim through a Rule 60(b)(5) motion, *see* JA 236.

Third, the court considered "the length of time preceding the [motion] during which the proposed intervenors knew or should have known of their interest in the case." JA 231. Attorney General Cameron had been on notice of the potential misalignment between his position and that of the new administration long before he moved to intervene. In light of the widespread reporting on the Governor's position on abortion, he knew as of November 2019, when he and the new Governor were elected, that his interests and those of the new Governor (and therefore the Secretary here) would diverge.

This Court's decision in *NAACP* makes clear that the court below did not abuse its discretion in this respect. In *NAACP*, this Court "readily conclude[d]" that the district court did not abuse its discretion in finding the motion to intervene untimely, even though the movants explained that they had learned

just four days before filing that the United States had essentially consented to summary judgment. 413 U.S. at 366-67. The Court reasoned that even though the suit was only a few months old, and the movants had relied on assurances from the United States that it would not settle the case, publicly available information (including a newspaper article, public comments, and pleadings) should have alerted them to the need to intervene earlier. *Id.* at 367; *see id.* at 375 (Brennan, J., dissenting).[8]

So, too, here, the Attorney General had "ample notice of his interest in this case." JA 233. His office was originally named as a defendant, *id.*, and the litigation expressly challenged the constitutionality of a state law. *Cf. Amador County*, 772 F.3d at 904 (holding Tribe's motion to intervene untimely where from the outset of litigation it "knew that the suit could adversely affect its rights"). It was clear, at least as of November 2019, that the Governor had run on a pro-choice platform and that he had repeatedly withdrawn from the defense of abortion restrictions when serving as the Attorney General. *See*, *e.g.*, JA 29-30; *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 445 (6th Cir. 2019) (granting Attorney

[8] *See also EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424, 2017 WL 10350992, at *1 (6th Cir. Mar. 27, 2017) (timeliness of intervention measured from beginning of new administration where "EEOC's recent actions imply that the new administration will less aggressively pursue transgender rights"); *United States House of Representatives v. Price*, No. 16-5202, 2017 WL 3271445, at *2 (D.C. Cir. Aug. 1, 2017) ("The States have filed within a reasonable time from when their doubts about adequate representation arose due to accumulating public statements by high-level officials . . . .").

General Beshear's motion for dismissal as defendant in challenge to pre-abortion ultrasound requirement). During his election campaign, Governor Beshear called himself "pro choice," and vowed not to defend abortion laws that he believed were unconstitutional.[9] Political opponents had "taken to calling him 'Abortion Andy'" *specifically* because of his "refus[al] to defend the state's abortion laws."[10] And when Attorney General Cameron took office—seven months before the Sixth Circuit issued its decision, JA 233—it was clear that the Secretary was the sole party to the appeal, and that the Attorney General would therefore not have decision-making authority over litigation matters, including whether to pursue en banc rehearing or to petition for certiorari, if he did not intervene. If the attempted intervenors in *NAACP* "knew or should have known" of their interest in the suit by virtue of, *e.g.*, "an informative February article in the New York Times," 413 U.S. at 366, so too was the Attorney General able to deduce months before he moved to intervene that his litigation preferences diverged from those of the new administration.

The Attorney General argues that he had a right to assume the new Secretary would adequately represent his interests until the Secretary informed him that he would not seek en banc review. But that

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[9] *See, e.g.*, Bruce Schreiner & Dylan Lovan, *Democratic Candidates Stake Out Stances on Abortion*, U.S. News (Apr. 30, 2019), https://bit.ly/3jJAQWU.

[10] Rachana Pradhan, *Abortion Could Decide Kentucky's Close Governor's Race, Politico* (Nov. 4, 2019), https://www.politico.com/news/2019/11/04/abortion-could-decide-kentuckys-close-governors-race-065382.

is the argument this Court rejected in *NAACP*. The putative intervenors in *NAACP* argued that they had appropriately relied "on representations said to have been made by Department of Justice attorneys during the course of telephone conversations," *id.* at 368, including "that papers were being prepared in opposition . . . [to] summary judgment," *id.* at 361-62, and therefore could not have known intervention was necessary to protect their interests "[p]rior to the announcement that the United States would not contest the motion for summary judgment," *id.* at 374 (Brennan, J., dissenting). This Court rejected that argument, holding that "it was incumbent upon" the NAACP and other proposed intervenors "to take immediate affirmative steps to protect their interests" once they were "aware of [the case's] existence," rather than wait to intervene until the "only step remaining was for the United States to either oppose or to consent to the entry of summary judgment." *Id.* at 367.

Like the putative intervenors and dissent in *NAACP*, the Attorney General places far too much weight on a single fact: That upon taking office, after briefing in this appeal was complete, and just weeks before oral argument, the new Secretary did not immediately dismiss the appeal. Pet'r Br. 2, 33-34. Under *NAACP*, however, the Sixth Circuit was not required to consider this fact in isolation. Rather, it correctly considered whether the Attorney General took "affirmative steps" to protect his interests by "inquir[ing] into and prepar[ing] for the Secretary's intended course in the event of an adverse decision," JA 234, before that point, *see NAACP*, 413 U.S. at 367.

Fourth, the Sixth Circuit found it "clear that granting the Attorney General's motion would significantly prejudice Plaintiffs." JA 235. The principal argument on which the Attorney General sought to intervene—third-party standing—had been waived. The court of appeals noted that, even after certiorari was granted in *June Medical* the Attorney General, when acting as counsel for the Secretary, did not use any available procedural mechanisms, such as a letter pursuant to Federal Rule of Appellate Procedure 28(j), to raise the issue of third-party standing before the panel ruled. JA 235. As the court of appeals found, allowing the Attorney General to raise this waived issue after the panel decision would have prejudiced the plaintiffs. JA 235*; accord Day*, 505 F.3d at 966 ("interject[ing] new issues into the litigation" at this stage would be prejudicial).

Allowing intervention at this stage would have further prejudiced respondents because, especially in light of Beshear's history of refusing to defend abortion restrictions, they had a reasonable expectation that the Secretary would not pursue extraordinary forms of relief if they prevailed in their appeal. *See Yniguez v. Arizona*, 939 F.2d 727, 739 (9th Cir. 1991) ("[A]llowing the Attorney General to intervene would mean that there would be an appeal of an otherwise unappealable judgment in [the plaintiffs'] favor. Certainly, this would prejudice [the plaintiffs]."). This Court and the courts of appeals encourage parties to be judicious when considering whether to pursue a petition for certiorari or rehearing en banc. *See* Sup. Ct. R. 10; Fed. R. App. P. 35; 6th Cir. I.O.P. 35, 35.1. Here, even the dissent did

not contend that H.B. 454 was unconstitutional under the prevailing constitutional standard, JA 133-51, and multiple courts had already enjoined similar laws, JA 92. The Attorney General's refrain that Respondents must have expected further appeals, *see e.g.*, Pet'r Br. 39, is thus inaccurate.

Fifth, the Sixth Circuit concluded that no unusual circumstances favored intervention. The Attorney General complains that the court overlooked this Court's forthcoming opinion in *June Medical*, but the opposite is true. The court correctly explained that if there were any conflict between the panel's merits decision and *June Medical*, "the Supreme Court's decision will prevail as a matter of course." JA 236. If *June Medical* did change the law so as to render the injunction no longer valid, Rule 60(b)(5) afforded the Attorney General an avenue to raise such claims. *See infra* Section II.B.

Unable to show that the Sixth Circuit made an error of law or a clearly erroneous assessment of the facts, *see Cooter*, 496 U.S. at 405, the Attorney General proposes a new rule, purportedly based on this Court's decision in *United Airlines v. McDonald*, 432 U.S. 385 (1977): That intervention is timely, even at the end stages of an appeal, so long as it is sought within the time during which a party could have sought further review (here, by a petition for rehearing). Pet'r Br. 38. But *McDonald* holds no such thing.

McDonald involved intervention *in the district court* pursuant to Federal Rule of Civil Procedure 24; it says nothing about the "exceptional circumstances" or "imperative reasons" that may justify intervention

in an ongoing appeal, much less intervention after the court of appeals has decided the appeal. *See, e.g.*, *Richardson*, 979 F.3d at 1105 (rejecting argument that same standards are applied to district court and appellate intervention motions); 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed. 2021).[11] Tellingly, none of the decisions cited by the Attorney General in which courts granted intervention on appeal so much as mentions *McDonald*.

Moreover, in *McDonald*, the intervenor was an unnamed putative class member whose ability to contest the denial of class certification was not litigable "until after final judgment," at which point she promptly moved to intervene in the district court for the purposes of taking an appeal. 432 U.S. at 394 n.15. By contrast, the Attorney General was named as a party to this action from its inception, had every opportunity from that point to "protect [his] interests," *id.* at 394, yet declined to do so.

And in *McDonald*, the plaintiffs had given the intervenor "no reason . . . to suppose" that they would not appeal the denial of class certification and had given every reason to suspect that they would do so,

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[11] Even in the district courts, *McDonald* does not establish that post-judgment intervention is timely so long as it is filed within the proper time for filing an appeal. *Bond v. Utreras*, 585 F.3d 1061, 1071 (7th Cir. 2009) ("[I]ntervention postjudgment . . . should generally be disfavored."); *Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric. & Markets*, 847 F.2d 1038, 1044 (2d Cir. 1988) (same); *Hodges, Grant & Kaufmann v. U.S. Gov't, Dep't of Treasury, I.R.S.*, 762 F.2d 1299, 1302 (5th Cir. 1985) (same); *Garrity v. Gallen*, 697 F.2d 452, 455 n.6 (1st Cir. 1983) (same).

including by pursuing an interlocutory appeal of the issue. 432 U.S. at 394. Here, by contrast, the Attorney General knew of the new governor's stance on abortion at the moment he took office, and could have "made his tactical decisions accordingly," including by intervening before the Sixth Circuit heard argument, rather than after it decided this case. *Yniguez*, 939 F.2d at 739. As legal counsel to the Secretary on appeal, the Attorney General had "every reason" to "inquire into and prepare for the Secretary's intended course in the event of an adverse decision," JA 234; *see NAACP*, 413 U.S. at 367.[12]

B. The Denial of Intervention as Untimely Did Not Interfere With State Sovereign Interests, Which Remain Fully Protected by Rule 60(b)(5).

Despite the Attorney General's sweeping rhetoric, the denial of the Attorney General's motion to intervene as untimely did not denigrate the Commonwealth's interests in defending its statute. The Sixth Circuit did not "question whether states' attorneys general may appropriately intervene to

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[12] Nor can the Attorney General justify his failure to intervene earlier by objecting that he would have had to reveal privileged communications. Pet'r Br. 35 n.1. Because the Attorney General could have explained that he sought intervention so that he would have decision-making authority over any discretionary appeals, he could have pursued an earlier intervention motion without disclosing any privileged communications with the Secretary. JA 234 n.3; *see also R.G. & G.R. Harris Funeral Homes, Inc.*, 2017 WL 10350992, at *1 (granting intervention where proposed intervenor's "fears that the EEOC will not support her case or withdraw from her case have yet to crystallize").

defend their states' laws in some—or indeed, even in many—situations." JA 237 n.4. It merely found the Attorney General's motion untimely. *See* 7 Am. Jur. 2d *Attorney General* § 35 ("Absent a special provision, the attorney general must comply with the same rules of procedure as other litigants."); *id.* § 26 (attorney general is "required to comply with procedural rules concerning intervention"). By contrast, where the Sixth Circuit has found that the Attorney General moved to intervene on a timely basis, it has granted intervention. Pet. 31; *see also EMW Women's Surgical Ctr. v. Sec'y of Ky. Cabinet for Health & Family Servs.*, No. 3:19-cv-178-DJH (W.D. Ky. Nov. 30, 2020), ECF No. 60.

The Attorney General sought to intervene primarily on the basis of a waived third-party standing argument he now concedes has no basis under existing law, Pet'r Br. 39-40 n.3, and to argue that that this Court's then-forthcoming decision in *June Medical* might change the governing law. Yet had *June Medical* in fact changed the law in a material respect, the Attorney General could pursue those arguments fully via Rule 60(b)(5). And while the Attorney General attempts to portray this lawsuit as an action against the Commonwealth itself, it is not; Plaintiffs sued, as they must, individual officers in their official capacity, and the Attorney General took himself out of the suit by seeking his own dismissal. As a dismissed party who failed to appeal from a binding judgment, he has no right to "substitute" himself for the Secretary. As such, the Attorney General's attempts to paint the denial of intervention

below as an assault on state sovereignty collapse under even modest scrutiny.

1. The decision to deny intervention does not close the courthouse door on the Attorney General.

The Attorney General claims that the denial of intervention "clos[ed] the courthouse doors" on the state's chief law officer, Pet'r Br. 3, and frustrated the Commonwealth's ability to defend its own law. But it did not do so for two reasons: the Attorney General can still pursue the arguments he sought to make as an intervenor in district court pursuant to Rule 60(b)(5); and it was the Attorney General himself who chose to exit the case through securing his own dismissal and leaving the defense of the statute to others.

Kentucky's sovereign interests remain fully protected by the ordinary avenue for relief from judgment, Rule 60(b). Besides the waived argument about third-party standing, the crux of the Attorney General's motion to intervene rested on speculation that this Court's then-forthcoming decision in *June Medical* might change the governing law. JA 156. But at the time, *June Medical* had not been decided. If in fact *June Medical,* once decided, had changed the law in a way that made prospective relief no longer equitable, then Rule 60(b)(5), which allows any party bound by the judgment "to ask a court to modify or vacate a judgment . . . if 'a significant change . . . in [decisional] law' renders continued enforcement 'detrimental to the public interest,'" afforded him a fully effective avenue for relief. *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Rufo v. Inmates of*

Suffolk Cnty. Jail, 502 U.S. 367, 384 (1992)). As the Sixth Circuit explained, if *June Medical* changed the legal standard, it "w[ould] prevail as a matter of course." JA 236.

Moreover, consideration of a Rule 60(b)(5) motion after *June Medical* was decided, rather than appellate intervention prior to such a decision, was the proper avenue for the Attorney General's arguments. Unlike the Sixth Circuit at the time it was considering the intervention motion, a district court considering a Rule 60(b)(5) motion could actually apply *June Medical* rather than merely speculate about what it might say. The district court is also best positioned to determine, in the first instance, how any changed legal standard should be applied in a fact-intensive case like this, including whether to consider additional evidence. *Cf. Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003), *superseded on other grounds by statute as stated in Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 276 (2015); *Schlup v. Delo*, 513 U.S. 298, 332 (1995); *Horne*, 557 U.S. at 459; *Rufo*, 502 U.S. at 385-86, 390. Yet the Attorney General has still not sought such relief, more than a year after *June Medical* was decided.

In light of this fully available avenue for relief, the denial of intervention as untimely did not undermine the Commonwealth's interests in defending its laws. The court of appeals did not resolve *June Medical*'s application to H.B. 454 "against [the] State by default," Pet'r Br. 43, because if the Attorney General still believes *June Medical* changed the law, he is free to pursue a Rule 60(b)(5) motion.

The Sixth Circuit's decision to deny intervention did not close the courthouse door on the Attorney General for a second reason: It was the Attorney General himself who chose to exit the case. *See County of Maricopa*, 889 F.3d at 653 (by seeking voluntary dismissal, county "delegate[d] responsibility for defense of the action to [remaining parties]"). Plaintiffs named the Attorney General as a defendant. D.Ct.Dkt. 1, at ¶ 9. But rather than participate as a party in defending the law, he chose to bind himself to the final judgment and leave the law's defense to the Secretary. JA 29-30. Had the Attorney General merely intended to let the Secretary lead the defense without relinquishing his ability to make litigation decisions, he could have remained in the lawsuit through final judgment, as the Commonwealth's Attorney did, or filed a timely appeal. He did neither. Whatever general authority Kentucky law confers on the Attorney General to defend Kentucky statutes does not change the fact that, *in this case*, the Attorney General was afforded the opportunity to defend the law but declined.

The Attorney General's reliance on *Virginia House of Delegates v. Bethune-Hill,* 139 S. Ct. 1945 (2019), is therefore misplaced. Pet'r Br. 20-25, 32. No one disputes that, if the Attorney General were still a party, he would have Article III standing to continue the litigation in the Secretary's absence. *See Bethune-Hill*, 139 S. Ct. at 1951 (observing that, if Virginia law "had designated the House to represent its interests, and *if the House had in fact carried out that mission*," the House would have standing (emphasis added)). *Bethune-Hill*'s unremarkable recognition that "'a

State must be able to designate agents to represent it in federal court,'" *id.* (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013)), is beside the point here, where the Attorney General himself renounced his role in this suit.[13]

The Ninth Circuit's decisions in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), and *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007), are similarly inapposite. Pet'r Br. 28-29. Both cases acknowledge the state's interest in defending its laws, as did the court below, but neither case involved a putative intervenor who had previously renounced the opportunity to defend the law at issue—nor a situation in which intervention was sought to be able to argue about the impact of a not-yet-decided Supreme Court case.

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[13] If the Court nevertheless concludes that the precise contours of the Attorney General's authority under Kentucky law are relevant to the intervention analysis, it should certify a question concerning the scope of that authority to the Kentucky Supreme Court to address in the first instance. *See* Ky. R. Civ. P. 76.37; *Fiore v. White*, 528 U.S. 23, 28 (1999). The Attorney General's remarkable assertion that *no Kentucky state official*, not even the Governor, has the authority to forgo or dismiss an appeal without the prior approval of the Attorney General, *see, e.g.*, Pet'r Br. 5, 22, has not been endorsed by any Kentucky court. *See Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); *see also League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 840-41 (5th Cir. 1993) (rejecting Texas Attorney General's "remarkable" contention that "the Attorney General is the sole arbiter of State policy when the State's interest is in litigation," especially where "[t]he state courts have had little occasion to face such a bold claim of authority").

2. This is a suit against individual officers, not the Commonwealth.

The Attorney General argues that the Sixth Circuit's "timeliness inquiry should have treated the Attorney General *as if he were no different from the Secretary*," because this case is "'no different than a suit against the State itself,'" Pet'r Br. 24-25 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)). But Respondents did not sue the Commonwealth, nor could they have. They sued specific state officials in their official capacities, pursuant to *Ex Parte Young*, 209 U.S. at 157. *See* D.Ct.Dkt. 1, at ¶¶ 9-10. "[W]hen a federal court commands a state official to do nothing more than refrain from violating federal law, [that official] is not the State." *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011). A suit against the Commonwealth itself would have been barred by sovereign immunity.

In addition, under 42 U.S.C. § 1983, the basis for suit here, this action is necessarily against individual officers and not the Commonwealth. A state is not a "person"—and therefore not a proper defendant—for purposes of Section 1983. *Arizonans for Off. Eng.*, 520 U.S. at 69 (holding no case or controversy because "[Section] 1983 creates no remedy against a State"); *Will*, 491 U.S. at 64-66. "[A] state official in his or her official capacity, when sued for injunctive relief would be a person under § 1983 because official capacity actions *for prospective relief* are *not* treated as actions against the State." *Will*, 491 U.S. at 71 n.10 (emphases added) (internal quotations and citations omitted); *see also Stewart*, 563 U.S. at 254-55.

The fact that the Commonwealth may have an interest in the litigation, *cf. Bethune-Hill*, 139 S. Ct. at 1951, or that the Attorney General has authority to represent those interests, does not transform this lawsuit into one against the Commonwealth itself. The final judgment bars the unconstitutional acts of specific state officials; it does not, and could not, afford relief directly against the Commonwealth. *See* JA 30, 68-69; D.Ct.Dkt. 52. The Attorney General therefore may not circumvent the requirement to intervene (or to appeal) on a timely basis by recasting his intervention motion as a mere "substitut[ion]" of one alter ego of the Commonwealth for another. Pet'r Br. 24.[14]

III. HAVING INDUCED THE DISTRICT COURT TO DISMISS HIM FROM THE SUIT, THE ATTORNEY GENERAL CANNOT NOW ASSUME A CONTRARY POSITION AS THE PREDICATE FOR INTERVENTION.

Even if the Attorney General's motion were not jurisdictionally barred and untimely, the decision below should be affirmed because the Attorney General's attempt to re-enter the case after procuring his own dismissal contradicts both the arguments he

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[14] Because it concluded that the Attorney General's motion was untimely, the Sixth Circuit did not reach any other factors pertinent to the intervention analysis. JA 237. Thus, if this Court were to conclude that the lower court abused its discretion on timeliness, it should remand to allow that court to exercise its discretion as to any remaining considerations in the first instance. *See Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001).

made and the outcome he obtained below. In the district court, the Attorney General contended that he had no authority to enforce H.B. 454 as the basis for his dismissal from the lawsuit and ceded defense of the law to other officials, in direct contravention to his arguments supporting intervention. *See Yniguez*, 939 F.2d at 738 ("From the fact that we have estopped litigants from asserting mere *arguments* that are inconsistent with arguments on which they prevailed in the district court, it follows *a fortiori* that we will not allow a party to seek an *outcome* directly contrary to the result he sought and obtained in the district court."). This Court should "not accept such a reversal in position." *Id.*

At the outset of the case, the Attorney General represented to the district court that "H.B. 454 does not confer upon the Attorney General the authority or duty to enforce the provisions as enacted," "does not provide the Attorney General with any regulatory responsibility or other authority to take any action related to the Act," and "[t]herefore, there is no act of the Attorney General or his Office for the Court to enjoin," D.Ct.Dkt. 42, at 1. Shortly thereafter, the Attorney General filed a proposed dismissal order, and agreed, as a condition of dismissal, that the Office of the Attorney General would be bound by final judgment. D.Ct.Dkt. 46. The district court accepted that condition in an order dismissing the Attorney General from the case. JA 29-30.

Yet after having succeeded in procuring his dismissal, the Attorney General reversed his position by seeking intervention in the case, making directly contradictory representations, and seeking a directly

contradictory outcome, both of which he reiterates before this Court. Where the Attorney General once told the district court that his office lacks any enforcement ties to H.B. 454 as a basis for exiting the case, he now claims enforcement responsibility as a basis for intervention. Pet'r Br. 45. And where the Attorney General once induced the district court to dismiss his Office, ceded responsibility for defense of the law to other state officials and failed to appeal the judgment to which he was bound, he now renounces those decisions and seeks to re-enter the case to contest the decision below.

"'Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011); *Pegram v. Herdrich*, 530 U.S. 211, 228 n.8 (2000); *cf. Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298, 2309 (2021) (at the heart of "many estoppel rules" is "a demand for consistency in dealing with others"). Under similar principles, this Court has refused to consider a party's argument that contradicted a "joint 'stipulation [entered] at the outset of th[e] litigation.'" *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 677 (2010) (quoting *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 226 (2000)); *accord Amgen Inc. v.*

Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 470 n.6 (2013).

The Ninth Circuit faced a strikingly similar situation, and denied intervention, in *Yniguez*. 939 F.2d at 738. The plaintiffs there sued multiple Arizona officials—including the governor and attorney general—in a challenge to a state constitutional provision declaring English the official language. As here, the state attorney general asserted that he had "no authority to enforce [the provision]" and was dismissed from the suit. *Id.* at 729-30. After the district court declared the provision unconstitutional, the governor, "who had publicly opposed the adoption of [the provision] during the 1988 election[,] immediately announced her decision not to appeal the district court's opinion and order," and the attorney general sought to intervene in order to appeal. *Id.* at 730.

The Ninth Circuit held that the attorney general was judicially estopped from reversing course and attempting to intervene. As the court explained, the attorney general had

> represented to the district court that he did not wish to be a party to this litigation, presented arguments in support of that position, and persuaded the district court to rule in his favor on that point. Only after the district court granted the Attorney General's request and then reached a result on the merits with which the Attorney General disagreed did that official decide that he would rather be a party after all.

Id. at 738. The court held such "a reversal in position" was improper, notwithstanding the governor's decision not to appeal. *Id.* Had the attorney general wished to ensure that his litigation preferences would carry the day, the court of appeals reasoned, he "should have made his tactical decisions accordingly." *Id.* at 739.

The Attorney General here likewise seeks to "'prevail[] in one phase of a case on an argument and then rely[] on a contradictory argument to prevail in another phase.'" *New Hampshire*, 532 U.S. at 749 (quoting *Pegram*, 530 U.S. at 228 n.8). The Attorney General "represented to the district court that he did not wish to be a party to this litigation," *Yniguez*, 939 F.2d at 738, and "succeeded in persuading" the district court "to accept" his position, *New Hampshire*, 532 U.S. at 750-51. But in his intervention motion, the Attorney General contradicted this position, "decid[ing] that he would rather be a party after all." *Yniguez*, 939 F.2d at 738; *see also Martinez*, 561 U.S. at 677 (refusing to consider argument contradicting position taken in parties' joint stipulation); *Morales Feliciano*, 303 F.3d at 8.

The Attorney General's 180-degree turn is prejudicial to Respondents. *See New Hampshire*, 532 U.S. at 751; *cf. Lapides v. Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002) ("judicial need to avoid inconsistency, anomaly, and unfairness" counsels against permitting government officers to maintain contradictory positions on immunity to suit). As *Yniguez* explained, "allowing the Attorney General to intervene would mean that there would be an appeal of an otherwise unappealable judgment in

[plaintiff's] favor. Certainly this would prejudice [plaintiff]." 939 F.2d at 739. Indeed, the prejudice to Respondents is even greater here than in *Yniguez*, because the Attorney General attempted to use intervention to sidestep rules of waiver and preservation by belatedly raising an argument—third-party standing—that the Secretary chose not to pursue on appeal. *See* JA 233.

The Attorney General claims that the stipulation and dismissal order "'reserve[d] all rights, claims, and defenses that may be available to him.'" Pet'r Br. 8 (quoting JA 29-30). But reserving the right to make certain arguments does not give the Attorney General authority to advance contradictory positions in litigation.[15] Because no such right exists, *see Martinez*, 561 U.S. at 677; *New Hampshire*, 532 U.S. at 749, this reservation in no way excuses the Attorney General's about-face. He likewise notes that the stipulation "reserve[d] all rights, claims, and defenses relating to whether he is a proper party in this action and *in any appeals* arising out of this

[15] Given that the sole predicate for the dismissal was the Attorney General's repudiation of enforcement authority under H.B. 454, JA 29, and given that the dismissal of the Attorney General was without prejudice to being sued again by Plaintiffs, *see Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001), the natural and reasonable reading of this reservation of rights is that the Attorney General was reserving his rights should he find himself again haled into court. The reservation of arguments concerning whether he was a proper party simply echoed the Attorney General's filing just days earlier *disclaiming* his status as a proper party because he had no authority to enforce H.B. 454, D.Ct.Dkt. 42, and reserved the right to make such arguments on appeal if it became necessary.

action." Pet'r Br. 8 (quoting JA 29). But because the Attorney General failed to appeal on a timely basis, this provision is inapplicable. And in any event, there is no right to make contradictory arguments in different phases of the same case. *New Hampshire*, 532 U.S. at 749.

The Attorney General also points to a recently amended Kentucky statute as the purported basis of his newfound enforcement authority. Pet'r Br. 46. But this new language was added on February 21, 2021—months *after* he moved to intervene and the Sixth Circuit denied his motion. Ky. Rev. Stat. § 15.241(1)(b); *see also NAACP*, 413 U.S. at 364-65 (review of intervention decision must be based "upon the facts available to [the original court] at [the] time" of its decision). It was when the pre-amendment statutory language was in effect that the Attorney General first told the district court he had no authority to enforce H.B. 454, D.Ct.Dkt. 42, and it was under that *same* pre-amendment statutory language that the Attorney General later reversed position and told the Sixth Circuit that he had "specific authority" to enforce the law. JA 168.

In sum, the Attorney General's belated motion to intervene was an about-face in two senses. He sought to be made a party in a lawsuit he had initially sought to be dismissed from. And his arguments rested on a representation directly contrary to the one he made to secure his dismissal. The Attorney General, like any other party, "must accept the consequences of [his] own acts," *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J. concurring), and cannot induce a court to grant relief on one theory,

only to later reverse position "according to the exigencies of the moment," *New Hampshire*, 532 U.S. at 749-50.

CONCLUSION

The Sixth Circuit's decision denying the Attorney General's motion to intervene should be affirmed, or the petition should be dismissed as improvidently granted.

Respectfully submitted,

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