SUPREME COURT
OF THE UNITED STATES

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.)

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Pages: 1 through 80

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DANIEL CAMERON, ATTORNEY GENERAL)

4 OF KENTUCKY,)

5 Petitioner,)

6 v.) No. 20-601

7 EMW WOMEN'S SURGICAL CENTER, P.S.C.,)

8 ET AL.,)

9 Respondents.)

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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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6 ALEXA KOLBI-MOLINAS, ESQ.

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1 P R O C E E D I N G S
2 (10:01 a.m.)
3 CHIEF JUSTICE ROBERTS: Today's orders
4 of the Court have been duly entered and
5 certified and filed with the Clerk.
6 We will hear argument first this
7 morning in Case 20-601, Cameron versus EMW
8 Women's Surgical Center.
9 Mr. Kuhn.
10 ORAL ARGUMENT OF MATTHEW F. KUHN
11 ON BEHALF OF THE PETITIONER
12 MR. KUHN: Mr. Chief Justice, and may
13 it please the Court:
14 Two days after learning that another
15 state official had stopped defending Kentucky's
16 House Bill 454, the Attorney General moved to
17 intervene so that the Commonwealth could exhaust
18 all appeals in defense of its law.
19 The Sixth Circuit kept the Attorney
20 General out of court, and it made three
21 fundamental errors in doing so.
22 First, the panel overlooked that the
23 Attorney General simply sought to pick up where
24 the Secretary had left off in this litigation.
25 More to the point, the Attorney General, on

1 behalf of the Commonwealth, merely accepted a
2 handoff for 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 has 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 out 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 intervening in his own capacity as distinct from
25 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 think it's different. If
10 we are retained as counsel --
11 CHIEF JUDGE 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.
16 JUSTICE SOTOMAYOR: All right.
17 MR. KUHN: There are a couple
18 qualifications to that, but, yes, generally.
19 JUSTICE SOTOMAYOR: Generally. You
20 didn't appeal the judgment, correct?
21 MR. KUHN: That's correct.
22 JUSTICE SOTOMAYOR: Why would we call
23 it an abuse of discretion for a court of
24 appeals, after it's rendered its judgment, to
25 say we don't really care what has happened in

1 the political arena. We don't want to be
2 dragged into it.
3 You agreed to be bound by this
4 judgment. You didn't appeal, even though you
5 were a party. Are you telling me you're now
6 willing to waive the sovereign immunity of the
7 state? Because that's what it sounds like,
8 because, if you're coming in as yourself, you
9 were here and left, you agreed to be bound by
10 whatever the Secretary of State did.
11 Under what theory of law would we be
12 able to say that the Sixth Circuit abused its
13 discretion in just respecting the very
14 stipulation you signed?
15 MR. KUHN: Justice Sotomayor, let me
16 start with the stipulation, and then I want to
17 step back and talk about Bethune-Hill and state
18 sovereignty.
19 But, with respect to the stipulation,
20 it was entered into in our capacity as someone
21 who can enforce House Bill 454. We were sued on
22 an ex parte Young theory. At pages 40 and 41 of
23 the red brief, EMW acknowledges that the
24 Commonwealth was not before the district court.
25 That acknowledgment, I think,

1 overcomes the stipulation because the
2 stipulation --
3 JUSTICE SOTOMAYOR: Well, it couldn't
4 have been before the district court. The state
5 has sovereign immunity, correct?
6 MR. KUHN: That's --
7 JUSTICE SOTOMAYOR: So the state under
8 no circumstance, even now on appeal, unless it's
9 willing to waive sovereignty, and -- and you
10 haven't told me if you are or aren't or whether
11 you have or haven't, I don't think you put that
12 before the Sixth Circuit.
13 So I go back to my question: How do
14 we say it abused its discretion in saying that
15 an individual party who had an opportunity to be
16 in the litigation and chose to get out and chose
17 to bind itself to the decisions of the Secretary
18 of State, how can we say it abused -- the Sixth
19 Circuit abused its discretion in honoring that
20 commitment by the Sec -- by the Attorney
21 General?
22 MR. KUHN: Justice Sotomayor, we don't
23 think that the Commonwealth is a party to the
24 stipulation because they had not been brought
25 before the court. They could have tried to sue

1 the Commonwealth, and at that point, we would
2 have been able to invoke sovereign immunity, but
3 we never got that chance.
4 And if I can just engage with you a
5 bit --
6 JUSTICE SOTOMAYOR: It would have been
7 almost actionable for them to have sued the
8 state, wouldn't it have been? I mean, it would
9 have been in bad faith. Everyone knows you
10 can't sue a state. You can sue the officers who
11 enforce the law, correct?
12 MR. KUHN: That's correct. They
13 brought it --
14 JUSTICE SOTOMAYOR: And now -- by the
15 way, you said you had no authority or duty to
16 enforce the provisions as enacted, but now you
17 come back and give a contrary representation
18 that you can enforce the provisions by defending
19 them, correct?
20 MR. KUHN: That's correct. The --
21 JUSTICE SOTOMAYOR: And so why
22 wouldn't that be judicial estoppel?
23 MR. KUHN: So one of the key elements
24 of judicial estoppel is that a court has to
25 accept your argument. The previous Attorney

1 General, we admit, took the position that he did
2 not have the authority to enforce House Bill
3 454.
4 The district court did not rule on
5 that issue. If you look at the stipulation, the
6 stipulation notes that we agreed not to enforce
7 House Bill 454. And so the stipulation, I
8 think, overcomes any suggestion that the
9 district court ruled on that issue.
10 And if I can point you to two
11 particular provisions of the stipulation that
12 even if the Court were to say that the
13 Commonwealth is bound by it, I think that it
14 protects exactly what we're doing here.
15 We reserved all rights to participate
16 in this action and any appeals arising out of
17 this action. And we preserved our ability to
18 benefit from any favorable result on appeal.
19 So those two provisions work together,
20 that even if the Attorney General --
21 JUSTICE SOTOMAYOR: But you didn't
22 appeal on time.
23 MR. KUHN: That's correct, but this
24 Court's general rule is that only a party or one
25 who becomes a party can file an appeal. That's

1 from --

2 JUSTICE SOTOMAYOR: You could have

3 filed an appeal if you lost, couldn't -- you

4 reserve the right to appeal if you -- if -- if

5 you won.

6 MR. KUHN: We -- we reserved the right

7 to -- we reserved all rights, claims, and

8 defenses --

9 JUSTICE SOTOMAYOR: But you didn't --

10 CHIEF JUSTICE ROBERTS: Counsel?

11 JUSTICE SOTOMAYOR: -- file a notice

12 of appeal on time.

13 MR. KUHN: We did not file a notice of

14 appeal, Justice Sotomayor. We had been

15 dismissed from the case without prejudice. We

16 were not mentioned in the judgment.

17 JUSTICE KAGAN: Mr. Kuhn --

18 CHIEF JUSTICE ROBERTS: Counsel, could

19 I ask you, the stipulation concerning being

20 bound by a final judgment, what do you

21 understand "final judgment" to mean?

22 It seems to me it can mean a number of

23 things. The district court ruling is a final

24 judgment, for example, for purposes of appeal.

25 On the other hand, there obviously are

1 subsequent proceedings that could take place in
2 appeal, obviously, and -- and so on that would
3 undermine the finality of the judgment.
4 When -- when you signed that
5 stipulation to be bound by a final judgment,
6 what is -- what are you being bound by?
7 MR. KUHN: The language is that we're
8 bound by the final judgment in this matter
9 disposing of all claims and the exhaustion of
10 any and all appeals that may arise in this
11 action.
12 So we get the benefit of any favorable
13 result on appeal. So the notion would be that,
14 yes, we're agreeing to be bound, but we're
15 preserving our rights to come back in.
16 I'll note that although the Sixth --
17 we disagree with most of what the Sixth Circuit
18 did, if you look at Joint Appendix 229, the
19 Sixth Circuit appears to have agreed with what
20 I'm saying here, where they noted that we had
21 preserved all claims and rights relating to
22 whether we -- claims and rights relating to
23 whether we can participate on appeal.
24 So I think that's one thing, reading
25 the stipulation, that the Sixth Circuit, in

1 fact, got right.

2 And if I can step back and talk about

3 Bethune-Hill, this Court has told us that

4 federal courts should respect how a state

5 structures itself when defending its laws.

6 Kentucky's put together a system where, as

7 Justice Sotomayor mentioned, state officials

8 oftentimes provide the front-line defense of

9 state laws, and this makes sense because they

10 have particular expertise in enforcing these

11 laws. But Kentucky, unlike Virginia had done in

12 Bethune-Hill, said it's not good enough for the

13 state that one official gets to make all

14 litigation decisions for the state.

15 What we as Kentuckians want is a

16 fail-safe, a fail-safe that if a state official

17 who enforces state law says, I'm not going to

18 appeal any further, Kentucky's Attorney General

19 can come in for the Commonwealth and say: No,

20 the Commonwealth wants to go farther.

21 This envisions a system of --

22 JUSTICE KAGAN: Mr. Kuhn -- I'm sorry.

23 Complete your sentence.

24 MR. KUHN: This -- this envisions a

25 system of state officials working together to

1 defend Kentucky's law, which is what happened
2 here.
3 JUSTICE KAGAN: Could -- could --
4 could I assume for a moment that the Attorney
5 General's Office could have appealed? Okay?
6 Just let's assume with me that it could have
7 because it was bound by the judgment, because of
8 the stipulation, because of the combination of
9 the two, because of any number of other things.
10 Just assume with me that the Attorney General's
11 Office could have appealed.
12 In that case, would the Petitioner's
13 jurisdictional argument be correct?
14 MR. KUHN: No, Justice Kagan, I don't
15 think it would, and let me explain why.
16 Let's assume, instead of putting the
17 power to defend Kentucky on the Attorney
18 General, the General Assembly of Kentucky had
19 given it to itself. If that had happened and
20 everything had stayed the same in your
21 hypothetical, this Court would not be having a
22 jurisdictional discussion then because everyone
23 would understand that the Attorney General, in
24 his enforcement capacity, who, in your
25 hypothetical, had gone to final judgment, is

1 different than the General Assembly coming in on
2 behalf of the Commonwealth.
3 JUSTICE KAGAN: Yeah, I -- I guess I'm
4 not sure I understand the answer, so let me
5 reframe the question a little bit.
6 You know, take our decision in Torres,
7 right, which is the -- the case where we make
8 clear that the notice of appeal requirement is
9 jurisdictional and impose a very harsh rule
10 saying that if you don't appeal, even if it's
11 not your fault, you're out of luck. Okay?
12 So do you think if Torres had gone
13 further and Mr. Torres had filed a motion to
14 intervene that we would have said, oh, sure, go
15 ahead and intervene in the suit? Would we have
16 -- would the Court have said that?
17 MR. KUHN: Our -- our position is that
18 we do not think a notice of appeal for a party
19 who could have -- or, sorry, for a party who
20 could have appealed but failed to do so, we
21 don't think a motion to intervene in the ensuing
22 appeal that the party failed to take, we -- we
23 don't think that would be proper because of how
24 this Court talked about jurisdiction in Torres.
25 But my point is -- is that if you had

1 separated the power to represent the state from
2 the Attorney General, no one would think there's
3 a jurisdictional problem. The only reason we're
4 having a jurisdictional discussion here is
5 because two hats were put on the same official,
6 two hats, the language this Court use -- used in
7 Bethune-Hill.
8 And this Court told us in Bethune-Hill
9 that representing a state as the agent of the
10 state is distinct from your --
11 JUSTICE KAGAN: Well, but -- but you
12 --
13 MR. KUHN: -- institutional hat.
14 JUSTICE KAGAN: -- but that's just
15 contesting the premise, which is that the
16 Attorney General could have appealed. If I
17 understand your argument, it's the Attorney
18 General couldn't have appealed because he would
19 have been doing so in a different capacity than
20 he had taken in the first place.
21 MR. KUHN: That's not my position. My
22 position is that, stepping outside of your
23 hypothetical, because of the way the stipulation
24 was written, the Attorney General could have
25 appealed because it's consistent with him

1 reserving his rights to -- claims and rights to
2 participate in any subsequent appeal and to
3 benefit from any favorable ruling.
4 JUSTICE KAGAN: I apologize for
5 pressing on this. I'm just maybe just not
6 understanding it. It might be my fault
7 entirely, but I'll just -- if you agree that in
8 the main -- mine run of cases in a Torres-type
9 case where the person could have appealed,
10 didn't appeal, if you agree that it would then
11 be improper to grant intervention rights, which
12 I take you to agree --
13 MR. KUHN: Mm-hmm.
14 JUSTICE KAGAN: -- okay, so that's a
15 very simple case. And it seems to me that the
16 Petitioners would say that's exactly what
17 happened here because the AG could have
18 appealed, didn't, and now is seeking
19 intervention.
20 And, you know, if -- if we assumed the
21 -- the point that the AG could have appealed,
22 why doesn't the same result follow?
23 MR. KUHN: Because this Court has told
24 us that different capacities should be treated
25 -- this Court's words are "different legal

1 personages." And, for example, in Bethune-Hill,
2 the fact that the Virginia House of Delegates
3 participated in that case to defend its
4 institutional interests did not mean that it
5 also brought any power it had to -- to appeal on
6 behalf of the state. The Court said the record
7 was silent about that issue.
8 The record here is silent as to the
9 Attorney General participating as an agent of
10 the state --
11 JUSTICE BARRETT: Mr. Kuhn --
12 MR. KUHN: -- and because we have --
13 JUSTICE BARRETT: -- could you have
14 intervened on behalf of the state qua state,
15 recognizing, as Justice Sotomayor pointed out,
16 that that would have waived the state's
17 sovereign immunity? Would -- we wouldn't be
18 even having this discussion if you had
19 intervened on behalf of Kentucky, with Kentucky
20 being the named party and you being the lawyer
21 for the state. Could you have done that?
22 MR. KUHN: I think that is essentially
23 what we did. The reason we came in on behalf of
24 the Commonwealth was because this Court told us
25 in Hollingsworth that we need -- that states

1 have to act through their agents. So we
2 identified ourselves as the agent of Kentucky,
3 and we came in on behalf of the Commonwealth,
4 just as Hollingsworth envisioned.
5 This Court noted in Hollingsworth that
6 state attorneys general are typically the people
7 who are tapped to defend the sovereign
8 interests, who speak for the people of Kentucky.
9 So, yes, I would agree with that, that we could
10 have come in as the Commonwealth, which is
11 essentially what we've done here. We were just
12 following this Court's direction from
13 Hollingsworth by identifying ourselves as the
14 agent of Kentucky.
15 JUSTICE SOTOMAYOR: So are you
16 answering yes? You've waived Kentucky's
17 sovereign immunity?
18 MR. KUHN: So I don't think this Court
19 has ever said that when we participate as an
20 agent of the Commonwealth or an agent of the
21 state, that that is, in fact, a waiver of
22 sovereign immunity.
23 JUSTICE SOTOMAYOR: If you're not a
24 party, you can't be the agent of anybody. You
25 can only be an agent of a party.

1 MR. KUHN: I think that's -- so I
2 agree that we're an agent of the party, and to
3 the extent that that does create a waiver of
4 sovereign immunity, I think it's a narrow waiver
5 related to whether House Bill 454 is
6 constitutional.
7 I -- it's not unprecedented for states
8 to come in and defend their laws. For example,
9 in Maine versus Taylor, this --
10 JUSTICE SOTOMAYOR: If you had stayed
11 in this litigation, would you have been
12 defending this law? What other capacity would
13 you have served if you had stayed in the
14 litigation when you were sued?
15 MR. KUHN: If we --
16 JUSTICE SOTOMAYOR: You were being
17 sued as an agent of the state, correct?
18 MR. KUHN: No. We were being sued
19 because we can enforce House Bill 454 under Ex
20 parte Young. If they had sued us as an agent of
21 the state, we would have been able to invoke
22 sovereign immunity.
23 Everybody agrees that Kentucky was not
24 there in district court. Pages 40 and 41 of the
25 red brief. That concession being made, it

1 cannot be the case that Kentucky is
2 jurisdictionally prohibited from coming in.
3 The only reason we're having this
4 discussion is because the Attorney General wears
5 two hats, just like the -- the state official
6 wore two hats in Karcher, just like the -- the
7 hats that were discussed in Bender. This is not
8 a novel thing. We followed the Court's
9 direction in -- in Bethune-Hill to bring us
10 here.
11 If I can, in closing, just point out
12 that after reading the Sixth Circuit's decision,
13 I think one would be forgiven for not
14 understanding the sovereign interests that are
15 at stake. We've had a discussion about state
16 sovereignty now, and that fact went unmentioned
17 in the -- in the court of appeals' ruling. It
18 wasn't mentioned anywhere. In fact, in Footnote
19 4 of the opinion, they -- they said they were
20 not going to consider the Attorney General's
21 ability to represent the state. We think that
22 that was a relevant factor that the court of
23 appeals should have considered.
24 Keep in mind that we had been
25 representing the Secretary before the Sixth

1 Circuit. We weren't sitting on the sidelines.
2 We stood up in the Sixth Circuit and argued in
3 defense of House Bill 454. The Secretary
4 informed the Attorney General's Office seven
5 days after that decision came down that he would
6 not appeal further.
7 Two days later, we filed a 20-page
8 motion to intervene on behalf of the
9 Commonwealth. That's how we titled it in both
10 our intro and our conclusion. We said that we
11 were on behalf of the Commonwealth more than a
12 dozen times in the motion. But that just went
13 unrepresented.
14 I think the only way we can understand
15 the Sixth Circuit's decision as making any sense
16 is to treat us as if we were bringing to bear a
17 new, previously unrepresented interest. We were
18 not doing that. The Secretary had been
19 defending Kentucky's interests. And we had been
20 counsel for some of that period. So, when we
21 stepped forward, we sought to defend the same
22 interests as the real party in interest that the
23 Secretary had been defending all along.
24 Under those circumstances, it was a
25 handoff of litigation authority to go the

1 distance. And I'll point out that the Secretary
2 did not oppose our motion to intervene.
3 The Secretary said, I'm not going to
4 appeal further, but he let us go -- he said, I'm
5 not going to oppose you going further.
6 This is an example of Kentucky's
7 unique system of defending its sovereign
8 interests working as it was meant to: state
9 officials working together. One state official
10 says no further. We come in for the
11 Commonwealth and say we want to go the distance.
12 If there are no further questions.
13 CHIEF JUSTICE ROBERTS: Justice
14 Thomas, anything further?
15 JUSTICE THOMAS: None for me, Chief.
16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer?
18 JUSTICE KAGAN: If I understand your
19 argument -- was -- was it up to me? I'm sorry.
20 CHIEF JUSTICE ROBERTS: Yes, you're
21 up.
22 JUSTICE KAGAN: Okay. -- correctly,
23 Mr. Kuhn, it really does all come down to this
24 two hats theory, is that correct?
25 MR. KUHN: I think we've got two

1 arguments on jurisdiction, the two hats theory
2 and the argument that even if you disagree with
3 us on two hats, the Attorney General could --
4 could not have appealed --
5 JUSTICE KAGAN: Okay.
6 MR. KUHN: -- because of the
7 stipulation.
8 JUSTICE KAGAN: Okay. Well, okay.
9 So, if you assume that the Attorney General
10 could have appealed, then it comes down to the
11 two -- two hats theory? Yes?
12 MR. KUHN: That's correct. If you
13 assume our second argument is wrong, we're
14 resting on our first.
15 JUSTICE KAGAN: Yes. So let -- just
16 -- just one question about the two hats theory,
17 which I -- I guess I'm just not sure I
18 understand because it seems to me that the
19 Secretary's role in this entire litigation
20 pretty much proves that the two hats theory
21 doesn't work because your theory is that the
22 Attorney General was stepping in to replace the
23 Secretary, who until that point was representing
24 the state's interests.
25 But the Secretary was sued in his

1 capacity as a state official who could enforce
2 state law. So doesn't it really come down to
3 the same thing? The Secretary was sued because
4 he could enforce state law. He was obviously
5 representing the state's interests. Nobody else
6 was doing that.
7 So the two seem completely intertwined
8 to me, and the Secretary's role in the
9 litigation prior to the Attorney General's
10 intervention motion proves that, doesn't it?
11 MR. KUHN: No, it doesn't. The
12 Secretary has the power as a matter of Kentucky
13 law to defend Kentucky law when challenged. But
14 he -- so their -- so the fact that he can take
15 actions consistent with -- with Kentucky's
16 interests in defending its law does not mean
17 that he has the power to stand in as the agent
18 of Kentucky.
19 Only the Attorney General under
20 Kentucky Revised Statute 15.020 has that power.
21 So I think the distinction to be drawn, Justice
22 Kagan, is that, yes, the Secretary took actions
23 consistent with Kentucky's interests by
24 defending Kentucky law.
25 When he said no further, that's when

1 we stepped in, which is what we think
2 Ms. McDonald did in this Court's McDonald
3 decision, and that's why we're consistent with
4 that.
5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch?
7 JUSTICE GORSUCH: Counsel, do you
8 agree that abuse of discretion is a proper
9 standard of review for this Court in analyzing
10 the Sixth Circuit decision?
11 MR. KUHN: So, as I mentioned with
12 Justice Thomas earlier, this Court has not ruled
13 on --
14 JUSTICE GORSUCH: I understand that.
15 That's why I'm asking the question.
16 MR. KUHN: So we have not contested
17 that point because of what this Court said in
18 NAACP versus New York. And if the position is
19 that Rule 24 is a helpful analogy, I think it's
20 a helpful analogy in that -- in that
21 circumstance. But we think this is an obvious
22 abuse of discretion because we were not treated
23 as --
24 JUSTICE GORSUCH: Okay, okay.
25 MR. KUHN: Yeah.

1 JUSTICE GORSUCH: And -- and then
2 second question briefly, you rest heavily on --
3 on the state's sovereignty interests here and --
4 and citing Bethune-Hill to us quite a lot.
5 Where do those interests run out?
6 When -- when would it be proper for a court of
7 appeals under an abuse of discretion standard to
8 deny intervention by a state entity?
9 MR. KUHN: If we had sought rehearing
10 like we did, tendered our rehearing petition,
11 but we had filed it after the deadline, I think
12 that a court of appeals would be within its
13 discretion to say, no, you're delaying this
14 litigation.
15 If we had come in and said, court of
16 appeals, please remand this case to the district
17 court to let us put on more facts, I think that
18 the Court would be within its discretion to deny
19 a state's intervention.
20 But our point is, where we moved to
21 intervene and did not delay this case by even a
22 day and where we merely sought to pick up where
23 the Secretary left off and to exhaust all
24 appeals, in that circumstance, we think that is
25 an abuse of discretion.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?
3 JUSTICE KAVANAUGH: Does the same kind
4 of rule apply in private litigation? So suppose
5 a private plaintiff sues a private defendant
6 under state tort law. The state -- the private
7 defendant argues that the state tort law is
8 unconstitutional and the court on appeal rules
9 that the tort law is unconstitutional, okay?
10 And the state -- the private plaintiff, sorry,
11 chooses not to seek en banc or cert.
12 Can a state AG intervene in that
13 circumstance even though the private plaintiff
14 has chosen not to seek en banc or cert to argue
15 that the state tort law is, in fact,
16 constitutional?
17 MR. KUHN: I think this Court told us
18 in Hollingsworth that a private party defending
19 state law is just a different matter than a
20 state official who has sworn an oath to defend
21 Kentucky's constitution who is popularly
22 elected.
23 So I think the state in that
24 circumstance would --
25 JUSTICE KAVANAUGH: The state tort law

1 in that circumstance will be declared
2 unconstitutional. And I think, by saying it's
3 different, you're saying the state AG in that
4 case could not seek en banc or cert even though
5 the state tort law had been declared
6 unconstitutional?
7 MR. KUHN: Our position is not that he
8 could not do so but that it would not be as easy
9 of an argument in that circumstance. I think it
10 matters that we have a handoff from one state
11 official to another, both of whom are sworn to
12 defend Kentucky law.
13 I think a lot of the things I'm saying
14 today would be consistent with the -- with the
15 hypothetical that you're talking about. But I
16 think we're perhaps a half step beyond that and
17 this is a much easier case than the one you've
18 hypothesized.
19 JUSTICE KAVANAUGH: Thank you.
20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?
22 JUSTICE BARRETT: I have a question
23 that's related to the question Justice Thomas
24 started out with and that Justice Gorsuch just
25 followed up on.

1 Justice Thomas asked you where we get
2 the authority to even impose these standards on
3 the courts of appeal. And I think we've treated
4 it as the lower court having some inherent
5 authority just pursuant to the judicial power to
6 manage its docket, and I heard you saying that
7 we have the authority to make sure that the
8 rules that the courts adopt and apply are not
9 abuses of their discretion. And that would be
10 true whether we're talking about pre-judgment or
11 post-judgment intervention. And -- and our role
12 in that regard is pretty limited.
13 I have a question specifically about
14 how we should think about that relationship in
15 the context of a post-judgment intervention
16 motion because we've also asserted that we have
17 some inherent supervisory authority over the
18 courts of appeal. And in the post-judgment
19 intervention context, we might also have some
20 concern that wouldn't be present in the
21 pre-judgment context about a court of appeals
22 trying to evade our review.
23 How, if at all, should we think about
24 that factoring into the analysis? Is that --
25 it's more than just equity to the litigants,

1 arguably. So how -- does that play a role at
2 all?
3 MR. KUHN: I think it -- it does. And
4 if this Court wants to look to the Day opinion
5 from the Ninth Circuit that dealt with that,
6 that was when Hawaii came in and the court noted
7 that Hawaii had come in later than they would
8 have let a private litigant. But the court
9 talked about its discomfort with saying that a
10 sovereign state could not seek en banc relief
11 and could not seek certiorari from this Court.
12 So I -- I read Day to basically create
13 a sovereignty tiebreaker when a state comes in
14 to seek further review.
15 JUSTICE BARRETT: But that's
16 sovereignty. I mean, you've emphasized
17 sovereignty, and I get that. But my question
18 was a little bit different because it's one that
19 might apply even in the context of private
20 parties, as Justice Kavanaugh was positing.
21 MR. KUHN: Mm-hmm. So I -- I think
22 so. And as you're thinking about the private
23 parties issue and the issue, Footnote 16 of this
24 Court's McDonald opinion talks about how its
25 analysis would apply outside of the

1 representational context, right?
2 Ms. McDonald there had been
3 represented by the non-named class members. The
4 Court gave two more examples of cases that would
5 apply post-judgment in the representational
6 context, but then it cited further cases and
7 said, outside of the representational context,
8 we think post-judgment intervention could be
9 allowed, and cited two cases and said this
10 Court's McDonald decision is consistent with
11 those other two cases to the extent the party
12 moves to intervene before any appellate
13 deadlines have run.
14 So I think the post-judgment part of
15 it and insulating a decision from further
16 review, especially for a sovereign state, is
17 something that matters quite a bit to the
18 analysis that we hope the Court adopts.
19 JUSTICE BARRETT: Thank you.
20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.
22 Ms. Kolbi-Molinas.
23 ORAL ARGUMENT OF ALEXA KOLBI-MOLINAS
24 ON BEHALF OF THE RESPONDENTS
25 MS. KOLBI-MOLINAS: Thank you, Mr.

1 Chief Justice, and may it please the Court:
2 The Attorney General agreed to be
3 bound by final judgment and chose not to appeal
4 it. Because he was expressly bound by the
5 judgment, he had a right to appeal, but he had
6 to do so within the 30-day timeframe set by
7 statute. He cannot now avoid his jurisdictional
8 failure by seeking to intervene instead.
9 The Attorney General does not directly
10 dispute that one who is bound by judgment and
11 fails to appeal cannot intervene. Instead, he
12 offers two responses, both insufficient.
13 First, he argues that he is exempt
14 from jurisdictional rules because he is wearing
15 a different hat on appeal than he wore when he
16 agreed to be bound. But the Attorney General
17 was sued and bound in his official capacity, and
18 the fact that a party has more than one job
19 responsibility does not allow it to evade a
20 jurisdictional bar.
21 Second, the Attorney General argues
22 that by reserving all rights, claims, and
23 defenses relating to whether he is a proper
24 party, he reserved the right to participate in
25 the appeal. But you can only reserve the rights

1 that are available to you, and there's no right
2 to join an appeal after failing to satisfy the
3 jurisdictional rules for doing so.
4 However, even if intervention were not
5 jurisdictionally barred, the court of appeals
6 should be affirmed. Intervention is not a
7 revolving door that allows a party to agree to
8 be bound, procure their dismissal, fail to
9 appeal, and then gain reentry to the suit after
10 the court of appeals has ruled.
11 Moreover, where the Attorney General
12 was on notice of his interest in preserving the
13 third-party standing argument nearly a year
14 before the court of appeals ruled and did
15 nothing about it, the court did not abuse its
16 discretion in denying post-judgment intervention
17 when it was based primarily on that argument.
18 Finally, it is not disrespectful to
19 the Attorney General's and Kentucky's sovereign
20 interests to hold the Attorney General to his
21 decision not to appeal, particularly when he can
22 make the same arguments he made in his
23 intervention motion through Rule 60(b).
24 I welcome the Court's questions but
25 will otherwise turn to the jurisdictional

1 argument first.

2 JUSTICE THOMAS: Just one brief

3 question. In your intro -- introduction --

4 introductory comments, you did not refer to

5 Eisenstein and how you would work around

6 Eisenstein if you think the Attorney General was

7 a party.

8 MS. KOLBI-MOLINAS: I don't think

9 Eisenstein changes the Attorney General's

10 obligation to appeal here because Eisenstein

11 recognized that what this Court held in Devlin

12 and what this Court held in Devlin and in the

13 three cases that it cited in Devlin is that when

14 a person participates in proceedings before the

15 district court in a manner that results in them

16 being bound, then they have a right to appeal.

17 And, of course, in Eisenstein, we were

18 talk -- you were talking specifically -- the

19 Court was talking specifically about the False

20 Claims Act context, where there is a statute

21 that says the United States can't participate

22 unless it first intervenes.

23 So, if this Court in Eisenstein had

24 held that the United States was a party even

25 though it had not done what Congress had

1 required it to do to become a party, then that
2 would have been undermining the statutory
3 interests.
4 But, here, and as Devlin recognized,
5 the situation is different. It's
6 context-specific. And, here, you have the
7 Attorney General, who moved for and obtained a
8 court order expressly binding him to the final
9 judgment, that final judgment was then entered
10 by the same district court that originally bound
11 him to it.
12 JUSTICE THOMAS: But what was the
13 effect of the order? Was the Attorney General
14 retained as a party or dismissed as a party?
15 MS. KOLBI-MOLINAS: The Attorney
16 General was dismissed as a named defendant but
17 not completely dismissed because, obviously,
18 when someone is completely dismissed, then they
19 have no more relation to the suit --
20 JUSTICE THOMAS: Can you give me --
21 MS. KOLBI-MOLINAS: -- and they
22 wouldn't be bound.
23 JUSTICE THOMAS: -- an example of
24 another case where a party was dismissed but
25 also remained a party?

1 MS. KOLBI-MOLINAS: I'm not sure that
2 this Court has ever considered such a case. I
3 do know that it's routine in the courts of
4 appeals for people who are bound by judgment,
5 even if they're not currently named defendants,
6 to be able to appeal. But I don't think there's
7 any court -- case that this Court has ever
8 considered.
9 JUSTICE THOMAS: And do you know of
10 any cases outside of class actions, for example?
11 MS. KOLBI-MOLINAS: Where one who is
12 bound by judgment but not a named party?
13 JUSTICE THOMAS: Yeah. Exactly.
14 MS. KOLBI-MOLINAS: Yes. We've cited
15 cases in the red brief and in the amici --
16 federal courts have cited decisions from the
17 courts of appeals -- I'm sorry if that was your
18 question -- but, from the courts of appeals,
19 where people who are expressly bound by the
20 judgment but not named as defendants have a
21 right to appeal.
22 JUSTICE THOMAS: And, finally, the
23 Sixth Circuit seemed to rely primarily not on
24 the jurisdictional issue but on intervention,
25 that the reason it would not grant intervention

1 was because of prejudice. And it based that
2 prejudice to you on an argument, a third-party
3 standing argument, that the Attorney General was
4 raising.
5 Can you give me an example of a case
6 where a party wanting to -- who wants to
7 intervene is prevented from doing so based on
8 prejudice because that party wanted to raise a
9 jurisdictional argument?
10 MS. KOLBI-MOLINAS: Well, Your Honor,
11 at that time, under the -- in the Sixth Circuit,
12 that party -- that argument was not a
13 jurisdictional -- the third-party standing
14 argument was not jurisdictional.
15 So -- but I'm not aware of any case in
16 which someone has been denied intervention to
17 raise a jurisdictional argument, but that
18 wasn't -- under Sixth Circuit precedent, that
19 wasn't a jurisdictional argument.
20 JUSTICE THOMAS: So what's the
21 prejudice?
22 MS. KOLBI-MOLINAS: The prejudice was
23 that the argument had been waived. The
24 Secretary had not made the argument about
25 third-party standing on appeal. It had been

1 part of the district court judgment. The
2 district court had held that the plaintiffs had
3 third-party standing. The Secretary chose not
4 to appeal it.
5 And that was clear as of July 2019,
6 nearly a year before the court of appeals ruled.
7 The Secretary filed their brief and did not make
8 the third-party standing argument.
9 Yet, throughout this time, the
10 Attorney General did nothing to try to intervene
11 and make the argument. He was on notice as of
12 July 2019 that if someone else didn't make the
13 third-party standing argument before the Sixth
14 Circuit ruled, it would be waived.
15 And yet, even when he entered an
16 appearance on behalf of the Secretary -- he
17 entered an appearance after briefing had been
18 completed. All he did was show up at argument.
19 But yet, he didn't request supplemental briefing
20 on the third-party standing question. He didn't
21 file a 28(j) about this Court's cert grant in
22 June Medical. He didn't ask the Sixth Circuit
23 to stay proceedings and at least wait for June
24 Medical so that there could be supplemental
25 briefing after that.

1 He was aware that the argument had
2 been waived and did nothing to try to raise it
3 before the court of appeals ruled. So it was
4 not an abuse of discretion for the Sixth
5 Circuit, under those circumstances, to hold that
6 when a party based virtually their entire
7 intervention motion on an argument that they
8 could have moved to intervene and made
9 beforehand and didn't was not an abuse of
10 discretion to hold that post-judgment
11 intervention in that context was untimely and
12 prejudicial.
13 JUSTICE THOMAS: Thank you.
14 MS. KOLBI-MOLINAS: Thank you.
15 Moving to the jurisdictional argument,
16 this Court has --
17 JUSTICE BREYER: Maybe I should ask a
18 question --
19 MS. KOLBI-MOLINAS: Okay.
20 JUSTICE BREYER: Can I? Is this --
21 CHIEF JUSTICE ROBERTS: Yes.
22 JUSTICE BREYER: -- appropriate?
23 Thank you.
24 Look, as I understand this -- and you
25 better correct me, please, because I'm not

1 certain I do -- look, there have been a lot of
2 party changes. First, the Republicans are in,
3 then the Democrats are in, and they have
4 different views on an abortion statute.
5 So -- so what happened was that, first
6 of all, the clinics sue to say Kentucky's
7 abortion statute's unconstitutional, and they're
8 defended -- it was defended by a person who
9 doesn't feel that strongly about it, and he
10 says, no, I can't -- the Secretary says, I can't
11 enforce this. And that's it.
12 But, eventually, when they get around
13 to deciding it, the lower court says, yeah, it
14 is unconstitutional. And then the court of
15 appeals says, yeah, it is unconstitutional. At
16 that point, for the first time, we have an
17 Attorney General who thinks it's a pretty good
18 statute. He wants to defend it.
19 So two days after he learns that
20 nobody's going to defend it, he comes in and
21 says, let me defend it. And that's okay under
22 Kentucky law apparently. Nobody says it isn't.
23 And so, if there's no prejudice to
24 anybody, and I can't see where there is, why
25 can't he just come in and defend the law? How

1 does he defend it? One, he asks for rehearing.
2 It's still timely. And then, two, if they say
3 no, he comes to this Court.
4 Now he may lose on both those, and he
5 may lose for the reasons that you say, but I
6 don't see why he can't -- if Kentucky law allows
7 him to make the argument, why can't he make the
8 argument?
9 MS. KOLBI-MOLINAS: Well, Your Honor,
10 that would be -- that would be the case if we
11 were talking about a true stranger or outsider
12 to the case. There were four defendants who
13 were sued originally in this case. The Attorney
14 General, rather than defend or rather than take
15 a back seat, moved for and obtained a court
16 order expressly binding him to the judgment.
17 The Secretary did defend. It's not
18 that the statute wasn't defended. The
19 Secretary --
20 JUSTICE BREYER: He defended on the
21 ground I'm the wrong person.
22 MS. KOLBI-MOLINAS: No, that's not the
23 grounds on which the Secretary --
24 JUSTICE BREYER: What?
25 MS. KOLBI-MOLINAS: The defend -- the

1 Secretary defended the suit all the way up --
2 JUSTICE BREYER: All the way on
3 everything?
4 MS. KOLBI-MOLINAS: -- through
5 decision based on the -- defending the
6 constitutionality of the statute. The Attorney
7 General is the one who originally said he had no
8 enforcement authority but now admits that he
9 does. The Secretary -- it was vigorously
10 defended through the court of appeals' decision.
11 The Attorney General, it is well
12 settled in this Court, stands in the shoes of
13 his predecessors. It is well settled that one
14 who is bound -- one -- a successor in office is
15 bound by the stipulations made by and judgments
16 against their predecessors. It doesn't matter
17 that there's been a political party change.
18 So, here, we're not talking about a
19 run-of-the-mill intervention case where the
20 Attorney General had not been involved, someone
21 else had backed out, and then the Attorney
22 General wants to come in.
23 JUSTICE BREYER: I -- I thought -- was
24 I not right, then I'm -- I'm wrong, that -- that
25 before -- that there was still something to do,

1 but the Sixth Circuit says this is
2 unconstitutional. And somebody could have
3 filed, a defendant, a motion for rehearing, and
4 then they could have tried to come here.
5 But the Secretary of State said, I'm
6 not going to do that, because there had been a
7 political party change. And it's at that point
8 the Attorney General says, well, two days ago,
9 he says, nobody's going to defend this, so I
10 better.
11 Has -- has that happened, or am I
12 totally wrong?
13 MS. KOLBI-MOLINAS: The Secretary did
14 make that decision not to continue the defense,
15 and the attorney --
16 JUSTICE BREYER: But was I right in my
17 statement?
18 MS. KOLBI-MOLINAS: In that the
19 Secretary -- there was a change in the
20 administration?
21 JUSTICE BREYER: I -- I don't want to
22 just repeat it again. I -- I -- did -- did you
23 take it in, or shall I repeat it again?
24 MS. KOLBI-MOLINAS: I believe that it
25 is correct that the Secretary decided not to

1 appeal and the Attorney General then moved to
2 intervene.
3 The point is that the Attorney General
4 is a former named defendant in the suit. He's
5 not a stranger. He already is bound by the
6 judgment and never appealed.
7 JUSTICE BREYER: All right. But what
8 I read in the thing that he signed is he said
9 he'd be sign -- he would be bound by a final --
10 what is it called -- a final decision?
11 MS. KOLBI-MOLINAS: Final judgment,
12 paragraph 3d.
13 JUSTICE BREYER: Final judgment of
14 what?
15 MS. KOLBI-MOLINAS: Of the district
16 court.
17 JUSTICE BREYER: It says final
18 judgment of the district court? I mean, is
19 there a final -- I thought perhaps you could --
20 that if -- if you had a lot of appeals to go,
21 you know, an awful lot -- not very many, but,
22 occasionally, a district court is reversed.
23 And, occasionally -- I'm not saying it happens
24 very often -- but even a court of appeals
25 sometimes is reversed.

1 And so is it a final judgment if there
2 still are appeals to take?
3 MS. KOLBI-MOLINAS: It is, Your Honor,
4 in this Court's decision in Malcone, and the
5 term "final judgment" refers to final and
6 appealable. It is only unless -- unless you
7 clarify a final and unappealable judgment that
8 you're talking about a judgment that is not
9 final until all appeals have been exhausted.
10 JUSTICE BREYER: So, if he -- if he
11 goes and asks them to rehear, a motion to
12 rehear, which is what he wants to do, then just
13 -- the court will just write what you just said?
14 No. Denied. Why? Because. And then they give
15 you a reason.
16 MS. KOLBI-MOLINAS: The Court could --
17 JUSTICE BREYER: Is that what you --
18 MS. KOLBI-MOLINAS: I would assume the
19 Court would deny it for being jurisdictionally
20 barred, but the Court is, before that point,
21 jurisdictionally barred from allowing him to
22 intervene. He did the final.
23 CHIEF JUSTICE ROBERTS: Well, I
24 thought -- I thought your friend on the other
25 side read additional language after the

1 stipulation to be bound saying subject to
2 preservation of rights to appeal and so on and
3 so forth. Isn't that --
4 MS. KOLBI-MOLINAS: Well, he read two
5 different provisions, and so I think it's
6 important to clarify. Paragraph 3b, which is on
7 page 29 of the Joint Appendix, is not the
8 paragraph that binds him to final judgment.
9 That is a separate agreement not to enforce
10 until all appeals were exhausted.
11 Paragraph 3d is where the Attorney
12 General agreed that he would be bound by final
13 judgment and then says "subject to any vacating
14 or reversal of that judgment on appeal." But
15 that just means he wasn't being bound by the
16 judgment, the final judgment, and, even if it
17 was later changed, he would remain bound by the
18 original judgment.
19 CHIEF JUSTICE ROBERTS: Well, could
20 you -- I -- I don't -- I can look up the
21 language again, but it seems to me saying he's
22 being bound by the final judgment unless it's
23 reversed or vacated suggests that it's a final
24 judgment in the same way you have to have a
25 final judgment to appeal, but it's not

1 necessarily the last word on the subject.
2 MS. KOLBI-MOLINAS: But every
3 defendant is bound by the final judgment. And
4 then, if that final judgment no longer exists,
5 then they can't be bound by it anymore. I mean,
6 there's an -- there are other defendants in this
7 suit. So, for example, the local prosecutor was
8 a defendant in this suit who stayed in the case
9 through the district court and then became bound
10 by final judgment but opted not to appeal.
11 If that final judgment is vacated on
12 appeal, even though he never appealed, he would
13 no longer be bound by it anymore, but that
14 doesn't mean he wasn't bound by the final
15 judgment and, therefore, didn't have an
16 obligation to appeal it. And it didn't mean
17 that he didn't lose his right to appeal when he
18 failed to do so.
19 JUSTICE GORSUCH: Counsel --
20 JUSTICE KAGAN: Counsel, could I take
21 you back to the original Justice Breyer
22 question, which does have to do with the change
23 in party.
24 And I understand your answer that the
25 Attorney General remains the Attorney General,

1 and we have a lot of law saying that even though
2 the Attorney General, the person, has changed
3 and even the party has changed, it's still the
4 same legal entity.
5 And, indeed, I don't take Kentucky to
6 disagree with that. No place in its briefing
7 does it talk about the fact that, well, once
8 there was a Democrat and now there's a
9 Republican and he thinks completely different
10 things.
11 But there's a real-world way in which
12 that seems to matter a lot. I mean, that
13 creates the problem here, which is that there's
14 nobody left defending the state's law.
15 And I think what Justice Breyer was
16 saying is: Gosh, that would be an extremely
17 harsh jurisdictional rule or at least a
18 counterintuitive rule if it ended up in a place
19 where nobody was there to rep -- to -- to defend
20 Kentucky's law, even though there are
21 significant parts of Kentucky's government that
22 still want it law -- its law defended.
23 MS. KOLBI-MOLINAS: Well, Your Honor,
24 first of all, harsh results don't change whether
25 or not a jurisdictional rule is imposed. Of

1 course, as this Court has repeatedly recognized,
2 jurisdictional rules often result in harsh
3 results and those results are imposed by
4 Congress. That doesn't mean that there can be
5 an exception to the jurisdictional rule.
6 But, second, under Kentucky law, the
7 Attorney General has the authority to decline to
8 defend a statute. The Kentucky Supreme Court
9 has held that. And that is exactly what
10 happened when the Attorney General originally in
11 this case declined to defend the statute.
12 And it is not a violation of
13 Kentucky's sovereign authority to hold him to
14 that decision. As this Court recognized in
15 Bethune-Hill, the decision not to appeal is as
16 much an exercise of sovereign authority as the
17 decision to appeal. It wouldn't mean -- if a
18 subsequent Virginia Attorney General was to come
19 and say: Well, I would have made a different
20 decision than the Attorney General in
21 Bethune-Hill, that doesn't mean that this Court
22 was violating Virginia's sovereign authority
23 when it held that he had the authority to make
24 the decision not to appeal.
25 I think, if anything, the fact that

1 different political parties might choose to
2 exercise that sovereign authority differently
3 calls for this Court to be neutral in the face
4 of that differential exercise of sovereign
5 authority.
6 And so, again, I think what separates
7 this case is the fact that, if the Attorney
8 General had never exercised that sovereign
9 authority to decline to defend and to enter into
10 a court-ordered stipulation and dismissal
11 binding him to the judgment, then I think we
12 would be more in the case of what Justice Breyer
13 was describing, of a case in which the sovereign
14 authority had -- the sovereign had never been
15 given the chance perhaps to exercise or defend
16 the statute and then now it was being taken away
17 from it.
18 But, here, the Attorney General
19 exercised the authority he had not to defend and
20 to agree to be bound. Another defendant chose
21 to continue to defend, chose to appeal, saw that
22 appeal all the way through, and then decided at
23 that point to lay down his sword.
24 None of that is a violation of
25 Kentucky's sovereign interests, and so that's

1 what I think sets this case apart and why, even
2 if this Court is concerned about the harsh
3 results that a jurisdictional rule might impose,
4 this is not that case because this is a case in
5 which the jurisdictional rules are being applied
6 neutrally, as they should, to an appropriate
7 exercise of sovereign authority.
8 It just happens to be that a different
9 political party -- a different Attorney General
10 of a different political party after an election
11 would have exercised that authority differently,
12 but that's always the case when a successor in
13 office stands into the shoes of their
14 predecessor.
15 JUSTICE GORSUCH: Counsel --
16 MS. KOLBI-MOLINAS: And so --
17 JUSTICE GORSUCH: I'm -- I'm -- I'm --
18 I'm sorry. Finish your answer.
19 MS. KOLBI-MOLINAS: That's okay.
20 JUSTICE GORSUCH: That's a good
21 stopping point?
22 MS. KOLBI-MOLINAS: That's a good
23 stopping point.
24 JUSTICE GORSUCH: Okay. All right.
25 Thank you.

1 My first question is put aside the
2 stipulation order. I -- I want to press further
3 where Justice Kagan and Justice Breyer were.
4 Put aside the stipulation order here. Assume
5 the Attorney General hadn't been involved
6 initially.
7 Would it have been proper for the
8 Attorney General then to intervene on appeal two
9 days after getting notice?
10 MS. KOLBI-MOLINAS: Would not have
11 been jurisdictionally barred.
12 JUSTICE GORSUCH: Okay.
13 MS. KOLBI-MOLINAS: We cert -- we
14 certainly still think there's a timeliness
15 issue, but there would not be a jurisdictional
16 issue if he had not been bound and failed to
17 appeal.
18 JUSTICE GORSUCH: Okay. And then do
19 you give any weight -- should this Court give
20 any weight to the fact that we are dealing with
21 a sovereign with the interests of defending a --
22 a -- a duly-enacted state law along the lines
23 Justice Kagan and Justice Breyer articulated?
24 Does that -- should that bear on our
25 consideration of this case at all?

1 MS. KOLBI-MOLINAS: I think it's
2 certainly one of the considerations. I don't
3 think it gets dispositive weight. And I think
4 the D.C. Circuit in the Amador County case, I
5 think, struck the balance appropriately where it
6 said that it would be an abuse of discretion not
7 to consider the fact that a sovereign is -- the
8 sovereign purposes behind intervention, but it's
9 not an abuse of discretion to fail to give them
10 dispositive weight.
11 JUSTICE GORSUCH: And then -- and
12 then, finally, I -- I -- I hope, with respect to
13 the conditions of dismissal, as I read it at any
14 rate, the Attorney General specifically reserved
15 rights relating to whether he's a proper party
16 in this action and in any appeals arising out of
17 this action.
18 The Attorney General obviously argues
19 that includes the -- the argument that he can
20 later seek intervention, that that was expressly
21 reserved. What do you do about that?
22 MS. KOLBI-MOLINAS: Your Honor, that
23 -- he could only reserve the rights that were
24 available to him. And we believe he had a right
25 to appeal.

1 JUSTICE GORSUCH: Well, but if --
2 MS. KOLBI-MOLINAS: So what we believe
3 --
4 JUSTICE GORSUCH: But, counsel, I'm
5 sorry, let me just --
6 MS. KOLBI-MOLINAS: Yeah.
7 JUSTICE GORSUCH: -- intervene there.
8 I'm sorry.
9 But I think we agree that, absent the
10 stipulation, one of the rights the Attorney
11 General would have had is to seek intervention
12 on appeal. So why wasn't that one of the
13 reserved rights?
14 MS. KOLBI-MOLINAS: Well, Your Honor,
15 we don't believe that that's what the -- the
16 stipulation and dismissal contemplates because
17 there is no right to intervene on appeal.
18 JUSTICE GORSUCH: It's a right to seek
19 intervention on appeal as part of the bundle of
20 rights I think we've all just agreed on that the
21 Attorney General had and that may be
22 particularly powerful as a sovereign.
23 And why -- why didn't this language
24 adequately reserve those rights?
25 MS. KOLBI-MOLINAS: Because if he was

1 -- and I'm -- I'm not trying to resist the
2 hypothetical -- but if he was bound by the
3 judgment, then he had to appeal. And if he
4 didn't, he couldn't come back to the suit. If
5 he wasn't --
6 JUSTICE GORSUCH: So we should --
7 MS. KOLBI-MOLINAS: -- bound by the --
8 JUSTICE GORSUCH: -- ignore the
9 reservation of rights here? Is that -- is that
10 the argument?
11 MS. KOLBI-MOLINAS: Well, I'm saying,
12 if he wasn't bound by the judgment, he wouldn't
13 have needed a reservation of rights to reserve
14 the right to seek intervention. That's not
15 something you would need to reserve because any
16 stranger or outsider to the action could move to
17 intervene. That's just not the context in which
18 this stipulation and dismissal was entered, Your
19 Honor.
20 JUSTICE BARRETT: Counsel, can I ask
21 you a question about the premise of the
22 jurisdictional argument all together? I guess
23 I'm struggling to see why 28 U.S.C. 2107 is the
24 right way to think about this, because it
25 doesn't seem to me that intervention necessarily

1 overlaps with 2107. I mean, he's not filing a
2 notice of appeal. He's seeking to intervene.
3 It seems like a different thing.
4 And it might be that the fact that he
5 styled -- signed this stipulation before might
6 be an equitable reason or one of the
7 considerations in this intervention calculation,
8 the Rule 24 analogue for why the court might not
9 let him do it. Like a court might say: Hey,
10 you had your chance, you signed that away. No,
11 we're not letting you come in at this late date.
12 But I guess I don't understand why
13 it's jurisdictional because it seems to me that
14 a motion to intervene is just a different way of
15 getting before the suit. So are you aware of
16 any other cases in which a court of appeals has
17 treated a motion to intervene as implicating
18 2107 at all? Because, I mean, after all, in the
19 language in 2107(a), it just says unless notice
20 of appeal is filed within 30 days.
21 So, presumably, even if you came in as
22 a stranger to the suit, someone not in the
23 Attorney General's strange two-hat position
24 here, would anyone invoke 2107 saying, well,
25 hey, even though you weren't a party below and

1 you didn't have the right to appeal, it was 30
2 days and that 30 days has run? It just seems
3 like a mismatch between what happened and then
4 -- and 2107.
5 MS. KOLBI-MOLINAS: So three
6 responses. First, just to briefly point you to
7 a case, the Tenth Circuit in Hutchinson did say
8 that intervention cannot be used as an end-run
9 or substitute to the ordinary rules of appellate
10 procedure and the person who was seeking
11 intervention there could have appealed. They
12 didn't use the -- they didn't cite Section 2107,
13 so I don't want to suggest that that -- but they
14 did say that cannot -- intervention cannot be
15 used as a substitution or end-run around the
16 ordinary rules of appellate procedure.
17 But, second, as this Court held in
18 Torres, one who was jurisdictionally barred from
19 achieving something directly is equally
20 jurisdictionally barred from achieving it
21 indirectly. The reason that this Court gave in
22 Torres for why the Petitioner was
23 jurisdictionally barred from rejoining his suit
24 was that to allow him to do so would have
25 been -- and the term this Court used -- would

1 have been the equivalent of allowing him to file
2 an untimely notice of appeal.
3 And because this Court didn't allow --
4 have the authority to allow him to file an
5 untimely notice of appeal, it couldn't allow him
6 to achieve the result any other way because to
7 do so would render jurisdictional rules
8 meaningless.
9 JUSTICE KAGAN: But -- but we didn't
10 talk about intervention in Torres, correct?
11 MS. KOLBI-MOLINAS: No, he was just
12 seeking to -- he was asking for an equitable
13 exception to rejoin his suit. But, of course --
14 JUSTICE KAGAN: Yeah. And Mr. Kuhn
15 said that he would not have been allowed to
16 intervene. But maybe Mr. Kuhn was wrong about
17 that. Maybe the way around the harshness of
18 Torres is just to allow people who don't file
19 their notices of appeal in time to come back and
20 say you should allow me to intervene?
21 MS. KOLBI-MOLINAS: I disagree, Your
22 Honor, because the crux of the holding in Torres
23 was that anything that amounts to the equivalent
24 of filing an untimely notice of appeal is as
25 jurisdictionally barred as filing an untimely

1 notice of appeal.

2 So it wouldn't matter if it was asking

3 for an equitable exception to rejoin the suit or

4 asking for equitable intervention on appeal.

5 Both of those are an end-run around filing an

6 untimely -- filing of a notice of appeal. And

7 that's why they're jurisdictionally barred. So

8 I don't think it would make a difference.

9 And the fact that intervention itself

10 requires some sort of threshold showing doesn't

11 change the fact that it would still be granting

12 an exception to someone who could have and

13 didn't file their notice of appeal and yet

14 letting them appeal anyway.

15 So I think that, at the end, it's this

16 anti-circumvention principle. If you are

17 jurisdictionally barred from achieving something

18 directly, you cannot achieve it through any

19 other means, regardless of what those means are.

20 Otherwise, a jurisdictional rule, as this Court

21 held in Torres, would be meaningless.

22 JUSTICE BARRETT: So do you represent

23 that if the Attorney General had, in fact, filed

24 a notice of appeal within the 30 days, that you

25 wouldn't have contested his right to do so?

1 MS. KOLBI-MOLINAS: I don't see on
2 what grounds we could have, Your Honor.
3 JUSTICE BREYER: Well, now I'm
4 confused. I mean, I'm trying to find in your
5 brief where you make this jurisdictional
6 argument. Now, on page 15 or page, rather, 8 --
7 5, you say what it is. You say he agreed, the
8 Attorney General, that any final judgment about
9 the constitutionality will be binding on the
10 Attorney General subject to any modification,
11 reversal, or vacation of the judgment on appeal.
12 That's what we're talking about,
13 right?
14 MS. KOLBI-MOLINAS: Yes.
15 JUSTICE BREYER: Okay. Then I see
16 later that really they dismissed it on a
17 different ground; namely, that it was untimely.
18 And I don't see much argument about that point,
19 that -- that that bars him forever. Have I
20 missed something?
21 Where -- where is it argued that that
22 -- that that's in a promise, that's a promise
23 that I won't intervene later or do anything
24 else, I'm out of it, whether the district court
25 holds, I'm out of it? That's what you're

1 saying, I think.
2 MS. KOLBI-MOLINAS: If you fail to
3 appeal, you are out. That's the jurisdictional
4 rule.
5 JUSTICE BREYER: Okay. No, no, okay.
6 So I got the argument right. Where do you
7 discuss it in your brief?
8 MS. KOLBI-MOLINAS: The jurisdictional
9 argument?
10 JUSTICE BREYER: Yeah. Yeah.
11 MS. KOLBI-MOLINAS: The brief, it is
12 -- it's the first argument.
13 JUSTICE BREYER: The first. Okay.
14 I've got it then. I know the first argument.
15 MS. KOLBI-MOLINAS: It's -- yes.
16 JUSTICE BREYER: Okay. But they
17 didn't reach that as a ground, did they?
18 MS. KOLBI-MOLINAS: No, the Sixth
19 Circuit --
20 JUSTICE BREYER: Because of this added
21 language and so forth, it -- what do you think
22 of saying, look -- you -- you did it on a
23 timeliness basis, but really there's an argument
24 here that they're barred jurisdictionally
25 because of this promise. Effectively they

1 promised not to do it.
2 Please consider that.
3 MS. KOLBI-MOLINAS: It would be
4 appropriate to allow the Sixth Circuit to
5 consider the jurisdictional argument because I
6 agree they didn't consider it.
7 I wanted to address the point about
8 sovereignty and the waiver of sovereign immunity
9 that had been raised before, because I think it
10 is very clear that we are dealing with the
11 Attorney General, who is the party who is
12 intervening here.
13 First, one need only look at pages 45
14 to 46 of the blue brief to see that the Attorney
15 General has cited his institutional interests.
16 He cited the fact that he has enforcement
17 authority under HB 454. He even cites that he
18 is bound by the judgment as a basis for
19 intervening.
20 But, second, every attorney general
21 knows the difference between moving for
22 intervention on behalf of himself and moving to
23 intervene for the state, because when the state
24 intervenes, it necessarily waives sovereign
25 immunity, which is significant and irreversible.

1 There is no such thing as essentially
2 waiving sovereign immunity. Sovereign immunity,
3 it must be unambiguously and expressly waived.
4 And this Court has held that voluntary
5 intervention is such a waiver.
6 And that's why I think it's not just a
7 mere technicality or formality that this case is
8 -- the intervenor is Attorney General Cameron
9 and this case is called Cameron v. EMW. The
10 intervenor here is the Attorney General; it is
11 not the State of Kentucky.
12 And this Court should not construe --
13 when there is ambiguity and where there is
14 question of who the intervenor is, should not
15 construe it as the Commonwealth of Kentucky,
16 because that would be an irreversible waiver of
17 Kentucky's sovereign immunity, and, indeed, the
18 parties in this case have not even briefed the
19 circumstances under which the Attorney General
20 in Kentucky can waive the Commonwealth's
21 immunity.
22 So I think that it's very clear that
23 what we are dealing with here is the same party
24 who was sued, is now the party who is moving to
25 intervene. The same party who was bound is the

1 party who is moving to intervene. And it's not
2 the Commonwealth of Kentucky who's moving to
3 intervene here. And that's why the
4 jurisdictional issue cannot be ignored.
5 JUSTICE KAVANAUGH: I thought he said
6 that it could be construed as a limited waiver
7 of sovereign immunity.
8 MS. KOLBI-MOLINAS: Under this Court's
9 precedent, in a -- voluntary intervention is a
10 waiver of sovereign immunity. It's not a
11 limited waiver of sovereign immunity.
12 So I don't know what that limited
13 waiver is that he's discussing, but if -- if the
14 Commonwealth of Kentucky is intervening here, it
15 has waived its sovereign immunity irreversibly.
16 I also want to go to this hat point,
17 Your Honor, because I think it makes just a hash
18 of Ex parte Young and of jurisdictional rules.
19 We sued the Attorney General because -- in his
20 official capacity. There are only two
21 capacities, official capacity and personal
22 capacity. It doesn't matter how many job
23 responsibilities you have.
24 And it would make hash of Ex parte
25 Young if the Attorney General could say, well,

1 with my left hand, I'm exercising my authority
2 to defend the constitutionality of state law so
3 that, with my right hand, I can enforce that
4 same law, and then claim that he's two separate
5 personas, one immune, one not. That would
6 render both Ex parte Young and jurisdictional
7 rules meaningless.
8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.
10 Just one more question. In another
11 suit, the Friedlander litigation, your client
12 opposed the Attorney General intervening prior
13 to a panel opinion on the basis that the
14 Secretary adequately represented the -- the
15 Commonwealth.
16 And in your papers, you -- you said
17 that you criticized the Attorney General's
18 concern about rehearing and cert as -- as
19 speculative. Now, here you're opposing the
20 intervention after the issuance of the prior --
21 of -- of a panel opinion.
22 And I wonder if that's -- I mean, I am
23 familiar that lawyers argue in the alternative,
24 but I wonder if that's really putting him in a
25 catch-22. If it's prior to the opinion, the

1 Secretary will do it. If it's after the
2 opinion, he has waited too long.
3 MS. KOLBI-MOLINAS: Well --
4 CHIEF JUSTICE ROBERTS: Which -- which
5 is it?
6 MS. KOLBI-MOLINAS: So three responses
7 to that, briefly, Your Honor. First, we did
8 lose the -- the adequate representation argument
9 in that case. He was permitted to intervene
10 before.
11 Second, that case actually was
12 different because there was not the previous --
13 the Attorney General had never been involved in
14 that suit and had never sought their dismissal
15 in that suit. So the question of adequate
16 representation was slightly different in that
17 suit.
18 But also at the end of the day, we
19 would make whatever good faith arguments were
20 available to us to oppose intervention under the
21 circumstances, but that doesn't ever relieve the
22 Attorney General from moving to intervene
23 timely. And the fact that we wouldn't have
24 consented to intervention doesn't relieve him of
25 his obligation to move timely.

1 CHIEF JUSTICE ROBERTS: I think you --
2 you should lose one of those, whether it's this
3 one or that one, but I wonder why it doesn't
4 make more sense to have the Attorney General out
5 of the case when the Secretary is representing
6 the state. You don't want the state speaking
7 through two different voices.
8 But once the Secretary is out of it,
9 Kentucky ought to -- maybe ought to be there in
10 some form, and the Attorney General is the one
11 that wants to intervene.
12 MS. KOLBI-MOLINAS: Well, Your Honor,
13 I think that intervention law incentivizes early
14 intervention and penalizes late intervention.
15 And there is a significant thing that happens
16 when the court of appeals has ruled.
17 I mean, intervention is as much about
18 the court of appeals being able to control its
19 docket and to control entry of new parties into
20 the suit late in the game.
21 CHIEF JUSTICE ROBERTS: Yeah, well,
22 late in the game, yes, but here the Attorney
23 General filed a petition for rehearing on the
24 same date that it would have been due if the
25 Secretary had still been in the case.

1 So it seems a bit much to say that
2 they were delaying the proceedings.
3 MS. KOLBI-MOLINAS: No, I'm not
4 arguing I don't think the court -- I don't think
5 I'm arguing they were delaying the proceedings.
6 But, nevertheless, part of docket control is
7 ensuring that you have all the parties who are
8 going to be in the suit in as early as possible.
9 As this Court --
10 CHIEF JUSTICE ROBERTS: Yes, that's
11 true, but as Justice Breyer pointed out, the
12 situation changes a bit when the state
13 representations are shuffled -- the -- the deck
14 is shuffled again after an election.
15 And the question is whether you want
16 to preclude the state from participating in the
17 litigation that is still ongoing, in a way that
18 doesn't delay it, to deny the state any
19 representation.
20 It's sort of an estoppel. I mean, if
21 you had one party's position being pressed in
22 the case and there was another election, well,
23 the -- the state is still stuck with what the --
24 the people have rejected in the election.
25 MS. KOLBI-MOLINAS: I don't think it

1 was an abuse of the court of appeals' discretion
2 to hold that under the circumstances that the
3 Attorney General did wait too long to intervene,
4 not, again, as a -- as a delay. I'm not saying
5 that. But that he had the opportunity to enter
6 the case and shape the decision before the court
7 of appeals ruled.
8 So I don't think it was an abuse of
9 the discretion for the court of appeals to say
10 that waiting until after judgment is entered to
11 try to make your arguments and to make a new
12 argument is waiting too long.
13 A different panel may have seen it
14 differently. But under the abuse of discretion
15 standard, I don't think there was an abuse
16 there.
17 CHIEF JUSTICE ROBERTS: Thank you.
18 Justice Thomas?
19 JUSTICE THOMAS: None for me, Chief.
20 CHIEF JUSTICE ROBERTS: Justice
21 Breyer, further?
22 JUSTICE SOTOMAYOR: I have a question.
23 Counsel, assume there is no jurisdictional
24 argument, meaning that they didn't have to file
25 a notice of appeal, Justice Breyer and I think

1 Justice Gorsuch and Justice Barrett have all
2 been concerned about never having given the
3 State of Kentucky the opportunity adequately to
4 defend this law after it was declared
5 unconstitutional, because the Secretary of state
6 walked away from it.
7 How do you address that concern?
8 MS. KOLBI-MOLINAS: Your Honor, I
9 don't -- I don't think it's fair to characterize
10 this case as if there was some sort of default
11 judgment or some sort of abdication by the
12 Secretary.
13 The Secretary was the sole defendant
14 who saw the case through to district court
15 judgment and then saw it all the way through on
16 appeal and defended it vigorously on appeal.
17 So it's not as if the -- the state was
18 denied its opportunity to defend the law. That
19 Secretary defended it all the way up until the
20 court of appeals and then decided, based on the
21 decision and based on whatever other
22 considerations, not to seek extraordinary
23 further appeals.
24 The Attorney General who had --
25 putting aside whether or not he was bound --

1 still had the opportunity to defend earlier, had
2 an opportunity to intervene earlier.
3 I don't think it's disrespectful of
4 Kentucky's sovereign interests for the court of
5 appeals to have held that at this point the case
6 has gone on too long and it's too late for
7 someone new to join.
8 CHIEF JUSTICE ROBERTS: Justice Kagan?
9 JUSTICE KAGAN: No.
10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch? Okay. Okay. Thank you, counsel.
12 You have rebuttal, Mr. Kuhn?
13 REBUTTAL ARGUMENT OF MATTHEW F. KUHN
14 ON BEHALF OF THE PETITIONER
15 MR. KUHN: Thank you, Mr. Chief
16 Justice. Two quick points.
17 I want to start with Justice Breyer's
18 question and what the Chief Justice referred to
19 as the deck being reshuffled.
20 I think after the elections in 2019
21 and the reversal of positions with various state
22 officials, we saw the wisdom of the way Kentucky
23 had structured its system of government, it's
24 way of defending its sovereignty when its laws
25 are challenged, because the reversal of one

1 party was not good enough for Kentucky's law to
2 go away.
3 It took two people. It took two
4 constitutionally elected, separately elected
5 officials to agree not to appeal further. The
6 Governor's administration said no further but
7 Kentucky created that fail-safe.
8 I think the effect of the Sixth
9 Circuit's ruling is to say to a sovereign state
10 that you just can't structure your government
11 that way. You cannot defend your sovereign
12 interests the way that you want to do so.
13 I think that is directly contrary to
14 what this Court said in Bethune-Hill that we
15 respect how states structure their government.
16 The second and final point that I want
17 to make is to respond to some of the questions
18 that Justice Gorsuch and the Chief Justice asked
19 about the terms of the stipulation.
20 This Court has told us that a party is
21 bound -- that agrees to be bound by a -- a
22 non-party that agrees to be bound by a judgment
23 is bound in accordance with the terms of his or
24 her agreement. That's Taylor versus Sturgell.
25 So I think that we have to look very

1 closely at what the Attorney General agreed to
2 in his enforcement capacity.
3 And as the questions have pointed out,
4 we preserved our right to benefit from any
5 favorable result on appeal. That is in
6 Section 3d in response to the Chief Justice's
7 question, and we reserved our right to
8 participate in any appeal.
9 We reserved all claims and rights
10 relating to whether we are a proper party.
11 I think by reserving that, that can
12 only be understood, to respond to Justice
13 Gorsuch's question, as to preserve our ability
14 to move to intervene if -- if circumstances
15 changed, which they did.
16 And so I think that if we're bound in
17 accordance with the terms of our agreement, I
18 think that we have the ability to come in and
19 protect Kentucky's interests when it became
20 unrepresented.
21 If there are no further questions, I
22 appreciate the Court's time.
23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.
25

1 (Whereupon, at 11:14 a.m., the case
2 was submitted.)
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