

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DANIEL CAMERON, ATTORNEY GENERAL             )  
OF KENTUCKY,   )  
  Petitioner,                     )  
  v.                                     ) No. 20-601  
EMW WOMEN'S SURGICAL CENTER, P.S.C.,         )  
ET AL.,   )  
  Respondents.                     )

- - - - -

Pages: 1 through 80  
Place: Washington, D.C.  
Date: October 12, 2021

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4   OF KENTUCKY,                                    )  
5                                    Petitioner,                                    )  
6                                    v.    ) No. 20-601  
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8   ET AL.,    )  
9                                    Respondents.                                    )  
10  - - - - -

11  
12    Washington, D.C.  
13    Tuesday, October 12, 2021

14  
15                                    The above-entitled matter came on for  
16   oral argument before the Supreme Court of the  
17   United States at 10:01 a.m.

18  
19   APPEARANCES:

20  
21   MATTHEW F. KUHN, Principal Deputy Solicitor General,  
22                                    Frankfort, Kentucky; on behalf of the  
23                                    Petitioner.

24   ALEXA KOLBI-MOLINAS, ESQUIRE, New York, New York; on  
25                                    behalf of the Respondents.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: Today's orders of the Court have been duly entered and certified and filed with the Clerk.

We will hear argument first this morning in Case 20-601, Cameron versus EMW Women's Surgical Center.

Mr. Kuhn.

ORAL ARGUMENT OF MATTHEW F. KUHN

ON BEHALF OF THE PETITIONER

MR. KUHN: Mr. Chief Justice, and may it please the Court:

Two days after learning that another state official had stopped defending Kentucky's House Bill 454, the Attorney General moved to intervene so that the Commonwealth could exhaust all appeals in defense of its law.

The Sixth Circuit kept the Attorney General out of court, and it made three fundamental errors in doing so.

First, the panel overlooked that the Attorney General simply sought to pick up where the Secretary had left off in this litigation. More to the point, the Attorney General, on

1       behalf of the Commonwealth, merely accepted a  
2       handoff from another state official to exhaust  
3       all appeals.

4                 Second, the panel refused to consider  
5       Kentucky's sovereign interests in enforcing and  
6       defending its law. To be clear, the panel did  
7       not merely weigh factors to arrive at its  
8       timeliness holding. It affirmatively treated  
9       Kentucky's sovereign interests as irrelevant to  
10      that inquiry.

11                And, third, the panel expected the  
12      Attorney General to have preemptively intervened  
13      while the Secretary was vigorously defending  
14      House Bill 454 with the Attorney General's  
15      office as his counsel. That is contrary to what  
16      this Court said in McDonald, and if accepted  
17      more broadly, it would lead to a flood of  
18      protective motions to intervene.

19                Before discussing the intervention  
20      issue further, let me address the jurisdictional  
21      argument that's been raised. This argument  
22      overlooks that the Attorney General is here in  
23      court today on behalf of the Commonwealth. This  
24      Court's case law instructs that acting for a  
25      state is a distinct capacity. Because everyone

1 agrees that the Attorney General did not  
2 participate in that capacity in district court,  
3 he is not jurisdictionally barred from doing so  
4 now.

5 Even still, the Attorney General could  
6 not have appealed the district court's judgment.  
7 He had been dismissed from the case without  
8 prejudice, he was not named in the district  
9 court's judgment, and he had preserved his  
10 ability to participate in any appeal and to  
11 benefit from any favorable result on appeal.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Mr. Kuhn, you --  
14 there isn't much law for appellate intervention,  
15 so what do we rely on? Do we rely on Rule 24,  
16 which doesn't really apply? Would you give us  
17 -- what would be your strongest case that we  
18 should have a basis for this intervention that's  
19 not in the rules of appellate procedure?

20 MR. KUHN: So the best case is the  
21 Scofield case that's discussed in our briefing,  
22 and what Scofield says is that even though Rule  
23 24 is not technically applicable in appellate  
24 courts, it serves as essentially a helpful  
25 analogy to -- so I think Rule 24 is perhaps the

1 starting point of what we're looking at.

2 And our position is not that  
3 intervention in district courts under Rule 24 is  
4 always the same as intervention in appellate  
5 courts. Our point is -- is that when we have a  
6 handoff from one state official to another only  
7 to exhaust all appeals, it doesn't make sense to  
8 draw a firm line between district court  
9 intervention and appellate intervention.

10 And that's why we think there's such a  
11 strong analogy in this case to McDonald, where  
12 Ms. McDonald moved to intervene as soon as she  
13 learned that her interests were unprotected, and  
14 this Court said that that was timely, even  
15 though it was post-judgment.

16 JUSTICE THOMAS: But you still -- we  
17 need a standard for timeliness. We need a basis  
18 for -- I think we're reviewing this on abuse of  
19 discretion standards. We need a basis for  
20 saying that the Sixth Circuit abused its  
21 discretion. And I simply want to know if it's  
22 -- Rule 24 does not apply on its own terms, what  
23 does apply that would give us the authority to  
24 find abuse of discretion?

25 MR. KUHN: So I -- I think it is a

1 general equitable standard. I don't take my  
2 friend on the other side to -- to argue that we  
3 are categorically prohibited from intervening in  
4 an appellate court. So I think there is a  
5 general equitable standard.

6 As we pointed out in page -- at page  
7 27 of the blue brief, this Court, on occasion,  
8 allows intervention on its own docket, and it  
9 does so in circumstances that are very -- very  
10 similar to what we have here, where another  
11 party had been representing the real party in  
12 interest's interests. Up to that point, the  
13 party that had been in court declined to seek  
14 certiorari, and this Court has, on occasion,  
15 granted a motion to intervene on this docket to  
16 allow the filing of a petition for certiorari.

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: You noted,  
19 counsel, that the Attorney General intervened on  
20 behalf of the Commonwealth of Kentucky. I don't  
21 quite understand if that's different than simply  
22 representing the Commonwealth of Kentucky as its  
23 -- its counsel or if the Attorney General is  
24 intervent -- intervening in his own capacity as  
25 distinct from the Commonwealth?



1                   MR. KUHN: Mr. Chief Justice, we  
2 followed the roadmap this Court laid in  
3 Hollingsworth, which is to say that a state has  
4 to have the power to act through its agent. And  
5 so our position is that we are here as the agent  
6 of Kentucky. And I think that's consistent with  
7 how Hollingsworth talked about it; a state has  
8 the power to act only through its agent.

9                   I'll point this Court also to its  
10 decision from last term in *Brnovich*, where the  
11 Attorney General of Arizona came here for the  
12 state, and the Court pointed out in discussing  
13 it that the Arizona Attorney General "fits the  
14 bill" of someone who can stand in for the state.

15                   I also think it's consistent with what  
16 this Court said in *Bethune-Hill*. In that case,  
17 the -- the Virginia House of Delegates did not  
18 have the authority that we have here, but the  
19 Court talked about it as standing in for the  
20 state.

21                   And I think that's what we're doing  
22 here. And I read *Bethune-Hill* to tell us that  
23 when we are here on behalf of the state, that is  
24 a distinct representational capacity that is  
25 separate and apart from whatever institutional

1 interests the Attorney General may have.

2 CHIEF JUSTICE ROBERTS: Is it the  
3 normal -- if you take a typical run-of-the-mine  
4 case and the attorney general's representing,  
5 you know, any state entity, do they appear on  
6 behalf of the, you know, Department of Social  
7 Services or whatever it is, or is -- is there no  
8 separate designation of the on behalf sort?

9 MR. KUHN: I -- I think it's  
10 different. If we are retained as counsel --

11 CHIEF JUSTICE ROBERTS: Uh-huh.

12 MR. KUHN: -- the Attorney General's  
13 Office, as we were by the Secretary before the  
14 Sixth Circuit, we just appeared as counsel for  
15 the Secretary.

16 But, as a general matter, when  
17 Kentucky's Attorney General comes into court for  
18 the Commonwealth, we note that it's often  
19 through a Commonwealth Ex Rel Attorney General  
20 action.

21 If you look at the cases we cited at  
22 pages 4 and 5 of our blue brief, they are  
23 Commonwealth Ex Rel Attorney General on behalf  
24 of the Commonwealth. And so, when we're  
25 appearing for another state official, we're just

1 counsel.

2 And --

3 JUSTICE SOTOMAYOR: I --

4 MR. KUHN: -- from a Kentucky law  
5 perspective, I think that makes sense because  
6 the Attorney General is just not -- is not just  
7 a lawyer for the Commonwealth. Kentucky law  
8 tells us he is the chief law officer of the  
9 Commonwealth. For that reason, there's a state  
10 law reason as well as a federal law reason of  
11 why we came in AG Cameron on behalf of the  
12 Commonwealth.

13 JUSTICE SOTOMAYOR: Counsel, I -- I  
14 understand that Virginia law permits the  
15 Attorney General to step in but doesn't require  
16 it to, and it permits state agencies like the  
17 Department of State to hire its own attorneys or  
18 hire the Attorney General.

19 In this case, I understand that four  
20 of the lawyers who are now part of the Attorney  
21 General's Office were working for the Department  
22 of State but not as part of the Attorney  
23 General's Office. The Secretary had hired his  
24 or her own attorneys, correct?

25 MR. KUHN: That is correct, Justice

1 Sotomayor.

2 JUSTICE SOTOMAYOR: So, when you were  
3 sued in the suit originally, you were sued as  
4 the Attorney General, correct?

5 MR. KUHN: That's correct, as someone  
6 who can enforce the challenged law.

7 JUSTICE SOTOMAYOR: And you said we  
8 can't. And you signed a stipulation dismissing  
9 yourself and saying that you would abide by the  
10 decision of the Secretary of State, its  
11 litigation, and abide by whatever judgment was  
12 entered in this case, would be bound by any  
13 final judgment in the action and -- is that  
14 correct?

15 MR. KUHN: That is correct. There are  
16 --

17 JUSTICE SOTOMAYOR: All right.

18 MR. KUHN: -- a couple qualifications  
19 to that, but, yes, generally.

20 JUSTICE SOTOMAYOR: Generally. You  
21 didn't appeal the judgment, correct?

22 MR. KUHN: That's correct.

23 JUSTICE SOTOMAYOR: Why would we call  
24 it an abuse of discretion for a court of  
25 appeals, after it's rendered its judgment, to

1 say we don't really care what has happened in  
2 the political arena. We don't want to be  
3 dragged into it.

4           You agreed to be bound by this  
5 judgment. You didn't appeal, even though you  
6 were a party. Are you telling me you're now  
7 willing to waive the sovereign immunity of the  
8 state? Because that's what it sounds like,  
9 because, if you're coming in as yourself, you  
10 were here and left, you agreed to be bound by  
11 whatever the Secretary of State did.

12           Under what theory of law would we be  
13 able to say that the Sixth Circuit abused its  
14 discretion in just respecting the very  
15 stipulation you signed?

16           MR. KUHN: Justice Sotomayor, let me  
17 start with the stipulation, and then I want to  
18 step back and talk about Bethune-Hill and state  
19 sovereignty.

20           But, with respect to the stipulation,  
21 it was entered into in our capacity as someone  
22 who can enforce House Bill 454. We were sued on  
23 an ex parte Young theory. At pages 40 and 41 of  
24 the red brief, EMW acknowledges that the  
25 Commonwealth was not before the district court.

1                   That acknowledgment, I think,  
2                   overcomes the stipulation because the  
3                   stipulation --

4                   JUSTICE SOTOMAYOR: Well, it couldn't  
5                   have been before the district court. The state  
6                   has sovereign immunity, correct?

7                   MR. KUHN: That's --

8                   JUSTICE SOTOMAYOR: So the state under  
9                   no circumstance, even now on appeal, unless it's  
10                  willing to waive sovereignty, and -- and you  
11                  haven't told me if you are or aren't or whether  
12                  you have or haven't. I don't think you put that  
13                  before the Sixth Circuit.

14                  So I go back to my question: How do  
15                  we say it abused its discretion in saying that  
16                  an individual party who had an opportunity to be  
17                  in the litigation and chose to get out and chose  
18                  to bind itself to the decisions of the Secretary  
19                  of State -- how can we say it abused -- the  
20                  Sixth Circuit abused its discretion in honoring  
21                  that commitment by the Sec -- by the Attorney  
22                  General?

23                  MR. KUHN: Justice Sotomayor, we don't  
24                  think that the Commonwealth is a party to the  
25                  stipulation because they had not been brought

1 before the court. They could have tried to sue  
2 the Commonwealth, and at that point, we would  
3 have been able to invoke sovereign immunity.  
4 But we never got that chance.

5 And if I can just engage with you a  
6 bit --

7 JUSTICE SOTOMAYOR: It would have been  
8 almost actionable for them to have sued the  
9 state, wouldn't it have been? I mean, it would  
10 have been in bad faith. Everyone knows you  
11 can't sue a state. You can sue the officers who  
12 enforce the law, correct?

13 MR. KUHN: That's correct. They  
14 brought it --

15 JUSTICE SOTOMAYOR: And now -- by the  
16 way, you said you had no authority or duty to  
17 enforce the provisions as enacted, but now you  
18 come back and give a contrary representation  
19 that you can enforce the provisions by defending  
20 them, correct?

21 MR. KUHN: That's correct. The --

22 JUSTICE SOTOMAYOR: And so why  
23 wouldn't that be judicial estoppel?

24 MR. KUHN: So one of the key elements  
25 of judicial estoppel is that a court has to

1 accept your argument. The previous Attorney  
2 General, we admit, took the position that he did  
3 not have the authority to enforce House Bill  
4 454.

5 The district court did not rule on  
6 that issue. If you look at the stipulation, the  
7 stipulation notes that we agreed not to enforce  
8 House Bill 454. And so the stipulation, I  
9 think, overcomes any suggestion that the  
10 district court ruled on that issue.

11 And if I can point you to two  
12 particular provisions of the stipulation that  
13 even if the Court were to say that the  
14 Commonwealth is bound by it, I think that it  
15 protects exactly what we're doing here.

16 We reserved all rights to participate  
17 in this action and any appeals arising out of  
18 this action. And we preserved our ability to  
19 benefit from any favorable result on appeal.

20 So those two provisions work together,  
21 that even if the Attorney General --

22 JUSTICE SOTOMAYOR: But you didn't  
23 appeal on time.

24 MR. KUHN: That's correct, but this  
25 Court's general rule is that only a party or one



1 who becomes a party can file an appeal. That's  
2 from --

3 JUSTICE SOTOMAYOR: You could have  
4 filed an appeal if you lost, couldn't -- you  
5 reserve the right to appeal if you -- if -- if  
6 you won.

7 MR. KUHN: We -- we reserved the right  
8 to -- we reserved all rights, claims, and  
9 defenses --

10 JUSTICE SOTOMAYOR: But you didn't --

11 CHIEF JUSTICE ROBERTS: Counsel?

12 JUSTICE SOTOMAYOR: -- file a notice  
13 of appeal on time.

14 MR. KUHN: We did not file a notice of  
15 appeal, Justice Sotomayor. We had been  
16 dismissed from the case without prejudice. We  
17 were not mentioned in the judgment.

18 JUSTICE KAGAN: Mr. Kuhn --

19 CHIEF JUSTICE ROBERTS: Counsel, could  
20 I ask you, the stipulation concerning being  
21 bound by a final judgment, what do you  
22 understand "final judgment" to mean?

23 It seems to me it can mean a number of  
24 things. The district court ruling is a final  
25 judgment, for example, for purposes of appeal.

1           On the other hand, there obviously are  
2 subsequent proceedings that could take place, an  
3 appeal, obviously, and -- and so on that would  
4 undermine the finality of the judgment.

5           When -- when you signed that  
6 stipulation to be bound by a final judgment,  
7 what is -- what are you being bound by?

8           MR. KUHN: The language is that we're  
9 bound by the final judgment in this matter  
10 disposing of all claims and the exhaustion of  
11 any and all appeals that may arise in this  
12 action.

13           So we get the benefit of any favorable  
14 result on appeal. So the notion would be that,  
15 yes, we're agreeing to be bound, but we're  
16 preserving our rights to come back in.

17           I'll note that although the Sixth --  
18 we disagree with most of what the Sixth Circuit  
19 did, if you look at Joint Appendix 229, the  
20 Sixth Circuit appears to have agreed with what  
21 I'm saying here, where they noted that we had  
22 preserved all claims and rights relating to  
23 whether we -- claims and rights relating to  
24 whether we can participate on appeal.

25           So I think that's one thing, reading

1 the stipulation, that the Sixth Circuit, in  
2 fact, got right.

3 And if I can step back and talk about  
4 Bethune-Hill, this Court has told us that  
5 federal courts should respect how a state  
6 structures itself when defending its laws.  
7 Kentucky's put together a system where, as  
8 Justice Sotomayor mentioned, state officials  
9 oftentimes provide the front-line defense of  
10 state laws, and this makes sense because they  
11 have particular expertise in enforcing these  
12 laws. But Kentucky, unlike Virginia had done in  
13 Bethune-Hill, said it's not good enough for the  
14 state that one official gets to make all  
15 litigation decisions for the state.

16 What we as Kentuckians want is a  
17 fail-safe, a fail-safe that if a state official  
18 who enforces state law says, I'm not going to  
19 appeal any further, Kentucky's Attorney General  
20 can come in for the Commonwealth and say: No,  
21 the Commonwealth wants to go farther.

22 This envisions a system of --

23 JUSTICE KAGAN: Mr. Kuhn -- I'm sorry.  
24 Complete your sentence.

25 MR. KUHN: This -- this envisions a

1 system of state officials working together to  
2 defend Kentucky's law, which is what happened  
3 here.

4 JUSTICE KAGAN: Could -- could --  
5 could I assume for a moment that the Attorney  
6 General's Office could have appealed? Okay?  
7 Just let's assume with me that it could have  
8 because it was bound by the judgment, because of  
9 the stipulation, because of the combination of  
10 the two, because of any number of other things.  
11 Just assume with me that the Attorney General's  
12 Office could have appealed.

13 In that case, would the Petitioner's  
14 jurisdictional argument be correct?

15 MR. KUHN: No, Justice Kagan, I don't  
16 think it would, and let me explain why.

17 Let's assume, instead of putting the  
18 power to defend Kentucky on the Attorney  
19 General, the General Assembly of Kentucky had  
20 given it to itself. If that had happened and  
21 everything had stayed the same in your  
22 hypothetical, this Court would not be having a  
23 jurisdictional discussion then because everyone  
24 would understand that the Attorney General, in  
25 his enforcement capacity, who, in your

1 hypothetical, had gone to final judgment, is  
2 different than the General Assembly coming in on  
3 behalf of the Commonwealth.

4 JUSTICE KAGAN: Yeah, I -- I guess I'm  
5 not sure I understand the answer, so let me  
6 reframe the question a little bit.

7 You know, take our decision in Torres,  
8 right, which is the -- the case where we make  
9 clear that the notice of appeal requirement is  
10 jurisdictional and impose a very harsh rule  
11 saying that if you don't appeal, even if it's  
12 not your fault, you're out of luck. Okay?

13 So do you think if Torres had gone  
14 further and Mr. Torres had filed a motion to  
15 intervene that we would have said, oh, sure, go  
16 ahead and intervene in the suit? Would we have  
17 -- would the Court have said that?

18 MR. KUHN: Our -- our position is that  
19 we do not think a notice of appeal for a party  
20 who could have -- or, sorry, for a party who  
21 could have appealed but failed to do so, we  
22 don't think a motion to intervene in the ensuing  
23 appeal that the party failed to take, we -- we  
24 don't think that would be proper because of how  
25 this Court talked about jurisdiction in Torres.

1           But my point is -- is that if you had  
2 separated the power to represent the state from  
3 the Attorney General, no one would think there's  
4 a jurisdictional problem. The only reason we're  
5 having a jurisdictional discussion here is  
6 because two hats were put on the same official,  
7 two hats, the language this Court use -- used in  
8 Bethune-Hill.

9           And this Court told us in Bethune-Hill  
10 that representing a state as the agent of the  
11 state is distinct from your --

12           JUSTICE KAGAN: Well, but -- but you  
13 --

14           MR. KUHN: -- institutional hat.

15           JUSTICE KAGAN: -- but that's just  
16 contesting the premise, which is that the  
17 Attorney General could have appealed. If I  
18 understand your argument, it's the Attorney  
19 General couldn't have appealed because he would  
20 have been doing so in a different capacity than  
21 he had taken in the first place.

22           MR. KUHN: That's not my position. My  
23 position is that, stepping outside of your  
24 hypothetical, because of the way the stipulation  
25 was written, the Attorney General could have

1 appealed because it's consistent with him  
2 reserving his rights to -- claims and rights to  
3 participate in any subsequent appeal and to  
4 benefit from any favorable ruling.

5 JUSTICE KAGAN: I apologize for  
6 pressing on this. I'm just maybe just not  
7 understanding it. It might be my fault  
8 entirely, but I'll just -- if you agree that in  
9 the main -- mine run of cases in a Torres-type  
10 case where the person could have appealed,  
11 didn't appeal, if you agree that it would then  
12 be improper to grant intervention rights, which  
13 I take you to agree --

14 MR. KUHN: Mm-hmm.

15 JUSTICE KAGAN: -- okay, so that's a  
16 very simple case. And it seems to me that the  
17 petitioners would say that's exactly what  
18 happened here because the AG could have  
19 appealed, didn't, and now is seeking  
20 intervention.

21 And, you know, if -- if we assumed the  
22 -- the point that the AG could have appealed,  
23 why doesn't the same result follow?

24 MR. KUHN: Because this Court has told  
25 us that different capacities should be treated

1 -- this Court's words are "different legal  
2 personages." And, for example, in Bethune-Hill,  
3 the fact that the Virginia House of Delegates  
4 participated in that case to defend its  
5 institutional interests did not mean that it  
6 also brought any power it had to -- to appeal on  
7 behalf of the state. The Court said the record  
8 was silent about that issue.

9           The record here is silent as to the  
10 Attorney General participating as an agent of  
11 the state --

12           JUSTICE BARRETT: Mr. Kuhn --

13           MR. KUHN: -- and because we have --

14           JUSTICE BARRETT: -- could you have  
15 intervened on behalf of the state qua state,  
16 recognizing, as Justice Sotomayor pointed out,  
17 that that would have waived the state's  
18 sovereign immunity? Would -- we wouldn't be  
19 even having this discussion if you had  
20 intervened on behalf of Kentucky, with Kentucky  
21 being the named party and you being the lawyer  
22 for the state. Could you have done that?

23           MR. KUHN: I think that is essentially  
24 what we did. The reason we came in on behalf of  
25 the Commonwealth was because this Court told us



1 in Hollingsworth that we need -- that states  
2 have to act through their agents. So we  
3 identified ourselves as the agent of Kentucky,  
4 and we came in on behalf of the Commonwealth,  
5 just as Hollingsworth envisioned.

6 This Court noted in Hollingsworth that  
7 state attorneys general are typically the people  
8 who are tapped to defend the sovereign  
9 interests, who speak for the people of Kentucky.

10 So, yes, I would agree with that, that  
11 we could have come in as the Commonwealth, which  
12 is essentially what we've done here. We were  
13 just following this Court's direction from  
14 Hollingsworth by identifying ourselves as the  
15 agent of Kentucky.

16 JUSTICE SOTOMAYOR: So are you  
17 answering yes? You've waived Kentucky's  
18 sovereign immunity?

19 MR. KUHN: So I don't think this Court  
20 has ever said that when we participate as an  
21 agent of the Commonwealth or an agent of the  
22 state, that that is, in fact, a waiver of  
23 sovereign immunity.

24 JUSTICE SOTOMAYOR: If you're not a  
25 party, you can't be the agent of anybody. You

1 can only be an agent of a party.

2 MR. KUHN: I think that's -- so I  
3 agree that we're an agent of the party, and to  
4 the extent that that does create a waiver of  
5 sovereign immunity, I think it's a narrow waiver  
6 related to whether House Bill 454 is  
7 constitutional.

8 I -- it's not unprecedented for states  
9 to come in and defend their laws. For example,  
10 in Maine versus Taylor, this --

11 JUSTICE SOTOMAYOR: If you had stayed  
12 in this litigation, would you have been  
13 defending this law? What other capacity would  
14 you have served if you had stayed in the  
15 litigation when you were sued?

16 MR. KUHN: If we --

17 JUSTICE SOTOMAYOR: You were being  
18 sued as an agent of the state, correct?

19 MR. KUHN: No. We were being sued  
20 because we can enforce House Bill 454 under Ex  
21 parte Young. If they had sued us as an agent of  
22 the state, we would have been able to invoke  
23 sovereign immunity.

24 Everybody agrees that Kentucky was not  
25 there in district court. Pages 40 and 41 of the

1 red brief. That concession being made, it  
2 cannot be the case that Kentucky is  
3 jurisdictionally prohibited from coming in.

4 The only reason we're having this  
5 discussion is because the Attorney General wears  
6 two hats, just like the -- the state official  
7 wore two hats in Karcher, just like the -- the  
8 hats that were discussed in Bender. This is not  
9 a novel thing. We followed the Court's  
10 direction in -- in Bethune-Hill to bring us  
11 here.

12 If I can, in closing, just point out  
13 that after reading the Sixth Circuit's decision,  
14 I think one would for -- be forgiven for not  
15 understanding the sovereign interests that are  
16 at stake. We've had a discussion about state  
17 sovereignty now, and that fact went unmentioned  
18 in the -- in the court of appeals' ruling. It  
19 wasn't mentioned anywhere. In fact, in Footnote  
20 4 of the opinion, they -- they said they were  
21 not going to consider the Attorney General's  
22 ability to represent the state. We think that  
23 that was a relevant factor that the court of  
24 appeals should have considered.

25 Keep in mind that we had been

1 representing the Secretary before the Sixth  
2 Circuit. We weren't sitting on the sidelines.  
3 We stood up in the Sixth Circuit and argued in  
4 defense of House Bill 454. The Secretary  
5 informed the Attorney General's Office seven  
6 days after that decision came down that he would  
7 not appeal further.

8           Two days later, we filed a 20-page  
9 motion to intervene on behalf of the  
10 Commonwealth. That's how we titled it in both  
11 our intro and our conclusion. We said that we  
12 were on behalf of the Commonwealth more than a  
13 dozen times in the motion. But that just went  
14 unrepresented.

15           I think the only way we can understand  
16 the Sixth Circuit's decision as making any sense  
17 is to treat us as if we were bringing to bear a  
18 new, previously unrepresented interest. We were  
19 not doing that. The Secretary had been  
20 defending Kentucky's interests. And we had been  
21 counsel for some of that period. So, when we  
22 stepped forward, we sought to defend the same  
23 interests as the real party in interest that the  
24 Secretary had been defending all along.

25           Under those circumstances, it was a

1 handoff of litigation authority to go the  
2 distance.

3           And I'll point out that the Secretary  
4 did not oppose our motion to intervene. The  
5 Secretary said, I'm not going to appeal further,  
6 but he let us go -- he said, I'm not going to  
7 oppose you going further.

8           This is an example of Kentucky's  
9 unique system of defending its sovereign  
10 interests working as it was meant to: state  
11 officials working together. One state official  
12 says no further. We come in for the  
13 Commonwealth and say we want to go the distance.

14           If there are no further questions.

15           CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17           Justice Thomas, anything further?

18           JUSTICE THOMAS: None for me, Chief.

19           CHIEF JUSTICE ROBERTS: Justice  
20 Breyer?

21           JUSTICE KAGAN: If I understand your  
22 argument -- was -- was it up to me? I'm sorry.

23           CHIEF JUSTICE ROBERTS: Yes, you're  
24 up.

25           JUSTICE KAGAN: Okay. -- correctly,

1 Mr. Kuhn, it really does all come down to this  
2 two hats theory, is that correct?

3 MR. KUHN: I think we've got two  
4 arguments on jurisdiction, the two hats theory  
5 and the argument that even if you disagree with  
6 us on two hats, the Attorney General could --  
7 could not have appealed --

8 JUSTICE KAGAN: Okay.

9 MR. KUHN: -- because of the  
10 stipulation.

11 JUSTICE KAGAN: Okay. Well, okay.  
12 So, if you assume that the Attorney General  
13 could have appealed, then it comes down to the  
14 two -- two hats theory? Yes?

15 MR. KUHN: That's correct. If you  
16 assume our second argument is wrong, we're  
17 resting on our first.

18 JUSTICE KAGAN: Yes. So let -- just  
19 -- just one question about the two hats theory,  
20 which I -- I guess I'm just not sure I  
21 understand because it seems to me that the  
22 Secretary's role in this entire litigation  
23 pretty much proves that the two hats theory  
24 doesn't work because your theory is that the  
25 Attorney General was stepping in to replace the

1 Secretary, who until that point was representing  
2 the state's interests.

3 But the Secretary was sued in his  
4 capacity as a state official who could enforce  
5 state law. So doesn't it really come down to  
6 the same thing? The Secretary was sued because  
7 he could enforce state law. He was obviously  
8 representing the state's interests. Nobody else  
9 was doing that.

10 So the two seem completely intertwined  
11 to me, and the Secretary's role in the  
12 litigation prior to the Attorney General's  
13 intervention motion proves that, doesn't it?

14 MR. KUHN: No, it doesn't. The  
15 Secretary has the power as a matter of Kentucky  
16 law to defend Kentucky law when challenged. But  
17 he -- so their -- so the fact that he can take  
18 actions consistent with -- with Kentucky's  
19 interests in defending its law does not mean  
20 that he has the power to stand in as the agent  
21 of Kentucky.

22 Only the Attorney General under  
23 Kentucky Revised Statute 15.020 has that power.  
24 So I think the distinction to be drawn, Justice  
25 Kagan, is that, yes, the Secretary took actions

1 consistent with Kentucky's interests by  
2 defending Kentucky law.

3           When he said no further, that's when  
4 we stepped in, which is what we think  
5 Ms. McDonald did in this Court's McDonald  
6 decision, and that's why we're consistent with  
7 that.

8           CHIEF JUSTICE ROBERTS: Justice  
9 Gorsuch?

10           JUSTICE GORSUCH: Counsel, do you  
11 agree that abuse of discretion is a proper  
12 standard of review for this Court in analyzing  
13 the Sixth Circuit decision?

14           MR. KUHN: So, as I mentioned with  
15 Justice Thomas earlier, this Court has not ruled  
16 on --

17           JUSTICE GORSUCH: I understand that.  
18 That's why I'm asking the question.

19           MR. KUHN: So we have not contested  
20 that point because of what this Court said in  
21 NAACP versus New York. And if the position is  
22 that Rule 24 is a helpful analogy, I think it's  
23 a helpful analogy in that -- in that  
24 circumstance. But we think this is an obvious  
25 abuse of discretion because we were not treated



1 as --

2 JUSTICE GORSUCH: Okay, okay.

3 MR. KUHN: Yeah.

4 JUSTICE GORSUCH: And then -- and then  
5 second question briefly, you rest heavily on --  
6 on the state's sovereignty interests here and --  
7 and citing Bethune-Hill to us quite a lot.

8 Where do those interests run out?  
9 When -- when would it be proper for a court of  
10 appeals under an abuse of discretion standard to  
11 deny intervention by a state entity?

12 MR. KUHN: If we had sought rehearing  
13 like we did, tendered our rehearing petition,  
14 but we had filed it after the deadline, I think  
15 that a court of appeals would be within its  
16 discretion to say, no, you're delaying this  
17 litigation.

18 If we had come in and said, court of  
19 appeals, please remand this case to the district  
20 court to let us put on more facts, I think that  
21 the Court would be within its discretion to deny  
22 a state's intervention.

23 But our point is, where we moved to  
24 intervene and did not delay this case by even a  
25 day and where we merely sought to pick up where

1 the Secretary left off and to exhaust all  
2 appeals, in that circumstance, we think that is  
3 an abuse of discretion.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Kavanaugh?

6 JUSTICE KAVANAUGH: Does the same kind  
7 of rule apply in private litigation? So suppose  
8 a private plaintiff sues a private defendant  
9 under state tort law. The state -- the private  
10 defendant argues that the state tort law is  
11 unconstitutional, and the court on appeal rules  
12 that the tort law is unconstitutional, okay?  
13 And the state -- the private plaintiff, sorry,  
14 chooses not to seek en banc or cert.

15 Can a state AG intervene in that  
16 circumstance even though the private plaintiff  
17 has chosen not to seek en banc or cert to argue  
18 that the state tort law is, in fact,  
19 constitutional?

20 MR. KUHN: I think this Court told us  
21 in Hollingsworth that a private party defending  
22 state law is just a different matter than a  
23 state official who has sworn an oath to defend  
24 Kentucky's constitution who is popularly  
25 elected.

1                   So I think the state in that  
2                   circumstance would --

3                   JUSTICE KAVANAUGH: The state tort law  
4                   in that circumstance will be declared  
5                   unconstitutional. And I think, by saying it's  
6                   different, you're saying the state AG in that  
7                   case could not seek en banc or cert even though  
8                   the state tort law had been declared  
9                   unconstitutional?

10                  MR. KUHN: Our position is not that he  
11                  could not do so but that it would not be as easy  
12                  of an argument in that circumstance. I think it  
13                  matters that we have a handoff from one state  
14                  official to another, both of whom are sworn to  
15                  defend Kentucky law.

16                  I think a lot of the things I'm saying  
17                  today would be consistent with the -- with the  
18                  hypothetical that you're talking about. But I  
19                  think we're perhaps a half step beyond that and  
20                  this is a much easier case than the one you've  
21                  hypothesized.

22                  JUSTICE KAVANAUGH: Thank you.

23                  CHIEF JUSTICE ROBERTS: Justice  
24                  Barrett?

25                  JUSTICE BARRETT: I have a question

1 that's related to the question Justice Thomas  
2 started out with and that Justice Gorsuch just  
3 followed up on.

4 Justice Thomas asked you where we get  
5 the authority to even impose these standards on  
6 the courts of appeal. And I think we've treated  
7 it as the lower court having some inherent  
8 authority just pursuant to the judicial power to  
9 manage its docket, and I heard you saying that  
10 we have the authority to make sure that the  
11 rules that the courts adopt and apply are not  
12 abuses of their discretion, and that would be  
13 true whether we're talking about pre-judgment or  
14 post-judgment intervention. And -- and our role  
15 in that regard is pretty limited.

16 I have a question specifically about  
17 how we should think about that relationship in  
18 the context of a post-judgment intervention  
19 motion because we've also asserted that we have  
20 some inherent supervisory authority over the  
21 courts of appeal. And in the post-judgment  
22 intervention context, we might also have some  
23 concern that wouldn't be present in the  
24 pre-judgment context about a court of appeals  
25 trying to evade our review.

1                   How, if at all, should we think about  
2                   that factoring into the analysis? Is that --  
3                   it's more than just equity to the litigants,  
4                   arguably. So how -- does that play a role at  
5                   all?

6                   MR. KUHN: I think it -- it does. And  
7                   if this Court wants to look to the Day opinion  
8                   from the Ninth Circuit that dealt with that,  
9                   that was when Hawaii came in, and the court  
10                  noted that Hawaii had come in later than they  
11                  would have let a private litigant. But the  
12                  court talked about its discomfort with saying  
13                  that a sovereign state could not seek en banc  
14                  relief and could not seek certiorari from this  
15                  Court.

16                  So I -- I read Day to basically create  
17                  a sovereignty tiebreaker when a state comes in  
18                  to seek further review.

19                  JUSTICE BARRETT: But that's  
20                  sovereignty. I mean, you've emphasized  
21                  sovereignty, and I get that. But my question  
22                  was a little bit different because it's one that  
23                  might apply even in the context of private  
24                  parties, as Justice Kavanaugh was positing.

25                  MR. KUHN: Mm-hmm. So I -- I think

1 so. And as you're thinking about the private  
2 parties issue and the issue, Footnote 16 of this  
3 Court's McDonald opinion talks about how its  
4 analysis would apply outside of the  
5 representational context, right?

6 Ms. McDonald there had been  
7 represented by the non-named class members. The  
8 Court gave two more examples of cases that would  
9 apply post-judgment in the representational  
10 context, but then it cited further cases and  
11 said, outside of the representational context,  
12 we think post-judgment intervention could be  
13 allowed, and cited two cases and said this  
14 Court's McDonald decision is consistent with  
15 those other two cases to the extent the party  
16 moves to intervene before any appellate  
17 deadlines have run.

18 So I think the post-judgment part of  
19 it and insulating a decision from further  
20 review, especially for a sovereign state, is  
21 something that matters quite a bit to the  
22 analysis that we hope the Court adopts.

23 JUSTICE BARRETT: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Ms. Kolbi-Molinas.

2 ORAL ARGUMENT OF ALEXA KOLBI-MOLINAS  
3 ON BEHALF OF THE RESPONDENTS

4 MS. KOLBI-MOLINAS: Thank you, Mr.  
5 Chief Justice, and may it please the Court:

6 The Attorney General agreed to be  
7 bound by final judgment and chose not to appeal  
8 it. Because he was expressly bound by the  
9 judgment, he had a right to appeal, but he had  
10 to do so within the 30-day timeframe set by  
11 statute. He cannot now avoid his jurisdictional  
12 failure by seeking to intervene instead.

13 The Attorney General does not directly  
14 dispute that one who is bound by judgment and  
15 fails to appeal cannot intervene. Instead, he  
16 offers two responses, both insufficient.

17 First, he argues that he is exempt  
18 from jurisdictional rules because he is wearing  
19 a different hat on appeal than he wore when he  
20 agreed to be bound. But the Attorney General  
21 was sued and bound in his official capacity, and  
22 the fact that a party has more than one job  
23 responsibility does not allow it to evade a  
24 jurisdictional bar.

25 Second, the Attorney General argues

1 that by reserving all rights, claims, and  
2 defenses relating to whether he is a proper  
3 party, he reserved the right to participate in  
4 the appeal. But you can only reserve the rights  
5 that are available to you, and there's no right  
6 to join an appeal after failing to satisfy the  
7 jurisdictional rules for doing so.

8           However, even if intervention were not  
9 jurisdictionally barred, the court of appeals  
10 should be affirmed. Intervention is not a  
11 revolving door that allows a party to agree to  
12 be bound, procure their dismissal, fail to  
13 appeal, and then gain reentry to the suit after  
14 the court of appeals has ruled.

15           Moreover, where the Attorney General  
16 was on notice of his interest in preserving the  
17 third-party standing argument nearly a year  
18 before the court of appeals ruled and did  
19 nothing about it, the court did not abuse its  
20 discretion in denying post-judgment intervention  
21 when it was based primarily on that argument.

22           Finally, it is not disrespectful to  
23 the Attorney General's and Kentucky's sovereign  
24 interests to hold the Attorney General to his  
25 decision not to appeal, particularly when he can



1 make the same arguments he made in his  
2 intervention motion through Rule 60(b).

3 I welcome the Court's questions but  
4 will otherwise turn to the jurisdictional  
5 argument first.

6 JUSTICE THOMAS: Just one brief  
7 question. In your intro -- introduction --  
8 introductory comments, you did not refer to  
9 Eisenstein and how you would work around  
10 Eisenstein if you think the Attorney General was  
11 a party.

12 MS. KOLBI-MOLINAS: I don't think  
13 Eisenstein changes the Attorney General's  
14 obligation to appeal here because Eisenstein  
15 recognized that what this Court held in Devlin  
16 and what this Court held in Devlin and in the  
17 three cases that it cited in Devlin is that when  
18 a person participates in proceedings before the  
19 district court in a manner that results in them  
20 being bound, then they have a right to appeal.

21 And, of course, in Eisenstein, we were  
22 talk -- you were talking specifically -- the  
23 Court was talking specifically about the False  
24 Claims Act context, where there is a statute  
25 that says the United States can't participate

1 unless it first intervenes.

2 So, if this Court in Eisenstein had  
3 held that the United States was a party even  
4 though it had not done what Congress had  
5 required it to do to become a party, then that  
6 would have been undermining the statutory  
7 interests.

8 But, here, and as Devlin recognized,  
9 the situation is different. It's  
10 context-specific. And, here, you have the  
11 Attorney General, who moved for and obtained a  
12 court order expressly binding him to the final  
13 judgment, that final judgment was then entered  
14 by the same district court that originally bound  
15 him to it.

16 JUSTICE THOMAS: But what was the  
17 effect of the order? Was the Attorney General  
18 retained as a party or dismissed as a party?

19 MS. KOLBI-MOLINAS: The Attorney  
20 General was dismissed as a named defendant but  
21 not completely dismissed because, obviously,  
22 when someone is completely dismissed, then they  
23 have no more relation to the suit --

24 JUSTICE THOMAS: Can you give me --

25 MS. KOLBI-MOLINAS: -- and they

1 wouldn't be bound.

2 JUSTICE THOMAS: -- an example of  
3 another case where a party was dismissed but  
4 also remained a party?

5 MS. KOLBI-MOLINAS: I'm not sure that  
6 this Court has ever considered such a case. I  
7 do know that it's routine in the courts of  
8 appeals for people who are bound by judgment,  
9 even if they're not currently named defendants,  
10 to be able to appeal. But I don't think there's  
11 any court -- case that this Court has ever  
12 considered.

13 JUSTICE THOMAS: And do you know of  
14 any cases outside of class actions, for example?

15 MS. KOLBI-MOLINAS: Where one who is  
16 bound by judgment but not a named party?

17 JUSTICE THOMAS: Yeah. Exactly.

18 MS. KOLBI-MOLINAS: Yes. We've cited  
19 cases in the red brief and in the amici --  
20 federal courts have cited decisions from the  
21 courts of appeals -- I'm sorry if that was your  
22 question -- but --

23 JUSTICE THOMAS: Yeah.

24 MS. KOLBI-MOLINAS: -- from the courts  
25 of appeals, where people who are expressly bound

1 by the judgment but not named as defendants have  
2 a right to appeal.

3 JUSTICE THOMAS: And, finally, the  
4 Sixth Circuit seemed to rely primarily not on  
5 the jurisdictional issue but on intervention,  
6 that the reason it would not grant intervention  
7 was because of prejudice, and it based that  
8 prejudice to you on an argument, a third-party  
9 standing argument, that the Attorney General was  
10 raising.

11 Can you give me an example of a case  
12 where a party wanting to -- who wants to  
13 intervene is prevented from doing so based on  
14 prejudice because that party wanted to raise a  
15 jurisdictional argument?

16 MS. KOLBI-MOLINAS: Well, Your Honor,  
17 at that time, under the -- in the Sixth Circuit,  
18 that party -- that argument was not a  
19 jurisdictional -- the third-party standing  
20 argument was not jurisdictional.

21 So -- but I'm not aware of any case in  
22 which someone has been denied intervention to  
23 raise a jurisdictional argument, but that  
24 wasn't -- under Sixth Circuit precedent, that  
25 wasn't a jurisdictional argument.

1 JUSTICE THOMAS: So what's the  
2 prejudice?

3 MS. KOLBI-MOLINAS: The prejudice was  
4 that the argument had been waived. The  
5 Secretary had not made the argument about  
6 third-party standing on appeal. It had been  
7 part of the district court judgment. The  
8 district court had held that the plaintiffs had  
9 third-party standing. The Secretary chose not  
10 to appeal it.

11 And that was clear as of July 2019,  
12 nearly a year before the court of appeals ruled.  
13 The Secretary filed their brief and did not make  
14 the third-party standing argument.

15 Yet, throughout this time, the  
16 Attorney General did nothing to try to intervene  
17 and make the argument. He was on notice as of  
18 July 2019 that if someone else didn't make the  
19 third-party standing argument before the Sixth  
20 Circuit ruled, it would be waived.

21 And yet, even when he entered an  
22 appearance on behalf of the Secretary, he  
23 entered an appearance after briefing had been  
24 completed. All he did was show up at argument.  
25 But yet, he didn't request supplemental briefing

1 on the third-party standing question. He didn't  
2 file a 28(j) about this Court's cert grant in  
3 June Medical. He didn't ask the Sixth Circuit  
4 to stay proceedings and at least wait for June  
5 Medical so that there could be supplemental  
6 briefing after that.

7 He was aware that the argument had  
8 been waived and did nothing to try to raise it  
9 before the court of appeals ruled. So it was  
10 not an abuse of discretion for the Sixth  
11 Circuit, under those circumstances, to hold that  
12 when a party based virtually their entire  
13 intervention motion on an argument that they  
14 could have moved to intervene and made  
15 beforehand and didn't was not an abuse of  
16 discretion to hold that post-judgment  
17 intervention in that context was untimely and  
18 prejudicial.

19 JUSTICE THOMAS: Thank you.

20 MS. KOLBI-MOLINAS: Thank you.

21 Moving to the jurisdictional argument,  
22 this Court has --

23 JUSTICE BREYER: Maybe I should ask a  
24 question --

25 MS. KOLBI-MOLINAS: Okay.

1 JUSTICE BREYER: Can I? Is this --

2 CHIEF JUSTICE ROBERTS: Yes.

3 JUSTICE BREYER: -- appropriate?

4 Thank you.

5 Look, as I understand this -- and you  
6 better correct me, please, because I'm not  
7 certain I do -- look, there have been a lot of  
8 party changes. First, the Republicans are in,  
9 then the Democrats are in, and they have  
10 different views on an abortion statute.

11 So -- so what happened was that, first  
12 of all, the clinics sue to say Kentucky's  
13 abortion statute's unconstitutional, and they're  
14 defended -- it was defended by a person who  
15 doesn't feel that strongly about it, and he  
16 says, no, I can't -- the Secretary says, I can't  
17 enforce this. And that's it.

18 But, eventually, when they get around  
19 to deciding it, the lower court says, yeah, it  
20 is unconstitutional. And then the court of  
21 appeals says, yeah, it is unconstitutional. At  
22 that point, for the first time, we have an  
23 Attorney General who thinks it's a pretty good  
24 statute. He wants to defend it.

25 So two days after he learns that

1 nobody's going to defend it, he comes in and  
2 says, let me defend it. And that's okay under  
3 Kentucky law apparently. Nobody says it isn't.

4 And so, if there's no prejudice to  
5 anybody, and I can't see where there is, why  
6 can't he just come in and defend the law? How  
7 does he defend it? One, he asks for rehearing.  
8 It's still timely. And then, two, if they say  
9 no, he comes to this Court.

10 Now he may lose on both those, and he  
11 may lose for the reasons that you say, but I  
12 don't see why he can't -- if Kentucky law allows  
13 him to make the argument, why can't he make the  
14 argument?

15 MS. KOLBI-MOLINAS: Well, Your Honor,  
16 that would be -- that would be the case if we  
17 were talking about a true stranger or outsider  
18 to the case. There were four defendants who  
19 were sued originally in this case. The Attorney  
20 General, rather than defend or rather than take  
21 a back seat, moved for and obtained a court  
22 order expressly binding him to the judgment.

23 The Secretary did defend. It's not  
24 that the statute wasn't defended. The  
25 Secretary --



1 JUSTICE BREYER: Though he defended on  
2 the ground I'm the wrong person.

3 MS. KOLBI-MOLINAS: No, that's not the  
4 grounds on which the Secretary --

5 JUSTICE BREYER: What?

6 MS. KOLBI-MOLINAS: The defend -- the  
7 Secretary defended the suit all the way up --

8 JUSTICE BREYER: All the way on  
9 everything?

10 MS. KOLBI-MOLINAS: -- through  
11 decision based on the -- defending the  
12 constitutionality of the statute. The Attorney  
13 General is the one who originally said he had no  
14 enforcement authority but now admits that he  
15 does. The Secretary -- it was vigorously  
16 defended through the court of appeals' decision.

17 The Attorney General, it is well  
18 settled in this Court, stands in the shoes of  
19 his predecessors. It is well settled that one  
20 who is bound -- one -- a successor in office is  
21 bound by the stipulations made by and judgments  
22 against their predecessors. It doesn't matter  
23 that there's been a political party change.

24 So, here, we're not talking about a  
25 run-of-the-mill intervention case where the

1 Attorney General had not been involved, someone  
2 else had backed out, and then the Attorney  
3 General wants to come in.

4 JUSTICE BREYER: I -- I thought -- was  
5 I not right, then I'm -- I'm wrong, that -- that  
6 before -- that there was still something to do,  
7 but the Sixth Circuit says this is  
8 unconstitutional. And somebody could have  
9 filed, a defendant, a motion for rehearing, and  
10 then they could have tried to come here.

11 But the Secretary of State said, I'm  
12 not going to do that, because there had been a  
13 political party change. And it's at that point  
14 the Attorney General says, well, two days ago,  
15 he says, nobody's going to defend this, so I  
16 better.

17 Has -- has that happened, or am I  
18 totally wrong?

19 MS. KOLBI-MOLINAS: The -- the  
20 Secretary did make that decision not to continue  
21 the defense, and the attorney --

22 JUSTICE BREYER: But was I right in my  
23 statement?

24 MS. KOLBI-MOLINAS: In that the  
25 Secretary -- there was a change in the

1 administration?

2 JUSTICE BREYER: I -- I don't want to  
3 just repeat it again. I -- I -- I -- I -- did  
4 -- did you take it in, or shall I repeat it  
5 again?

6 MS. KOLBI-MOLINAS: I believe that it  
7 is correct that the Secretary decided not to  
8 appeal and the Attorney General then moved to  
9 intervene.

10 The point is that the Attorney General  
11 is a former named defendant in the suit. He's  
12 not a stranger. He already is bound by the  
13 judgment and never appealed.

14 JUSTICE BREYER: All right. But what  
15 I read in the thing that he signed is he said  
16 he'd be sign -- he would be bound by a final --  
17 what is it called -- a final decision?

18 MS. KOLBI-MOLINAS: Final judgment,  
19 paragraph 3d.

20 JUSTICE BREYER: Final judgment of  
21 what?

22 MS. KOLBI-MOLINAS: Of the district  
23 court.

24 JUSTICE BREYER: It says "final  
25 judgment of the district court"? I mean, is

1       there a final -- I thought perhaps you could --  
2       that if -- if you had a lot of appeals to go,  
3       you know, an awful lot -- not very many, but,  
4       occasionally, a district court is reversed.  
5       And, occasionally -- I'm not saying it happens  
6       very often -- but even a court of appeals  
7       sometimes is reversed.

8                   And so is it a final judgment if there  
9       still are appeals to take?

10                   MS. KOLBI-MOLINAS:  It is, Your Honor,  
11       in this Court's decision in Malcone, and the  
12       term "final judgment" refers to final and  
13       appealable.  It is only unless -- unless you  
14       clarify a final and unappealable judgment that  
15       you're talking about a judgment that is not  
16       final until all appeals have been exhausted.

17                   JUSTICE BREYER:  So, if he -- if he  
18       goes and asks them to rehear, a motion to  
19       rehear, which is what he wants to do, then just  
20       -- the court will just write what you just said?  
21       No.  Denied.  Why?  Because.  And then they give  
22       you a reason.

23                   MS. KOLBI-MOLINAS:  The court could --

24                   JUSTICE BREYER:  Is that what you --

25                   MS. KOLBI-MOLINAS:  I would assume the

1 court would deny it for being jurisdictionally  
2 barred, but the court is, before that point,  
3 jurisdictionally barred from allowing him to  
4 intervene. He did the final.

5 CHIEF JUSTICE ROBERTS: Well, I  
6 thought -- I thought your friend on the other  
7 side read additional language after the  
8 stipulation to be bound saying subject to  
9 preservation of rights to appeal and so on and  
10 so forth. Isn't that --

11 MS. KOLBI-MOLINAS: Well, he read two  
12 different provisions, and so I think it's  
13 important to clarify. Paragraph 3b, which is on  
14 page 29 of the Joint Appendix, is not the  
15 paragraph that binds him to final judgment.  
16 That is a separate agreement not to enforce  
17 until all appeals were exhausted.

18 Paragraph 3d is where the Attorney  
19 General agreed that he would be bound by final  
20 judgment and then says "subject to any vacating  
21 or reversal of that judgment on appeal." But  
22 that just means he wasn't being bound by the  
23 judgment, the final judgment, and, even if it  
24 was later changed, he would remain bound by the  
25 original judgment.

1                   CHIEF JUSTICE ROBERTS: Well, could  
2 you -- I -- I don't -- I can look up the  
3 language again, but it seems to me saying he's  
4 being bound by the final judgment unless it's  
5 reversed or vacated suggests that it's a final  
6 judgment in the same way you have to have a  
7 final judgment to appeal, but it's not  
8 necessarily the last word on the subject.

9                   MS. KOLBI-MOLINAS: But every  
10 defendant is bound by the final judgment. And  
11 then, if that final judgment no longer exists,  
12 then they can't be bound by it anymore. I mean,  
13 there's an -- there are other defendants in this  
14 suit. So, for example, the local prosecutor was  
15 a defendant in this suit who stayed in the case  
16 through the district court and then became bound  
17 by final judgment but opted not to appeal.

18                   If that final judgment is vacated on  
19 appeal, even though he never appealed, he would  
20 no longer be bound by it anymore, but that  
21 doesn't mean he wasn't bound by the final  
22 judgment and, therefore, didn't have an  
23 obligation to appeal it, and it didn't mean that  
24 he didn't lose his right to appeal when he  
25 failed to do so.

1 JUSTICE KAGAN: Counsel --

2 JUSTICE GORSUCH: Counsel --

3 JUSTICE KAGAN: -- could I take you  
4 back to the original Justice Breyer question,  
5 which does have to do with the change in party.

6 And I understand your answer that the  
7 Attorney General remains the Attorney General,  
8 and we have a lot of law saying that even though  
9 the Attorney General, the person, has changed  
10 and even the party has changed, it's still the  
11 same legal entity.

12 And, indeed, I don't take Kentucky to  
13 disagree with that. No place in its briefing  
14 does it talk about the fact that, well, once  
15 there was a Democrat and now there's a  
16 Republican and he thinks completely different  
17 things.

18 But there's a real-world way in which  
19 that seems to matter a lot. I mean, that  
20 creates the problem here, which is that there's  
21 nobody left defending the state's law.

22 And I think what Justice Breyer was  
23 saying is: Gosh, that would be an extremely  
24 harsh jurisdictional rule or at least a  
25 counterintuitive rule if it ended up in a place

1 where nobody was there to rep -- to -- to defend  
2 Kentucky's law, even though there are  
3 significant parts of Kentucky's government that  
4 still want it law -- its law defended.

5 MS. KOLBI-MOLINAS: Well, Your Honor,  
6 first of all, harsh results don't change whether  
7 or not a jurisdictional rule is imposed. Of  
8 course, as this Court has repeatedly recognized,  
9 jurisdictional rules often result in harsh  
10 results and those results are imposed by  
11 Congress. That doesn't mean that there can be  
12 an exception to the jurisdictional rule.

13 But, second, under Kentucky law, the  
14 Attorney General has the authority to decline to  
15 defend a statute. The Kentucky Supreme Court  
16 has held that. And that is exactly what  
17 happened when the Attorney General originally in  
18 this case declined to defend the statute.

19 And it is not a violation of  
20 Kentucky's sovereign authority to hold him to  
21 that decision. As this Court recognized in  
22 Bethune-Hill, the decision not to appeal is as  
23 much an exercise of sovereign authority as the  
24 decision to appeal. It wouldn't mean -- if a  
25 subsequent Virginia Attorney General was to come



1 and say: Well, I would have made a different  
2 decision than the Attorney General in  
3 Bethune-Hill, that doesn't mean that this Court  
4 was violating Virginia's sovereign authority  
5 when it held that he had the authority to make  
6 the decision not to appeal.

7 I think, if anything, the fact that  
8 different political parties might choose to  
9 exercise that sovereign authority differently  
10 calls for this Court to be neutral in the face  
11 of that differential exercise of sovereign  
12 authority.

13 And so, again, I think what separates  
14 this case is the fact that, if the Attorney  
15 General had never exercised that sovereign  
16 authority to decline to defend and to enter into  
17 a court-ordered stipulation and dismissal  
18 binding him to the judgment, then I think we  
19 would be more in the case of what Justice Breyer  
20 was describing, of a case in which the sovereign  
21 authority had -- the sovereign had never been  
22 given the chance perhaps to exercise or defend  
23 the statute and then now it was being taken away  
24 from it.

25 But, here, the Attorney General

1 exercised the authority he had not to defend and  
2 to agree to be bound. Another defendant chose  
3 to continue to defend, chose to appeal, saw that  
4 appeal all the way through, and then decided at  
5 that point to lay down his sword.

6 None of that is a violation of  
7 Kentucky's sovereign interests, and so that's  
8 what I think sets this case apart and why, even  
9 if this Court is concerned about the harsh  
10 results that a jurisdictional rule might impose,  
11 this is not that case because this is a case in  
12 which the jurisdictional rules are being applied  
13 neutrally, as they should, to an appropriate  
14 exercise of sovereign authority.

15 It just happens to be that a different  
16 political party -- a different Attorney General  
17 of a different political party after an election  
18 would have exercised that authority differently.  
19 But that's always the case when a successor in  
20 office stands into the shoes of their  
21 predecessor.

22 JUSTICE GORSUCH: Counsel --

23 MS. KOLBI-MOLINAS: And so --

24 JUSTICE GORSUCH: I'm -- I'm -- I'm --  
25 I'm sorry. Finish your answer.

1 MS. KOLBI-MOLINAS: That's okay.

2 JUSTICE GORSUCH: That's a good  
3 stopping point?

4 MS. KOLBI-MOLINAS: That's a good  
5 stopping point.

6 JUSTICE GORSUCH: Okay. All right.  
7 Thank you.

8 My first question is put aside the  
9 stipulation order. I -- I want to press further  
10 where Justice Kagan and Justice Breyer were.  
11 Put aside the stipulation order here. Assume  
12 the Attorney General hadn't been involved  
13 initially.

14 Would it have been proper for the  
15 Attorney General then to intervene on appeal two  
16 days after getting notice?

17 MS. KOLBI-MOLINAS: Would not have  
18 been jurisdictionally barred.

19 JUSTICE GORSUCH: Okay.

20 MS. KOLBI-MOLINAS: We cert -- we  
21 certainly still think there's a timeliness  
22 issue, but there would not be a jurisdictional  
23 issue if he had not been bound and failed to  
24 appeal.

25 JUSTICE GORSUCH: Okay. And then do

1 you give any weight -- should this Court give  
2 any weight to the fact that we are dealing with  
3 a sovereign with the interests of defending a --  
4 a -- a duly-enacted state law along the lines  
5 Justice Kagan and Justice Breyer articulated?  
6 Does that -- should that bear on our  
7 consideration of this case at all?

8 MS. KOLBI-MOLINAS: I think it's  
9 certainly one of the considerations. I don't  
10 think it gets dispositive weight. And I think  
11 the D.C. Circuit in the Amador County case, I  
12 think, struck the balance appropriately where it  
13 said that it would be an abuse of discretion not  
14 to consider the fact that a sovereign is -- the  
15 sovereign purposes behind intervention, but it's  
16 not an abuse of discretion to fail to give them  
17 dispositive weight.

18 JUSTICE GORSUCH: And then -- and  
19 then, finally, I -- I -- I hope, with respect to  
20 the conditions of dismissal, as I read it at any  
21 rate, the Attorney General specifically reserved  
22 rights relating to whether he's a proper party  
23 in this action and in any appeals arising out of  
24 this action.

25 The Attorney General obviously argues

1 that includes the -- the argument that he can  
2 later seek intervention, that that was expressly  
3 reserved. What do you do about that?

4 MS. KOLBI-MOLINAS: Your Honor, that  
5 -- he could only reserve the rights that were  
6 available to him. And we believe he had a right  
7 to appeal.

8 JUSTICE GORSUCH: Well, but if --

9 MS. KOLBI-MOLINAS: So what we believe  
10 --

11 JUSTICE GORSUCH: But, counsel, I'm  
12 sorry, let me just --

13 MS. KOLBI-MOLINAS: Yeah.

14 JUSTICE GORSUCH: -- intervene there.  
15 I'm sorry.

16 But I think we agree that, absent the  
17 stipulation, one of the rights the Attorney  
18 General would have had is to seek intervention  
19 on appeal. So why wasn't that one of the  
20 reserved rights?

21 MS. KOLBI-MOLINAS: Well, Your Honor,  
22 we don't believe that that's what the -- the  
23 stipulation and dismissal contemplates because  
24 there is no right to intervene on appeal.

25 JUSTICE GORSUCH: It's a right to seek

1 intervention on appeal as part of the bundle of  
2 rights I think we've all just agreed on that the  
3 Attorney General had and that may be  
4 particularly powerful as a sovereign.

5 And why -- why didn't this language  
6 adequately reserve those rights?

7 MS. KOLBI-MOLINAS: Because if he was  
8 -- and I'm -- I'm not trying to resist the  
9 hypothetical -- but if he was bound by the  
10 judgment, then he had to appeal, and if he  
11 didn't, he couldn't come back to the suit. If  
12 he wasn't --

13 JUSTICE GORSUCH: So we should --

14 MS. KOLBI-MOLINAS: -- bound by the --

15 JUSTICE GORSUCH: -- ignore the  
16 reservation of rights here? Is that -- is that  
17 the argument?

18 MS. KOLBI-MOLINAS: Well, I'm saying,  
19 if he wasn't bound by the judgment, he wouldn't  
20 have needed a reservation of rights to reserve  
21 the right to seek intervention. That's not  
22 something you would need to reserve because any  
23 stranger or outsider to the action could move to  
24 intervene. That's just not the context in which  
25 this stipulation and dismissal was entered, Your

1 Honor.

2 JUSTICE BARRETT: Counsel, can I ask  
3 you a question about the premise of the  
4 jurisdictional argument altogether? I guess I'm  
5 struggling to see why 28 U.S.C. 2107 is the  
6 right way to think about this, because it  
7 doesn't seem to me that intervention necessarily  
8 overlaps with 2107. I mean, he's not filing a  
9 notice of appeal. He's seeking to intervene.  
10 It seems like a different thing.

11 And it might be that the fact that he  
12 styled -- signed this stipulation before might  
13 be an equitable reason or one of the  
14 considerations in this intervention calculation,  
15 the Rule 24 analog for why the court might not  
16 let him do it. Like a court might say: Hey,  
17 you had your chance, you signed that away. No,  
18 we're not letting you come in at this late date.

19 But I guess I don't understand why  
20 it's jurisdictional, because it seems to me that  
21 a motion to intervene is just a different way of  
22 getting before the suit. So are you aware of  
23 any other cases in which a court of appeals has  
24 treated a motion to intervene as implicating  
25 2107 at all? Because, I mean, after all, in the

1 language in 2107(a), it just says "unless notice  
2 of appeal is filed within 30 days."

3 So, presumably, even if you came in as  
4 a stranger to the suit, someone not in the  
5 Attorney General's strange two-hat position  
6 here, would anyone invoke 2107 saying, well,  
7 hey, even though you weren't a party below and  
8 you didn't have the right to appeal, it was 30  
9 days and that 30 days has run? It just seems  
10 like a mismatch between what happened and -- and  
11 2107.

12 MS. KOLBI-MOLINAS: So three  
13 responses. First, just to briefly point you to  
14 a case, the Tenth Circuit in Hutchinson did say  
15 that intervention cannot be used as an end-run  
16 or substitute to the ordinary rules of appellate  
17 procedure and the person who was seeking  
18 intervention there could have appealed. They  
19 didn't use the -- they didn't cite Section 2107,  
20 so I don't want to suggest that that -- but they  
21 did say that cannot -- intervention cannot be  
22 used as a substitution or end-run around the  
23 ordinary rules of appellate procedure.

24 But, second, as this Court held in  
25 Torres, one who is jurisdictionally barred from



1 achieving something directly is equally  
2 jurisdictionally barred from achieving it  
3 indirectly. The reason that this Court gave in  
4 Torres for why the Petitioner was  
5 jurisdictionally barred from rejoining his suit  
6 was that to allow him to do so would have  
7 been -- and the term this Court used -- would  
8 have been the equivalent of allowing him to file  
9 an untimely notice of appeal.

10 And because this Court didn't have the  
11 authority to allow him to file an untimely  
12 notice of appeal, it couldn't allow him to  
13 achieve the result any other way because to do  
14 so would render jurisdictional rules  
15 meaningless.

16 JUSTICE KAGAN: But -- but we didn't  
17 talk about intervention in Torres, correct?

18 MS. KOLBI-MOLINAS: No, he was just  
19 seeking to -- he was asking for an equitable  
20 exception to rejoin his suit, though, of course  
21 --

22 JUSTICE KAGAN: Yeah. And Mr. Kuhn  
23 said that he would not have been allowed to  
24 intervene. But maybe Mr. Kuhn was wrong about  
25 that. Maybe the way around the harshness of

1 Torres is just to allow people who don't file  
2 their notices of appeal in time to come back and  
3 say you should allow me to intervene?

4 MS. KOLBI-MOLINAS: I disagree, Your  
5 Honor, because the crux of the holding in Torres  
6 was that anything that amounts to the equivalent  
7 of filing an untimely notice of appeal is as  
8 jurisdictionally barred as filing an untimely  
9 notice of appeal.

10 So it wouldn't matter if it was asking  
11 for an equitable exception to rejoin the suit or  
12 asking for equitable intervention on appeal.  
13 Both of those are an end-run around filing an  
14 untimely -- filing a notice of appeal, and  
15 that's why they're jurisdictionally barred. So  
16 I don't think it would make a difference.

17 And the fact that intervention itself  
18 requires some sort of threshold showing doesn't  
19 change the fact that it would still be granting  
20 an exception to someone who could have and  
21 didn't file their notice of appeal and yet  
22 letting them appeal anyway.

23 So I think that, at the end, it's this  
24 anti-circumvention principle. If you are  
25 jurisdictionally barred from achieving something

1 directly, you cannot achieve it through any  
2 other means, regardless of what those means are.  
3 Otherwise, a jurisdictional rule, as this Court  
4 held in *Torres*, would be meaningless.

5 JUSTICE BARRETT: So do you represent  
6 that if the Attorney General had, in fact, filed  
7 a notice of appeal within the 30 days that you  
8 wouldn't have contested his right to do so?

9 MS. KOLBI-MOLINAS: I don't see on  
10 what grounds we could have, Your Honor.

11 JUSTICE BREYER: Well, now I'm  
12 confused. I mean, I'm trying to find in your  
13 brief where you make this jurisdictional  
14 argument. Now, on page 15 or page, rather, 8 --  
15 5, you say what it is. You say he agreed, the  
16 Attorney General, that any final judgment about  
17 the constitutionality will be binding on the  
18 Attorney General subject to any modification,  
19 reversal, or vacation of the judgment on appeal.

20 That's what we're talking about,  
21 right?

22 MS. KOLBI-MOLINAS: Yes.

23 JUSTICE BREYER: Okay. Then I see  
24 later that really they dismissed it on a  
25 different ground, namely, that it was untimely.

1 And I don't see much argument about that point,  
2 that -- that that bars him forever. Have I  
3 missed something?

4 Where -- where is it argued that that  
5 -- that that's a promise, that's a promise that  
6 I won't intervene later or do anything else, I'm  
7 out of it? Whatever the district court holds,  
8 I'm out of it? That's what you're saying, I  
9 think.

10 MS. KOLBI-MOLINAS: If you fail to  
11 appeal, you are out. That's the jurisdictional  
12 rule.

13 JUSTICE BREYER: Okay. No, no, okay.  
14 So I got the argument right. Where do you  
15 discuss it in your brief?

16 MS. KOLBI-MOLINAS: The jurisdictional  
17 argument?

18 JUSTICE BREYER: Yeah. Yeah.

19 MS. KOLBI-MOLINAS: The brief, it is  
20 -- it's the first argument.

21 JUSTICE BREYER: The first. Okay.  
22 I've got it then. I know the first argument.

23 MS. KOLBI-MOLINAS: So it's -- yes.

24 JUSTICE BREYER: Okay. But they  
25 didn't reach that as a ground, did they?

1 MS. KOLBI-MOLINAS: No, the Sixth  
2 Circuit --

3 JUSTICE BREYER: I mean -- I mean,  
4 because of this added language and so forth, it  
5 -- what do you think of saying, look -- you --  
6 you did it on a timeliness basis, but, really,  
7 there's an argument here that they're barred  
8 jurisdictionally because of this promise.  
9 Effectively, they promise not to do it.

10 Please consider that.

11 MS. KOLBI-MOLINAS: It would be  
12 appropriate to allow the Sixth Circuit to  
13 consider the jurisdictional argument because I  
14 agree they didn't consider it.

15 I wanted to address the point about  
16 sovereignty and the waiver of sovereign immunity  
17 that had been raised before because I think it  
18 is very clear that we are dealing with the  
19 Attorney General, who is the party who is  
20 intervening here.

21 First, one need only look at pages 45  
22 to 46 of the blue brief to see that the Attorney  
23 General has cited his institutional interests.  
24 He cited the fact that he has enforcement  
25 authority under HB 454. He even cites that he

1 is bound by the judgment as a basis for  
2 intervening.

3 But, second, every attorney general  
4 knows the difference between moving for  
5 intervention on behalf of himself and moving to  
6 intervene for the state because, when a state  
7 intervenes, it necessarily waives sovereign  
8 immunity, which is significant and irreversible.

9 There is no such thing as essentially  
10 waiving sovereign immunity. Sovereign immunity,  
11 it must be unambiguously and expressly waived.  
12 And this Court has held that voluntary  
13 intervention is such a waiver.

14 And that's why I think it's not just a  
15 mere technicality or formality that this case is  
16 -- the intervenor is Attorney General Cameron  
17 and this case is called Cameron v. EMW. The  
18 intervenor here is the Attorney General; it is  
19 not the State of Kentucky.

20 And this Court should not construe --  
21 where there is ambiguity and where there is  
22 question of who the intervenor is, should not  
23 construe it as the Commonwealth of Kentucky,  
24 because that would be an irreversible waiver of  
25 Kentucky's sovereign immunity, and, indeed, the

1 parties in this case have not even briefed the  
2 circumstances under which the Attorney General  
3 in Kentucky can waive the Commonwealth's  
4 immunity.

5           So I think that it's very clear that  
6 what we are dealing with here is the same party  
7 who was sued is now the party who is moving to  
8 intervene. The same party who was bound is the  
9 party who is moving to intervene. And it's not  
10 the Commonwealth of Kentucky who's moving to  
11 intervene here, and that's why the  
12 jurisdictional issue cannot be ignored.

13           JUSTICE KAVANAUGH: I thought he said  
14 that it could be construed as a limited waiver  
15 of sovereign immunity.

16           MS. KOLBI-MOLINAS: Under this Court's  
17 precedent, in a -- voluntary intervention is a  
18 waiver of sovereign immunity. It's not a  
19 limited waiver of sovereign immunity.

20           So I don't know what that limited  
21 waiver is that he's discussing, but if -- if the  
22 Commonwealth of Kentucky is intervening here, it  
23 has waived its sovereign immunity irreversibly.

24           I also want to go to this hat point,  
25 Your Honor, because I think it makes just a hash

1 of Ex parte Young and of jurisdictional rules.  
2 We sued the Attorney General because -- in his  
3 official capacity. There are only two  
4 capacities, official capacity and personal  
5 capacity. It doesn't matter how many job  
6 responsibilities you have.

7 And it would make hash of Ex parte  
8 Young if the Attorney General could say, well,  
9 with my left hand, I'm exercising my authority  
10 to defend the constitutionality of state law so  
11 that, with my right hand, I can enforce that  
12 same law, and then claim that he's two separate  
13 legal personas, one immune, one not. That would  
14 render both Ex parte Young and jurisdictional  
15 rules meaningless.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Just one more question. In another  
19 suit, the Friedlander litigation, your client  
20 opposed the Attorney General intervening prior  
21 to a panel opinion on the basis that the  
22 Secretary adequately represented the -- the  
23 Commonwealth.

24 And in your papers, you -- you said  
25 that you criticized the Attorney General's



1 concern about rehearing and cert as -- as  
2 speculative. Now, here, you're opposing the  
3 intervention after the issuance of the prior --  
4 of -- of a panel opinion.

5 And I wonder if that's -- I mean, I'm  
6 familiar that lawyers argue in the alternative,  
7 but I wonder if that's really putting him in a  
8 catch-22. If it's prior to the opinion, the  
9 Secretary will do it. If it's after the  
10 opinion, he's waited too long.

11 MS. KOLBI-MOLINAS: Well --

12 CHIEF JUSTICE ROBERTS: So Which --  
13 which is it?

14 MS. KOLBI-MOLINAS: So three responses  
15 to that, briefly, Your Honor.

16 First, we did lose the -- the adequate  
17 representation argument in that case. He was  
18 permitted to intervene before.

19 Second, that case actually was  
20 different because there was not the previous --  
21 the Attorney General had never been involved in  
22 that suit and had never sought their dismissal  
23 in that suit. So the question of adequate  
24 representation was slightly different in that  
25 suit.

1           But also, at the end of the day, we  
2 would make whatever good-faith arguments were  
3 available to us to oppose intervention under the  
4 circumstances, but that doesn't ever relieve the  
5 Attorney General from moving to intervene  
6 timely. And the fact that we wouldn't have  
7 consented to intervention doesn't relieve him of  
8 his obligation to move timely.

9           CHIEF JUSTICE ROBERTS: Well, I think  
10 you -- you should lose one of those, whether  
11 it's this one or that one, but I wonder why it  
12 doesn't make more sense to have the Attorney  
13 General out of the case when the Secretary is  
14 representing the state. You don't want the  
15 state speaking through two different voices.

16           But, once the Secretary's out of it,  
17 Kentucky ought to -- maybe ought to be there in  
18 some form, and the Attorney General is the one  
19 that wants to intervene.

20           MS. KOLBI-MOLINAS: Well, Your Honor,  
21 I think that intervention law incentivizes early  
22 intervention and penalizes late intervention.  
23 And there is a significant thing that happens  
24 when the court of appeals has ruled.

25           I mean, intervention is as much about

1 the court of appeals being able to control its  
2 docket and to control entry of new parties into  
3 the suit late in the game.

4 CHIEF JUSTICE ROBERTS: Yeah, well,  
5 late in the game, yes, but, here, the Attorney  
6 General filed a petition for rehearing on the  
7 same date that it would have been due if the  
8 Secretary had still been in the case.

9 So it seems a bit much to say that  
10 they were delaying the proceedings.

11 MS. KOLBI-MOLINAS: No, I'm not  
12 arguing and I don't think the court -- I don't  
13 think I'm arguing that they were delaying the  
14 proceedings. But, nevertheless, part of docket  
15 control is ensuring that you have all the  
16 parties who are going to be in the suit in as  
17 early as possible.

18 I mean, as this Court --

19 CHIEF JUSTICE ROBERTS: Well, I guess  
20 that's true, but, as Justice Breyer pointed out,  
21 the situation changes a bit when the -- the  
22 state representations are shuffled -- the -- the  
23 deck is shuffled again after an election.

24 And the question is whether you want  
25 to preclude the state from participating in the

1 litigation that is still ongoing in a way that  
2 doesn't delay it to deny the state any  
3 representation.

4 It's sort of an estoppel. I mean, if  
5 you had one party's position being pressed in  
6 the case and there was another election, well,  
7 the -- the state's still stuck with what the --  
8 the people have rejected in the election.

9 MS. KOLBI-MOLINAS: I don't think it  
10 was an abuse of the court of appeals' discretion  
11 to hold that under the circumstances that the  
12 Attorney General did wait too long to intervene,  
13 not, again, as a delay -- I'm not saying that --  
14 but that he had the opportunity to enter the  
15 case and shape the decision before the court of  
16 appeals ruled.

17 So I don't think it was an abuse of  
18 the discretion for the court of appeals to say  
19 that waiting until after judgment is entered to  
20 try to make your arguments and to make a new  
21 argument is waiting too long.

22 A different panel may have seen it  
23 differently. But, under the abuse of discretion  
24 standard, I don't think there was an abuse  
25 there.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 Justice Thomas?

3 JUSTICE THOMAS: None for me, Chief.

4 CHIEF JUSTICE ROBERTS: Justice

5 Breyer, further?

6 JUSTICE SOTOMAYOR: I have a question.

7 Counsel, assuming there's no jurisdictional  
8 argument, meaning that they didn't have to file  
9 a notice of appeal, Justice Breyer and I think  
10 Justice Gorsuch and Justice Barrett have all  
11 been concerned about never having given the  
12 State of Kentucky the opportunity adequately to  
13 defend this law after it was declared  
14 unconstitutional because the Secretary of State  
15 walked away from it.

16 How do you address that concern --

17 MS. KOLBI-MOLINAS: Your Honor --

18 JUSTICE SOTOMAYOR: -- and that --

19 MS. KOLBI-MOLINAS: -- I don't -- I  
20 don't think it's fair to characterize this case  
21 as if there was some sort of default judgment or  
22 some sort of abdication by the Secretary.

23 The Secretary was the sole defendant  
24 who saw the case through to district court  
25 judgment and then saw it all the way through on

1 appeal and defended it vigorously on appeal.

2 So it's not as if the state was denied  
3 its opportunity to defend the law. That  
4 Secretary defended it all the way up until the  
5 court of appeals and then decided, based on the  
6 decision and based on whatever other  
7 considerations, not to seek extraordinary  
8 further appeals.

9 The Attorney General who had --  
10 putting aside whether or not he was bound --  
11 still had the opportunity to defend earlier, had  
12 an opportunity to intervene earlier.

13 I don't think it's disrespectful of  
14 Kentucky's sovereign interests for the court of  
15 appeals to have held that at this point the case  
16 has gone on too long and it's too late for  
17 someone new to join.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 JUSTICE KAGAN: No.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Gorsuch? Okay. Okay. Thank you, counsel.

22 You have rebuttal, Mr. Kuhn?

23 REBUTTAL ARGUMENT OF MATTHEW F. KUHN

24 ON BEHALF OF THE PETITIONER

25 MR. KUHN: Thank you, Mr. Chief

1 Justice. Two quick points.

2 I want to start with Justice Breyer's  
3 question and what the Chief Justice referred to  
4 as the deck being reshuffled.

5 I think, after the elections in 2019  
6 and the reversal of positions with various state  
7 officials, we saw the wisdom of the way Kentucky  
8 had structured its system of government, its way  
9 of defending its sovereignty when its laws are  
10 challenged, because the reversal of one party  
11 was not good enough for Kentucky's law to go  
12 away. It took two people. It took two  
13 constitutionally elected, separately elected  
14 officials to agree not to appeal further. The  
15 Governor's administration said no further, but  
16 Kentucky created that fail-safe.

17 I think the effect of the Sixth  
18 Circuit's ruling is to say to a sovereign state  
19 that you just can't structure your government  
20 that way. You cannot defend your sovereign  
21 interests the way that you want to do so.

22 I think that is directly contrary to  
23 what this Court said in *Bethune-Hill* that we  
24 respect how states structure their government.

25 The second and final point that I want

1 to make is to respond to some of the questions  
2 that Justice Gorsuch and the Chief Justice asked  
3 about the terms of the stipulation.

4 This Court has told us that a party is  
5 bound -- that agrees to be bound by a -- a  
6 non-party that agrees to be bound by a judgment  
7 is bound in accordance with the terms of his or  
8 her agreement. That's Taylor versus Sturgell.

9 So I think that we have to look very  
10 closely at what the Attorney General agreed to  
11 in his enforcement capacity.

12 And as the questions have pointed out,  
13 we preserved our right to benefit from any  
14 favorable result on appeal. That is in  
15 Section 3d in response to the Chief Justice's  
16 question, and we reserved our right to  
17 participate in any appeal. We reserved all  
18 claims and rights relating to whether we are a  
19 proper party.

20 I think, by reserving that, that can  
21 only be understood, to respond to Justice  
22 Gorsuch's question, as to preserve our ability  
23 to move to intervene if -- if circumstances  
24 changed, which they did.

25 And so I think that if we're bound in



1 accordance with the terms of our agreement, I  
2 think that we have the ability to come in and  
3 protect Kentucky's interests when it became  
4 unrepresented.

5 If there are no further questions, I  
6 appreciate the Court's time.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel. The case is submitted.

9 (Whereupon, at 11:14 a.m., the case  
10 was submitted.)

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<b>1</b>	<b>abused</b> <sup>[5]</sup> 6:20 12:13 13:15,19,20 <b>abuses</b> <sup>[1]</sup> 35:12 <b>accept</b> <sup>[1]</sup> 15:1 <b>accepted</b> <sup>[2]</sup> 4:1,16 <b>accordance</b> <sup>[2]</sup> 79:7 80:1 <b>achieve</b> <sup>[2]</sup> 64:13 66:1 <b>achieving</b> <sup>[3]</sup> 64:1,2 65:25 <b>acknowledges</b> <sup>[1]</sup> 12:24 <b>acknowledgment</b> <sup>[1]</sup> 13:1 <b>act</b> <sup>[4]</sup> 8:4,8 24:2 40:24 <b>acting</b> <sup>[1]</sup> 4:24 <b>action</b> <sup>[8]</sup> 9:20 11:13 15:17,18 17:12 59:23,24 61:23 <b>actionable</b> <sup>[1]</sup> 14:8 <b>actions</b> <sup>[3]</sup> 30:18,25 42:14 <b>actually</b> <sup>[1]</sup> 72:19 <b>added</b> <sup>[1]</sup> 68:4 <b>additional</b> <sup>[1]</sup> 52:7 <b>address</b> <sup>[3]</sup> 4:20 68:15 76:16 <b>adequate</b> <sup>[2]</sup> 72:16,23 <b>adequately</b> <sup>[3]</sup> 61:6 71:22 76:12 <b>administration</b> <sup>[2]</sup> 50:1 78:15 <b>admit</b> <sup>[1]</sup> 15:2 <b>admits</b> <sup>[1]</sup> 48:14 <b>adopt</b> <sup>[1]</sup> 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