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PERSPECTIVE

High court to consider when AGs can intervene

By Christopher D. Dusseault

In *Cameron v. EMW Medical Center*, the U.S. Supreme Court will decide whether Kentucky's attorney general may intervene to defend a state law banning a commonly used second-trimester abortion method. The attorney general sought to intervene after the district court struck down the law and the 6th U.S. Circuit Court of Appeals affirmed, because the state official who had previously defended the law opted not to petition for rehearing or certiorari. The 6th Circuit denied the attorney general's intervention motion as untimely.

The question of who can defend a challenged law, and when, is an important and recurring one. Controversial and hotly debated state laws are often enacted with the knowledge, or even the strategic plan, that they will be challenged in the courts and that such challenges may lead to significant judicial decisions. Such challenges will name state officials in their official capacities. State laws vary as to which officials may defend a law and, significantly, the individuals holding those offices may change during the course of a multi-year litigation.

I was part of the team in another high profile case, *Hollingsworth v. Perry*, where issues of who can defend a challenged state law arose. *Hollingsworth* was a landmark case challenging a California state law denying gay men and lesbians the right to marry. The district court held that California's Proposition 8 violated the 14th Amendment and the 9th Circuit affirmed. The Supreme Court then held that the official proponents of Proposition 8 lacked standing to appeal, which meant that the district court's decision would stand and Proposition 8 could not be enforced. This also meant that the Supreme Court would not reach the substantive constitutional issue until two years later in *Obergefell v. Hodges*.

The question before the Supreme Court in *Cameron v. EMW* turns more on the timing of the attempt to intervene than on which office holder can defend a challenged law. Kentucky's attorney general originally was a named defendant in the case, but he sought and secured his dismissal at an early stage. After a five-day bench trial in May 2019, the district court held that the law was unconstitutional, and the interim secretary of Kentucky's Cabinet for Health and Family Services appealed to the 6th Circuit. In November 2019, Kentucky held elections in which attorney general Andrew Beshear, a Democrat, was elected governor and Daniel Cameron, a Republican, was elected attorney general.

The 6th Circuit affirmed the district court's decision in June 2020. The secretary informed the attorney general that he would not petition for rehearing or certiorari, and two days later the attorney general moved to intervene. The 6th Circuit denied the motion as untimely. Applying established timeliness factors, the 6th Circuit concluded that intervention after an appeal has been decided is disfavored, that the primary purpose of the intervention was to raise a waived issue, and that the attorney general was on notice of his interest and could have intervened months earlier. The Supreme Court granted certiorari on the intervention issue.

That the Supreme Court granted certiorari suggests at least some level of concern about a challenge coming to an end when the attorney general wishes to continue defending the law. According to the attorney general, this is a critical issue of state sovereignty. But according to plaintiffs, this appeal does nothing more than question the 6th Circuit's routine, fact-specific application of an undisputed timeliness standard that must be met by any litigant. There is certainly room for the Supreme Court to decide the case on narrow grounds, either deferring to the 6th Circuit's fact-based conclusion that the attorney general could and should have sought to intervene earlier, or finding that the attorney general was justified in staying on the sidelines until the official defending the law formally stated that he would no longer do so.

Cameron v. EMW Medical Center also raises other issues that have come up in cases like *Hollingsworth* and will likely arise in future cases. First, while the issue before the Supreme Court is a procedural one, how it is resolved will have a real-world, substantive impact. If the Supreme Court affirms, then the challenge to Kentucky's abortion law is over and the 6th Circuit's decision stands. If it reverses, the attorney general can try to persuade the 6th Circuit to reverse course and petition the Supreme Court for review on the merits if he is unsuccessful. This process could take years.

Second, there is nothing inherently wrong with an elected official making a good-faith determination not to appeal an adverse decision from a district court or appellate court. All litigants have a duty to evaluate a decision and determine whether there is truly an error that should or is likely to be reversed. This is particularly so where, as is the case here and was the case in *Hollingsworth*, the district court's decision to enjoin enforcement of a law follows a bench trial in which the Supreme Court makes detailed factual findings. Rather than casting any such decision as an abdication of duty, the issue should be whether and under what circumstances another state official can step in and continue to defend the law if he or she believes that the outcome is wrong, that he or she was elected to fight for or against a particular issue, or simply that any law passed by the legislature must be defended to the bitter end.

Third, a finding that an intervenor lacks standing to appeal (as in *Hollingsworth*), or that an official who generally could defend a law but waited too long to do so (as in *EMW*) impacts the parties on both sides of the case. It locks in the result of the case, but it also forecloses the possibility that the challenge might lead to a Supreme Court decision. Whether a particular party benefits from a state official's decision not to pursue further appeals turns in part on who won the last round, but it is also impacted by each party's assessment of the likely result in the next round. ■

Christopher D. Dusseault *is a partner at Gibson, Dunn & Crutcher LLP.*