

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MIKE BROWN, ACTING WARDEN,)
 Petitioner,)
 v.) No. 20-826
ERVINE DAVENPORT,)
 Respondent.)
- - - - -

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5 v.) No. 20-826
6 ERVINE DAVENPORT,)
7 Respondent.)
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9
10 Washington, D.C.
11 Tuesday, October 5, 2021
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:00 a.m.
16
17 APPEARANCES:
18
19 FADWA A. HAMMOUD, Solicitor General, Lansing,
20 Michigan; on behalf of the Petitioner.
21 TASHA BAHAL, ESQUIRE, Boston, Massachusetts; on behalf
22 of the Respondent.
23
24
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	FADWA A. HAMMOUD, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	TASHA BAHAL, ESQ.	
7	On behalf of the Respondent	28
8	REBUTTAL ARGUMENT OF:	
9	FADWA A. HAMMOUD, ESQ.	
10	On behalf of the Petitioner	48
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: Justice

4 Kavanaugh is participating remotely today.

5 We'll hear argument first this morning
6 in Case 20-826, Brown versus Davenport.

7 Ms. Hammoud.

8 ORAL ARGUMENT OF FADWA A. HAMMOUD

9 ON BEHALF OF THE PETITIONER

10 MS. HAMMOUD: Mr. Chief Justice, and
11 may it please the Court:

12 Davenport's concession that Brecht
13 doesn't always subsume AEDPA narrows the dispute
14 here. But the modified Brecht-only approach, he
15 suggests, gives no deference to state courts'
16 merits adjudications and absolves habeas
17 petitioners of their burden under 2254(d)(1).

18 Even if federal judges relied only on
19 material permissible under AEDPA within its
20 Brecht analysis, the inquiry is not over. It is
21 not enough for federal judges to believe in
22 their own minds that an error substantially
23 influenced the verdict. Before granting relief,
24 they must look through AEDPA's highly
25 deferential lens and ask whether all other

1 fair-minded jurists would disagree with the
2 state court's conclusion.

3 When Congress enacted AEDPA, it did
4 not give federal judges the option of ignoring
5 this crucial deference. That is why, as a
6 precondition to habeas relief, they must apply
7 both Brecht and AEDPA. Failing to do so
8 contravenes this Court's modern habeas
9 jurisprudence, including Ayala, which reaffirmed
10 that AEDPA's -- that AEDPA's limitations are
11 distinct from Brecht.

12 The Sixth Circuit's Brecht-only
13 approach failed to defer to the Michigan courts.
14 It also extended this Court's holdings, relied
15 on circuit precedent, conducted an independent
16 review of the record, and used extrajudicial
17 social science studies, all of which are
18 prohibited under AEDPA. As Judge Thapar said in
19 his en banc dissent, federal judges can't simply
20 ignore AEDPA's guardrails whenever they find
21 actual prejudice under Brecht.

22 We ask this Court to articulate the
23 correct standard and to reverse the Sixth
24 Circuit.

25 JUSTICE THOMAS: If you were writing

1 on a clean slate, how would you coordinate
2 Brecht and AEDPA?

3 MS. HAMMOUD: One, in --

4 JUSTICE THOMAS: Would you say that --
5 for example, that one subsumes the other?

6 MS. HAMMOUD: In a case of denial, in
7 a case of denial of relief, applying the other
8 would be a mere formality. Esparza, this Court
9 found that the state court's conclusion --

10 JUSTICE THOMAS: So it really wouldn't
11 matter if you deny?

12 MS. HAMMOUD: If you -- if you denied,
13 applying the other would not -- formally
14 applying it would not matter because it would be
15 a mere formality. However, if a court were to
16 grant relief under either, it must go to the
17 next test. So, if they were to grant relief
18 under Brecht, as the Sixth Circuit did, it must
19 apply AEDPA as a precondition to the grant of
20 relief.

21 And if a state court used the -- the
22 wrong standard or it was contrary to this
23 Court's precedent, then, if a petitioner
24 prevails under AEDPA, Brecht must be applied as
25 well prior to relief, Your Honor. I hope that

1 answered your question.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Why -- that's
4 how you think it would be applied, but why would
5 a rational legislature set the system up this
6 way? In other words, okay, let's have this
7 inquiry under Brecht. Then let's have this
8 separate inquiry under -- under AEDPA.

9 Would somebody just sitting down on a
10 -- on a clean slate put that system together?

11 MS. HAMMOUD: Well, one, we know that
12 they are different tests. They're distinct
13 tests. They ask different questions. And when
14 Congress enacted 2254(d)(1), that was three
15 years after Brecht. So Brecht could never
16 consider the limitations that AEDPA set in
17 place.

18 And Brecht -- Brecht applies whether
19 or not there's a state court determination. So
20 they're not two of the same. Each hold
21 different burdens as well. So --

22 CHIEF JUSTICE ROBERTS: Well, if
23 that's really -- if they sat down and decided
24 that's what we're going to do, don't you think
25 they would have made it a little clearer than to

1 have us sitting here now and saying, well, how
2 do -- how do we reconcile these two things?

3 Because, you know, they're addressed
4 to the same question, I guess, at a broad level.
5 In other words, it would seem to me odd that
6 they would leave it implicit that AEDPA and
7 Brecht would coexist.

8 MS. HAMMOUD: They -- they have to
9 coexist because when -- when -- 2254
10 specifically applies to a state court's merits
11 determination. Brecht doesn't need a state
12 court's merits adjudication for it to apply, and
13 we know that this Court said in -- in Fry that
14 on collateral review, whether there's a state
15 court's merits adjudication or not, Brecht
16 applies on collateral review.

17 Now, once there is a state court's
18 merits adjudication, that was the heart of
19 AEDPA, was to protect that, and that's the basic
20 structure.

21 Now that there is a state court merits
22 adjudication, then that needs to be protected,
23 and it can't be ignored and it doesn't offer a
24 menu of options. We must give it deference.

25 And so they do ask different

1 questions, and as Judge Thapar said, different
2 questions often lead to different answers.

3 JUSTICE BARRETT: Ms. Hammoud, do we
4 have to --

5 MS. HAMMOUD: Yes.

6 JUSTICE BARRETT: -- overrule Ayala to
7 side with you, and if not, how do we handle that
8 "subsumes" language in Ayala?

9 MS. HAMMOUD: The Court does not have
10 to overrule Ayala because the question that's
11 presented here was never asked in Ayala. And,
12 in fact, in Ayala, the Court applied both, and
13 the Court made clear that AEDPA is a
14 precondition to relief. And in Ayala, the Court
15 did not grant relief.

16 So, in terms of the "subsumes"
17 language, I think that the Court can clarify
18 that if a federal court were to grant relief
19 under Brecht, we ask this Court to do exactly
20 and say what it said -- reiterate AEDPA's
21 limitations, that AEDPA remains a precondition
22 to relief.

23 JUSTICE BARRETT: So --

24 JUSTICE ALITO: What is your
25 understanding of the meaning of the term

1 "subsume"?

2 MS. HAMMOUD: Your Honor, we know that
3 it can't mean ignore or make null. However, our
4 reading of it is it could subsume, which means a
5 court does not have to formally apply AEDPA if
6 the petitioner was not entitled to relief under
7 Brecht, doesn't have to go through a separate
8 application, because there is no grant of relief
9 in that case. So it kind of subsumed that
10 conclusion, that decision --

11 JUSTICE ALITO: Well, if I look up the
12 definition in the dictionary, will I find
13 something like this, include as a component? Is
14 that a meaning of the -- of the term "subsume"?

15 MS. HAMMOUD: And I know that the
16 definition, Your Honor, has been debated with
17 what does it mean, right? Judge Readler said it
18 can't mean consume. Certainly, the Sixth
19 Circuit thinks that it means you can completely
20 leapfrog -- that AEDPA would all -- that AEDPA
21 would be -- all of AEDPA's limitations would be
22 included in Brecht and that a federal court
23 could leapfrog and ignore AEDPA.

24 We know that at least it can't mean
25 that, which is why I think this case is a --

1 JUSTICE ALITO: Well, it means include
2 as a component. And so, if 2254(d) is included
3 as a component of Brecht, then doesn't that mean
4 that a court purporting to apply Brecht still
5 has to satisfy 2254(d)?

6 MS. HAMMOUD: They're not two of the
7 same. And, you know, when we -- when we look at
8 the two tests differently, we know that Brecht
9 doesn't answer -- doesn't ask the questions that
10 AEDPA asks.

11 One, they're distinct. One is an
12 independent review as to what, as this Court
13 said in O'Neal, me as a federal court judge
14 believe in my own mind, and as opposed to AEDPA,
15 they have to look and ask the question, is there
16 fair-minded disagreement on this?

17 JUSTICE ALITO: Well, sometimes
18 judicial opinions can -- can -- can confuse
19 things, so maybe it's helpful to go back to
20 first principles.

21 Isn't federal habeas relief entirely
22 statutory except in those circumstances in which
23 there would otherwise be a suspension of the
24 writ?

25 MS. HAMMOUD: And, yes, but this

1 Court's --

2 JUSTICE ALITO: Yes. Okay. The
3 answer to that is yes, 2254(d) is a statute. On
4 what basis could a federal court say, we're not
5 going to follow 2254(d), we're going to follow a
6 judicially created standard in Brecht?

7 What do you understand to have been
8 the basis for Brecht? Was it -- it wasn't in
9 the federal habeas statute at that time, was it?

10 MS. HAMMOUD: No, Your Honor. In
11 fact, this Court -- one, they must -- they must
12 both apply the federally mandated congressional
13 statute --

14 JUSTICE ALITO: It was an --

15 MS. HAMMOUD: -- and --

16 JUSTICE ALITO: -- understanding -- it
17 was our understanding, it was our application of
18 the equity that a federal court exercises when
19 it provides federal habeas relief. It was an
20 equitable rule that was read into the previous
21 statute, the previous version of the statute.

22 And so, if there were a conflict
23 between that and a subsequently enacted statute,
24 which would prevail?

25 MS. HAMMOUD: They must both prevail

1 because Brecht does not need a state court's
2 merits adjudication in order to apply. And,
3 two, both of them can exist at the same time,
4 especially on collateral review.

5 JUSTICE KAGAN: But I do think, Ms.
6 Hammoud, that the language in Davis v. Ayala and
7 also in Fry, which Davis v. Ayala quotes and
8 refers to as a holding, that that language goes,
9 you know, something like this: It -- it says,
10 we've looked at these two tests, and what we
11 think is that the stricter standard is the --
12 the --

13 MS. HAMMOUD: Brecht.

14 JUSTICE KAGAN: -- Brecht standard.

15 MS. HAMMOUD: Yeah.

16 JUSTICE KAGAN: And so, if a court
17 does Brecht, that's good enough for us. If a
18 court does Brecht only, that's good enough for
19 us.

20 Now you might contest that. You might
21 say, well, that was too hasty to just say that
22 Brecht is stricter in all circumstances. But,
23 in fact, that's what the Court twice said. It
24 said in no uncertain terms that the one subsumes
25 the other because the Brecht test is stricter

1 than the Chapman test, so if a court does the
2 Brecht test, it's sufficient.

3 That's the way I view -- I read and I
4 think as the only way to read both of these
5 decisions. Now I -- I understand the point that
6 they were wrong in saying that. I mean, I
7 understand the argument you're making, but --
8 but they say what they say, don't they?

9 MS. HAMMOUD: Justice Kagan, that is
10 correct. That language was included in Fry,
11 and -- and as Your Honor stated, Brecht and
12 Chapman were compared in Fry. And, in fact, in
13 Fry, there was no harmless error determination
14 by a state subject to deference in Fry with no
15 AEDPA overlay.

16 What our position is, is that when
17 there is an AEDPA overlay, that's distinct from
18 Fry. Sure, when one is comparing Brecht and
19 Chapman, you can compare into which one is
20 friendlier to a -- a criminal defendant.
21 However, the AEDPA overlay asks different
22 questions, and that is not what that specific
23 judge thinks but whether there is fair-minded
24 disagreement.

25 JUSTICE KAGAN: I hear you on that. I

1 hear you. But what -- what I'm suggesting is
2 that that's an argument that could have been
3 made to the Davis v. Ayala court, it's an
4 argument that could have been made to the Fry
5 court, but that the language in both of those
6 cases essentially rejects that argument.

7 It basically says: Look, we think
8 that the Brecht standard is -- you know, that
9 it -- it's just going to do all the work here,
10 so we think that the Brecht standard is enough.

11 MS. HAMMOUD: This Court in Fry did
12 not consider this question, and this Court in
13 Ayala did not consider this question. In fact,
14 this Court in Ayala specifically stated that Fry
15 did not abrogate AEDPA.

16 And this Court has repeatedly stated
17 that the two tests are distinct, not only with
18 different burdens as well in terms of who
19 carries the burden under each test. We know
20 that this -- from this Court that the state
21 court's ruling has to have been so lacking in
22 justification that there was an error well
23 understood and comprehended in existing law
24 beyond any possibility for fair-minded
25 disagreement.

1 JUSTICE SOTOMAYOR: Counsel, all --

2 MS. HAMMOUD: Those are different
3 tests. Yes, Your Honor?

4 JUSTICE SOTOMAYOR: -- all of those
5 things you're saying, those language --
6 fair-minded disagreement, nobody else can think
7 of this this way -- that's not the language of
8 the statute. The statute just says -- and I'm
9 reading 2254(d) -- shall -- "habeas shall not be
10 granted with respect to any claim that was
11 adjudicated on the merits in a state" -- I'm
12 sorry -- "resulted in a decision that was
13 contrary to" --

14 MS. HAMMOUD: Correct.

15 JUSTICE SOTOMAYOR: -- and this is the
16 operative language -- "or involved in
17 unreasonable application of clearly established
18 federal law."

19 MS. HAMMOUD: Yes.

20 JUSTICE SOTOMAYOR: Explain to me in
21 layman's term when a court under Brecht, under
22 Chapman, under any test that you want to set
23 forth basically says the constitutional
24 violation here had to have substantially injured
25 -- caused substantial and injurious effect on a

1 verdict, aren't they saying by definition that
2 whatever interpretation you give, it can't be
3 reasonable? Isn't that what Davis meant by
4 "subsumes"? Isn't that what Fry meant by -- by
5 the same concept?

6 How can it ever be reasonable to
7 conclude that there was no injury to a -- to a
8 verdict when a judge finds there was?

9 MS. HAMMOUD: Thank you, Judge --
10 Justice Sotomayor. I'm going to address both of
11 your questions.

12 First, I want to go back to the
13 statute, and the reading of the statute is a
14 writ shall not be granted -- that's a command --
15 unless the state court's adjudication in
16 layman's terms --

17 JUSTICE SOTOMAYOR: But that's exactly
18 what we said in Davis. In Davis, when we --

19 MS. HAMMOUD: That's --

20 JUSTICE SOTOMAYOR: -- talked about
21 the Brecht standard, that -- that Ayala had to
22 meet the Brecht standard and that while a
23 federal habeas need not formally apply both
24 Brecht and Havers, AEDPA nevertheless sets forth
25 a precondition to the grant of habeas.

1 MS. HAMMOUD: And that's exactly what
2 we -- what we want this Court to say.

3 JUSTICE SOTOMAYOR: Well, that's
4 exactly what the Court said. You don't have to
5 apply both.

6 MS. HAMMOUD: Yes. There -- the Court
7 in -- in -- in its analysis in Ayala want to say
8 that there's no basis for finding that Ayala
9 suffered actual prejudice and there was no
10 causal statement between the two. The decision
11 of the California Supreme Court represented an
12 entirely reasonable application of controlling
13 precedent.

14 What the Sixth Circuit didn't do
15 according to the statute that Your Honor just
16 cited, 2254(d)(1), at no point did they consider
17 whether or not it was an unreasonable
18 application that --

19 JUSTICE SOTOMAYOR: All right. Is
20 that --

21 MS. HAMMOUD: -- the state court did.

22 JUSTICE SOTOMAYOR: -- is all you're
23 asking us to do in this case today is to tell
24 the courts below apply both Brecht and
25 Chapman/AEDPA? Is that all you're asking us to

1 do today?

2 MS. HAMMOUD: We're asking that the
3 Court articulate that prior to the grant of --
4 of relief, they must apply both Brecht and
5 AEDPA, and -- and we believe that --

6 JUSTICE SOTOMAYOR: All right. So --

7 MS. HAMMOUD: -- the Court --

8 JUSTICE SOTOMAYOR: -- you'd be happy
9 if that's all we said here?

10 MS. HAMMOUD: I'm sorry?

11 JUSTICE SOTOMAYOR: That's all you're
12 asking us to do, to remand it and say apply
13 both, don't rely on circuit precedent, and don't
14 use social science data? Is that what you're
15 asking us to do?

16 MS. HAMMOUD: By applying both, that's
17 already included because they're different
18 questions and they consider different actions.
19 What's happening here is the -- is the state in
20 -- in Ayala --

21 JUSTICE SOTOMAYOR: Just answer my
22 question. What do you want our judgment line to
23 say?

24 MS. HAMMOUD: Exactly what -- what
25 Your Honor had stated, is that prior to the

1 grant of relief they must apply both. And we
2 believe it would be prudent and it would offer
3 the state -- it would offer the bar and bench
4 guidance if this Court were to go and articulate
5 the difference between the two standards and
6 exactly why the Sixth Circuit failed to give
7 deference to state courts and to abide by
8 congressionally mandated statute.

9 And we think that the best way to --
10 to -- to answer that is for the Court to even go
11 as far as applying it. But, at the end, in our
12 question, we do ask that this Court articulate
13 the correct standard.

14 JUSTICE SOTOMAYOR: Well, you've told
15 us that the Sixth Circuit didn't do that, right?

16 MS. HAMMOUD: It did not do that.

17 JUSTICE SOTOMAYOR: And is it our
18 common practice -- isn't it against our common
19 practice to do something in the first instance?
20 Don't we lay out standards and let the court
21 below apply them?

22 MS. HAMMOUD: That's -- that's
23 correct, Your Honor. And, Your Honor, we're
24 asking this Court to, one, articulate exactly
25 why the Sixth Circuit did not do that, and, two,

1 the district court in this case, before -- prior
2 to it going to the Sixth Circuit, actually,
3 their decision was that the state court -- they
4 applied AEDPA and that the state court's merits
5 adjudication was not objectively unreasonable.
6 They asked those questions prior to it going to
7 the Sixth Circuit.

8 CHIEF JUSTICE ROBERTS: I thought your
9 --

10 JUSTICE BARRETT: Ms. --

11 CHIEF JUSTICE ROBERTS: -- brief ended
12 by asking that -- said the Court should reverse
13 the Sixth Circuit's judgment, not remand it?

14 MS. HAMMOUD: Yes, reverse it on that
15 jurisprudentially significant question, Your
16 Honor.

17 JUSTICE BARRETT: And, Ms. Hammoud,
18 can I ask you, what was the last adjudication on
19 the merits? Why shouldn't we -- I mean, it
20 seemed to me that below, in saying that the
21 Michigan Supreme Court's probably was, you
22 basically conceded that it was, but now you're
23 saying that after -- your brief says that after
24 considered reflection, you think it was the
25 court of appeals'. Why shouldn't we hold you to

1 your earlier concession?

2 MS. HAMMOUD: Your Honor, when -- when
3 we filed our briefing in district court, in the
4 district court's adjudication and review of our
5 case, their decision was that the Michigan court
6 of appeals was the last reasoned decision based
7 on their analysis.

8 And since then, we have carried that
9 position, but we've always said, whichever one,
10 they still deserve deference. And in our
11 briefing, we -- we did state that after
12 reconsideration of that legal question, it's the
13 Michigan court of appeals' decision that's the
14 last reasoned decision because that's what
15 deference is. You have to take them at their
16 word. They made a decision not to decide the
17 case, and they denied leave to appeal.

18 JUSTICE BARRETT: But they offered --
19 I mean, they -- it -- it's unusual in that they
20 didn't take the case, but they also had a bit of
21 an opinion. I mean, they -- they offered some
22 views about the merits.

23 MS. HAMMOUD: Yes. They -- and they
24 offered that at the end of their denial. And
25 our courts often -- sometimes -- and -- and --

1 and sometimes they don't, and sometimes they
2 do -- offer guidance to lower courts. And in
3 Michigan, that's consistent not -- not just with
4 our state laws but with this Court's
5 jurisprudence as to the fact that even if they
6 offer guidance at the end, that's not considered
7 to be the last merits adjudication on the case.

8 JUSTICE BREYER: All right. My
9 difficulty with this case is I believe that you
10 understand it, and I believe that the lawyers in
11 front of me understand it, and my colleagues
12 spent time on it. So did I.

13 And I have a terrible time
14 understanding where all these different
15 standards are and how they fit together. But --
16 and I doubt that a lot of habeas judges will
17 understand it either. Maybe they will, but many
18 will not no matter what we say.

19 So I began to think of how could we
20 deal with this. The problem comes up --

21 MS. HAMMOUD: And, Justice --

22 JUSTICE BREYER: -- because Brecht
23 says, if you're the habeas person, you want
24 habeas, I have to find, me, the habeas judge --

25 MS. HAMMOUD: That's correct.

1 JUSTICE BREYER: -- you have proved
2 that it was harmful. Right?

3 MS. HAMMOUD: That's correct, Your
4 Honor.

5 JUSTICE BREYER: No problem. But the
6 state court, the DA there, what she did was
7 prove beyond a reasonable doubt that it wasn't
8 harmless -- or, wait a minute --

9 MS. HAMMOUD: That it wasn't harmful.

10 JUSTICE BREYER: -- prove beyond a
11 reasonable -- prove that it was harmless beyond
12 a reasonable doubt.

13 And so then you get where Justice
14 Kagan was and you say: But that's just
15 contradictory. Ahh, not quite, because we've
16 said that when you look at that state court
17 decision, as long as a reasonable jurist could
18 have found that it was harmless beyond a
19 reasonable doubt, it has to stand up.

20 What's my problem? I think it was
21 harmful, but I can't bring myself to say that no
22 reasonable jurist could have agreed with that
23 person over in the state court. And so you say
24 that's what we should apply.

25 Now I have an idea. The purpose of

1 this whole thing is to get the habeas judge to
2 pay some attention to what they did on this in
3 the district court, in the federal -- in the
4 state court. That's the purpose, isn't it? Pay
5 attention, federal habeas judge, to the fact
6 that those are good judges over there too, and
7 they came out the opposite. You say it was
8 harmful, but they said no reasonable -- beyond a
9 reasonable doubt, it was -- it was harmless.
10 Pay attention to it.

11 So why don't we just say that? Why
12 don't we just say this is one of the questions
13 where, if you ever have such a situation,
14 federal habeas judge, please pay some attention?
15 And instead of writing it in a legal standard
16 that no one can understand, just tell them what
17 to do: Pay some attention.

18 Now I grant you that would leave it
19 all up to them. It would be very hard to
20 review. But we leave lots of things to district
21 judges. And there we get our objective: Pay
22 attention to the fact that the state court did
23 come out the opposite on this than you did.

24 What about that?

25 MS. HAMMOUD: This Court has already

1 done that. This Court in Richter has
2 specifically stated federal judges can't use
3 this test as a test of its -- its own confidence
4 in the result they would reach in a de novo
5 review, that they cannot grant petitions because
6 merely they disagree with the state court's
7 harmlessness determination.

8 In this case, not only did you have 11
9 Michigan judges that believed it was harmless --

10 JUSTICE BREYER: All right. All
11 right. Stop right there. Just say, okay, we
12 said it already; we'll just repeat that.

13 MS. HAMMOUD: And --

14 JUSTICE BREYER: And we -- and we'll
15 say whatever the technicalities here of this
16 language, Chapman, Brecht, which nobody really
17 has -- can understand, we'll need two hours of
18 study, just do what we said there, pay some
19 attention to the state court, the fact that they
20 found the opposite.

21 MS. HAMMOUD: As -- as Judge Sutton
22 had put it --

23 JUSTICE BREYER: Would you be happy
24 with that?

25 MS. HAMMOUD: No. And I wish it

1 worked, Your Honor. But this Court has said
2 that repeatedly. Two-and-a-half decades after
3 Congress enacted AEDPA, this Court have said
4 that.

5 And as Judge Sutton put it, there is
6 vexing language, and he stated in his concurring
7 opinion in the en banc denial, I suspect every
8 federal judge in the nation would benefit from
9 -- from articulating the standard and clarifying
10 this language.

11 And that is why we believe that it's
12 important that this state -- this Court
13 articulate, because this question has not been
14 asked, and it's not been in front of this Court
15 before, that if a petitioner were to prevail
16 under Brecht, can a state court -- can a federal
17 court leapfrog AEDPA --

18 JUSTICE KAGAN: Ms. Hammoud --

19 MS. HAMMOUD: -- and consider it null?

20 JUSTICE KAGAN: -- I mean, I've been
21 trying to figure out how this question matters.
22 And I'm going to have some questions for Ms.
23 Bahal on this point too because, frankly, I'm
24 not sure that it matters all that much. But let
25 me put this to you, which is, has there ever

1 been a case where a court granted relief under
2 Brecht and then said, sorry, we can't grant
3 relief because of AEDPA/Chapman?

4 MS. HAMMOUD: Your Honor, this -- this
5 case is the perfect case to do that, and this
6 case --

7 JUSTICE KAGAN: No, but has there ever
8 been a case where any judge ever said that? I
9 mean, I think the reason Ayala --

10 MS. HAMMOUD: Yes.

11 JUSTICE KAGAN: -- and -- and Fry look
12 the way they do is essentially that the Court
13 made a judgment that they could not imagine --

14 MS. HAMMOUD: Yeah.

15 JUSTICE KAGAN: -- a court saying
16 that. And, in fact, as far as I can see, no
17 court has ever said that.

18 MS. HAMMOUD: This is the first time
19 that a court actually grants relief without
20 applying AEDPA/Chapman. And the reason why we
21 don't have more of those decisions is because
22 circuit courts have been applying AEDPA/Chapman,
23 and the Sixth Circuit did not conform to that.

24 I see that my time is up, and I would
25 like to reserve the rest of my time for

1 rebuttal.

2 CHIEF JUSTICE ROBERTS: You'll have

3 rebuttal.

4 Justice Thomas?

5 JUSTICE THOMAS: No.

6 CHIEF JUSTICE ROBERTS: Justice

7 Breyer? No? No?

8 Anybody? Justice Kavanaugh?

9 JUSTICE KAVANAUGH: No further

10 questions, Chief.

11 CHIEF JUSTICE ROBERTS: Thank you.

12 Thank you very much, counsel.

13 MS. HAMMOUD: Thank you, Mr. Chief

14 Justice.

15 CHIEF JUSTICE ROBERTS: We'll -- we'll

16 hear now from you, Ms. Bahal.

17 ORAL ARGUMENT OF TASHA BAHAL

18 ON BEHALF OF THE RESPONDENT

19 MS. BAHAL: Mr. Chief Justice, and may

20 it please the Court:

21 Brecht and AEDPA/Chapman are both

22 preconditions to habeas relief and both

23 standards have been met here. Mr. Davenport was

24 actually prejudiced by the unconstitutional

25 shackling, as the court of appeals found under

1 Brecht. The state has not sought review of that
2 Brecht determination before this Court. The
3 finding of actual prejudice necessarily means
4 the state court adjudication on the merits was
5 an unreasonable application of the Chapman
6 standard.

7 There is a clear and logical
8 relationship between Brecht and AEDPA/Chapman,
9 with Brecht setting the higher hurdle. Chapman
10 requires the state to prove on direct review the
11 error was harmless beyond a reasonable doubt.
12 That means the state must show there was no
13 reasonable possibility the error contributed to
14 the verdict.

15 AEDPA then asks whether a fair-minded
16 jurist could agree with that Chapman
17 determination. Brecht, in turn, asks whether
18 there is more than a reasonable possibility the
19 error contributed to the verdict.

20 Comparing the standards, where there
21 is more than a reasonable possibility the error
22 contributed to the verdict, as is the case here,
23 no fair-minded jurist could agree there is no
24 reasonable possibility the error contributed to
25 the verdict.

1 Put differently, a fair-minded jurist
2 confronted with more than a reasonable
3 possibility of harm could not find the error
4 harmless beyond a reasonable doubt. That
5 relationship between the standards was
6 recognized by this Court in Fry and again in
7 Ayala, and it's also been recognized in the
8 practical experience of federal courts applying
9 these standards for more than 20 years.

10 Through multiple rounds of briefing,
11 the state has never identified a single case in
12 which Brecht was satisfied but AEDPA/Chapman was
13 not satisfied. Therefore, where a finding of
14 actual prejudice under Brecht has been made and
15 that finding does not rest on sources of law
16 that would not be permissible to consider under
17 2254(d), the Brecht inquiry answers the AEDPA
18 questions.

19 I'd now be happy to take the Court's
20 questions.

21 JUSTICE THOMAS: Counsel, would you
22 comment or respond to Justice Alito's point as
23 to the stature or status of Brecht as an
24 equitable doctrine in comparison with AEDPA,
25 which is statutory?

1 Does one have preference over the
2 other, the statutory over the equitable, or are
3 they both to be treated -- given the same
4 weight?

5 MS. BAHAL: Our position in this case,
6 Your Honor, is that both Brecht and
7 AEDPA/Chapman are both preconditions to habeas
8 relief and that both have been satisfied in this
9 case.

10 JUSTICE THOMAS: Well, I understand
11 that, but if you had to choose between one or
12 the other, which has the higher status?

13 MS. BAHAL: The Brecht question asks a
14 question that requires a more difficult hurdle
15 for a defendant to satisfy, but I believe that
16 they are both equally important in the granting
17 of habeas relief.

18 JUSTICE THOMAS: Well, Brecht is -- is
19 a -- an opinion, a decision from this Court,
20 and, as I said, it's equitable. AEDPA is
21 statutory. And you don't think there's any
22 difference as far as which has the higher
23 stature and which one should command more of our
24 attention?

25 MS. BAHAL: I -- I think they both

1 must be satisfied before habeas relief should be
2 granted, as they were in this case.

3 JUSTICE THOMAS: Well, if you think --
4 if you don't think that they can be -- if you
5 don't think they are compatible -- let's assume
6 just for the sake of discussion that someone
7 thinks they're incompatible. Which takes
8 precedent?

9 MS. BAHAL: I'm not sure I know how to
10 answer the question as -- as we're not conceding
11 that one test is more important or less
12 important than the other. We think they both
13 must be satisfied, as -- as they were here, and
14 an act of Congress is important, as is this
15 Court's precedent.

16 JUSTICE KAGAN: I mean, if that's
17 true, Ms. Bahal, that both have to be satisfied,
18 then why not just tell courts that both have to
19 be satisfied? You know, it seems like kind of a
20 waste of pages and a kind -- but, you know, just
21 go through the motions, do it twice.

22 And I understand why you don't want
23 that, because that's not the way the Sixth
24 Circuit decision reads, so it's unfair perhaps
25 to ask you to answer this question because, you

1 know, your client has a real interest in keeping
2 this judgment.

3 But, I mean, if just -- I guess -- I
4 guess my question here is -- is, if one, you
5 know, generally subsumes the other, but maybe
6 contra-Ayala and contra-Fry we could imagine a
7 case in which that wasn't true, just have the
8 courts go through both and we'll be sure?

9 MS. BAHAL: Courts can do formal
10 application of both. That -- that's up to the
11 courts. The question here is whether --

12 JUSTICE KAGAN: Yeah. I mean, the
13 question is --

14 MS. BAHAL: -- it's error not to.

15 JUSTICE KAGAN: -- is whether to
16 require it, right?

17 MS. BAHAL: Yeah. The question --

18 JUSTICE KAGAN: And so why not just
19 say, you know, you -- you have to do it just so
20 we're sure that no errors are taking place and
21 that AEDPA is being considered in the right way?

22 MS. BAHAL: To require parties and
23 courts to go through the time, effort, energy of
24 briefing, arguing two separate questions, the
25 2254(d) question first, when it's answered and

1 then require that whole round of time, energy,
2 effort to then answer the Brecht question when
3 we know the Brecht question will answer the
4 AEDPA/Chapman inquiry seems unnecessary.

5 Courts can do it. That's fine. But,
6 here, the question is whether it's error not to
7 do it. And the --

8 JUSTICE BREYER: You can make up cases
9 where -- where it could really lead to a
10 different result. The habeas judge sits there
11 and says, Smith, the juror, saw the shackle.
12 I'm sure he saw the shackle. And so it's --
13 it's -- it's not harmless. It's harmful.

14 And then he says, of course, the court
15 of appeals over there in the state, what they
16 said is that Smith didn't see the shackle
17 because he was looking out the window, and I
18 don't believe that, but I think a reasonable
19 juror could have believed it. See? Now we've
20 got different results from the two tests.

21 And so they're saying, well, that
22 could have happened. And then you say, well, it
23 never happened. She says that's hardly
24 surprising because nobody could understand the
25 test, but -- but, regardless, it could happen.

1 So what are we supposed to do?

2 And -- and that's sort of where I'm
3 stuck. I can imagine cases where it happens and
4 they seem far and -- few and far between, but I
5 can imagine it. And so what are we supposed to
6 do?

7 MS. BAHAL: Well, in the hypothetical
8 you just gave, Justice Breyer, that question
9 goes to whether there was an underlying
10 constitutional violation in the first place if
11 someone sees the shackles or not. Here, the --

12 JUSTICE BREYER: There was.

13 MS. BAHAL: -- record is undisputed --

14 JUSTICE BREYER: There was. There was
15 a -- well, let's make it just -- just make a
16 different thing. I mean, you see, make a
17 different thing was -- was -- was this witness
18 believable. The habeas judge says, yeah, I
19 think he's absolutely believable, and,
20 therefore, this omission here of the witness was
21 really harmful. You know, the other one says:
22 No, it wasn't, he wasn't believable at all.

23 First judge: Ah, I think I agree with
24 that second -- well, no, I don't, but I could
25 see a reasonable juror might. Now that's being

1 a little too honest, but you see the problem.

2 MS. BAHAL: The context that we're
3 advocating here and our approach here is limited
4 to the context where there is an underlying
5 constitutional violation. The weighing the
6 credibility might not fall into that category.

7 And so the relationship between the
8 standards as I described them is limited to
9 where Chapman is the underlying clearly
10 established law --

11 JUSTICE ALITO: Well, in --

12 MS. BAHAL: -- because there --

13 JUSTICE ALITO: I'm sorry, no, please
14 finish.

15 MS. BAHAL: Because there is an
16 underlying constitutional violation where
17 Chapman applies, Brecht would subsume the
18 AEDPA/Chapman inquiry.

19 JUSTICE ALITO: Well, Brecht calls on
20 the federal habeas judge to make a personal
21 judgment. The federal habeas judge could say, I
22 personally have a grave doubt, I -- I -- I
23 personally think that this had a substantial
24 effect on the outcome.

25 But AEDPA looks at something

1 different, and a judge -- couldn't a judge say:
2 I personally think this had a substantial
3 effect, but a fair-minded jurist could reach --
4 could reasonably reach the opposite conclusion?
5 They're looking at two different things, aren't
6 they?

7 MS. BAHAL: The standards are an
8 apples-to-apples comparison because they're all
9 looking at whether the constitutional trial
10 error affected the verdict and they're setting
11 different hurdles for that, with Brecht being
12 the higher hurdle. You can't surpass the Brecht
13 hurdle without also satisfying the AEDPA/Chapman
14 hurdle.

15 JUSTICE ALITO: Well, why is that so?
16 Isn't what I just said possible? A judge could
17 say, I personally think that it had a
18 substantial effect, but -- and I have no grave
19 doubt about that. On the other hand, a
20 reasonable jurist could reach the opposite
21 conclusion. Is that -- is that irrational? Is
22 it inconsistent?

23 MS. BAHAL: It would be like a
24 prosecutor standing up at closing argument and
25 saying, there is more than a reasonable

1 possibility that this defendant is innocent, but
2 I, the state, still proved him guilty beyond a
3 reasonable doubt.

4 JUSTICE ALITO: Well, no, it's not at
5 all the same.

6 MS. BAHAL: The -- the Brecht
7 standard, because it subsumes the AEDPA inquiry,
8 you cannot have a finding of grave doubt on one
9 hand with an -- a fair-minded jurist concluding
10 on the other that the harm was harmless beyond a
11 reasonable doubt.

12 JUSTICE ALITO: Well, maybe our --
13 maybe our opinions have confused things by
14 introducing this concept of one subsuming the
15 other. Why shouldn't we just get rid of that?

16 AEDPA is a statute. It says in
17 unequivocal terms you can't grant federal habeas
18 relief unless the decision is based on an
19 unreasonable application of federal law defined
20 in a certain way. Period.

21 There's no way that federal relief,
22 federal habeas relief, can be granted unless
23 that is satisfied. So forget about what
24 subsumes -- something subsuming the other.
25 Brecht was an equitable decision. It continues

1 to have force in a situation in which there
2 isn't a -- an applicable AEDPA provision, which
3 is what Fry addressed when there wasn't a
4 harmlessness determination by the -- by -- by
5 the state court. Isn't that -- doesn't that
6 simplify things? And is there anything wrong
7 with it?

8 MS. BAHAL: If you disagree with the
9 logical relationship as I laid out and require
10 formal application of both tests, application,
11 formal application, of AEDPA here confirms the
12 result. The Michigan Supreme Court opinion was
13 contrary to clearly established law. The law
14 that was to be applied was Chapman, which
15 requires the state to prove the error harmless
16 beyond a reasonable doubt.

17 CHIEF JUSTICE ROBERTS: This is not --
18 the -- AEDPA was a sea change in habeas law, and
19 this is why it's -- and this is the argument
20 your friend makes -- different from Brecht. It
21 said you've made your determination under Brecht
22 and that's fine. We don't care whether there's
23 one judge who disagrees with the state court.
24 We want to make sure that that determination is
25 unreasonable, that there's no reasonable jurist

1 out there.

2 That's a totally different inquiry.
3 And the same with respect to the materials that
4 are before it. Yes, state -- you know, you may
5 have looked at a wide range of materials, you,
6 the federal habeas judge, and made your
7 determination. AEDPA says, for review, we want
8 to look at only the Supreme Court cases. We
9 don't care about the lower courts. It -- it
10 elevated the importance of the state court
11 determination.

12 So the idea that it's informal or --
13 or, you know, you could -- they -- they ask the
14 same question, I think -- and it's -- maybe I'm
15 just repeating Justice Alito's point, but they
16 don't ask the same question.

17 MS. BAHAL: They -- they ask the
18 question as to whether what the state court did
19 was an unreasonable application of clearly
20 established federal law.

21 In this case, where the underlying
22 constitutional violation requires Chapman, that
23 is a very different review than when the
24 underlying determination is, for instance,
25 sufficiency under Jackson or inefficient of

1 counsel under Strickland. Both Jackland --
2 Jackson and Strickland require deference to the
3 state, and then, when you add AEDPA on top of
4 that, this Court has called that dual deference.

5 When you're applying Chapman as the
6 underlying standard, that requires the state to
7 prove beyond a reasonable doubt that the error
8 was harmless. It's a -- it's a question, as
9 this Court called it in need -- in the Neder
10 case, whether the evidence could rationally lead
11 to a different verdict. If it could, then
12 reversal is required.

13 The AEDPA lens in this case needs to
14 be viewed in the context of Chapman, unlike the
15 other standards.

16 JUSTICE BARRETT: But, Ms. Bahal, I
17 don't understand you to be arguing for
18 straight-up Brecht. Don't you kind of argue for
19 Brecht but as limited with the guardrails of
20 AEDPA and that why the Sixth Circuit's decision
21 was okay here is that it was Brecht, but they
22 only considered clearly established Supreme
23 Court law -- just putting aside, just assuming
24 that they did -- and -- and all of the -- the
25 differences that Judge Thapar points out in his

1 dissent from the denial of en banc review, you
2 say, well, they did all that; it was just the
3 substantive standard. So you're advocating this
4 hybrid thing, which seems to me kind of
5 confusing. That's not really what Brecht said.

6 So why not, just for the sake of
7 clarity, to make it -- you know, as Justice
8 Breyer's pointed out, it's hard to unpack all
9 this. For the sake of clarity, why not just
10 tell courts apply both, kind of explain it like
11 Judge Easterbrook did, apply AEDPA, and even if
12 AEDPA's relitigation bar would permit it, you
13 know, apply Brecht too, and they have to pass
14 both in order to get relief?

15 MS. BAHAL: So I -- I agree, the
16 approach we advocate here is applying Brecht,
17 and if the Brecht inquiry finds actual prejudice
18 without relying on sources of law that would be
19 impermissible under 2254(d), we know the answer
20 to the AEDPA inquiry.

21 If there are sources that are relied
22 upon, then formal application of --

23 JUSTICE BARRETT: But Brecht --

24 MS. BAHAL: -- AEDPA might make sense.

25 JUSTICE BARRETT: -- didn't require

1 that because Brecht preceded 2254(d)(1). So
2 you're not really asking just for the
3 application of Brecht. You're trying to meld
4 the two together in a new test, right?

5 MS. BAHAL: I -- I don't think of it
6 as a new test. I think of it as a assurance or
7 a check that the Brecht test will actually
8 subsume the AEDPA inquiry.

9 But, again, here, formal application
10 of AEDPA confirms the result. The state court
11 adjudication on the merits was contrary to
12 clearly established law. They found the error
13 harmless because there was an unacceptable risk
14 of impermissible factors coming into play. That
15 is not the Chapman test.

16 That was a standard from this Court's
17 opinion in Holbrook that applied to determine if
18 there was a constitutional violation by having
19 four uniformed officers sitting behind the bar
20 in the courtroom. That is not what should have
21 been applied here.

22 My friend on the other side agrees
23 that Chapman is the underlying law. So formal
24 --

25 JUSTICE KAVANAUGH: What about --

1 MS. BAHAL: -- application
2 here confirms the result.

3 JUSTICE KAVANAUGH: Ms. Bahal, what
4 about the fact that all the jurors testified
5 that the shackles did not influence the verdict?

6 MS. BAHAL: Thank you, Justice
7 Kavanaugh. This Court has made clear, first in
8 Holbrook and again in Deck, that relying on
9 juror testimony as to whether the effect of
10 shackles affected their verdict is unreliable
11 because a juror will not always be aware of the
12 effect of seeing a defendant in shackles. It
13 has sort of a subconscious effect on the jurors.
14 And so it is not at all surprising that a juror
15 was not able to testify on the remand
16 proceedings that -- that, yes, I saw the
17 shackles and, yes, they affected the verdict.

18 This Court recognized in Holbrook and
19 Deck that the effect of shackling is implicit in
20 the juror and they will not be able to
21 articulate the reasons why the shackling is
22 prejudicial.

23 JUSTICE KAVANAUGH: And a second
24 question. Chief Judge Sutton in his opinion,
25 joined by Judge Kethledge, seemed to suggest

1 that you apply AEDPA. If the state court's
2 issued a ruling on the harmlessness question
3 under Chapman, then you apply AEDPA. If the
4 state court did not issue a ruling on the merits
5 of the harmlessness question, then you apply
6 Brecht.

7 So not really applying both in every
8 case but first making that determination, did
9 the state court actually conduct a harmlessness
10 analysis. If so, AEDPA. If not, Brecht.

11 Anything to say for that approach?

12 MS. BAHAL: The -- the statute itself
13 requires where there is an adjudication on the
14 merits that AEDPA will apply. Here, both sides
15 agree there was an adjudication on the merits.
16 And so the 2254(d) question does apply, as does
17 Brecht.

18 We think the Brecht question answers
19 the 2254 inquiry, but that is one way that AEDPA
20 can be informally applied through Brecht. Both
21 -- both tests apply, and both tests have been
22 satisfied here.

23 JUSTICE ALITO: You mentioned that the
24 state supreme court referred to "an unacceptable
25 risk." Is there any reason why that phrase in a

1 very short opinion should not be understood to
2 mean a risk that cannot be ruled out beyond a
3 reasonable doubt?

4 MS. BAHAL: They cited the test from
5 Holbrook. We know the context in which the
6 Holbrook court used that test. It was a test to
7 determine whether there was a constitutional
8 violation in the first place.

9 The state concedes in their briefing
10 that it was not a harmless error test. The test
11 to be applied, as we all agree, was the Chapman
12 test. There's no indication from the supreme
13 court opinion that they applied Chapman. They
14 certainly didn't cite it, and there's no
15 indication that they applied it at all. They
16 did not hold the state to that burden of proving
17 the error harmless beyond a reasonable doubt.

18 If there are no further questions, I
19 would ask this Court to please affirm.

20 CHIEF JUSTICE ROBERTS: I guess I have
21 one further one. We talk about informally
22 applying AEDPA and formally applying it. What
23 do you understand that difference to be?

24 MS. BAHAL: I use that terminology in
25 light of this Court's opinions in Fry and --

1 CHIEF JUSTICE ROBERTS: No, no, I know
2 -- I know we've used the terminology. I just
3 want you to explain to me -- why don't you
4 explain to me what we meant.

5 (Laughter.)

6 MS. BAHAL: So the -- the formal
7 application of -- of AEDPA, as I understand it,
8 requires making a determination as to what is
9 the last reasoned opinion. Informal application
10 through an understanding that the Brecht test
11 will subsume the AEDPA inquiry means no matter
12 what the last reasoned opinion from the state
13 court is, it was unreasonable because there has
14 been a finding of actual prejudice.

15 And so the informal application
16 doesn't require specifically making the
17 determination as to the last reasoned opinion.

18 CHIEF JUSTICE ROBERTS: Justice
19 Thomas?

20 JUSTICE THOMAS: No, nothing, Chief.

21 CHIEF JUSTICE ROBERTS: Justice Alito?
22 No? All right.

23 Justice Kavanaugh, do you have
24 anything further?

25 JUSTICE KAVANAUGH: No further

1 questions.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 MS. BAHAL: Thank you.

4 CHIEF JUSTICE ROBERTS: Rebuttal, Ms.
5 Hammoud?

6 REBUTTAL ARGUMENT OF FADWA A. HAMMOUD
7 ON BEHALF OF THE PETITIONER

8 MS. HAMMOUD: Thank you, Mr. Chief
9 Justice.

10 If I may, I'd like to address Justice
11 Thomas's and Justice Alito's question in terms
12 of which takes precedent when there's a
13 congressional mandate. And when there is a
14 state court merits application -- adjudication,
15 this is the way we believe the test should work
16 because that is the basic structure of AEDPA.

17 If this -- if there is a state merit
18 -- state court merits adjudication, then they
19 must start with AEDPA first. The point that we
20 were trying to make is let's say a petitioner
21 prevails because a state court used the wrong
22 test, for example, stated that Chapman is not
23 beyond a reasonable doubt but by probable cause
24 standard.

25 The petitioner then wouldn't go to a

1 direct Chapman -- pure Chapman application.
2 Then, as the Court in -- stated in Fry, Brecht
3 would apply. So, in terms of what the Court
4 should articulate, if there is a state court
5 merits adjudication, then AEDPA's highly
6 deferential standards kicks in and it makes --
7 it makes sense that they should start there.

8 And if a petitioner prevails under
9 AEDPA, then we move over to the next test. I
10 know that my friend had stated that the Sixth
11 Circuit did just that when they asked -- when --
12 when they asked the question in Brecht, and,
13 again, that's an independent question, we know
14 me as a judge.

15 We have to take the Sixth Circuit at
16 their word when they specifically stated that
17 the answer in the circuit is that Brecht is
18 always the test and there is no reason to ask
19 whether the state court unreasonably applied
20 Chapman.

21 So to say that Brecht encompasses
22 AEDPA is simply not true because, again, they
23 ask different questions. And in this -- in this
24 specific case and in cases to follow, it is
25 important that this Court, like the tests

1 that -- that have been suggested, when there is
2 a state court merits adjudication, we start with
3 AEDPA/Chapman. If a petitioner prevails, then
4 you move over to Brecht.

5 But what happened here, if a state
6 court finds that there is substantial or an
7 injurious effect on the verdict, I think that
8 that's already been articulated. The question
9 is different.

10 Just because I, a federal judge,
11 disagreed or even as this Court's jurisprudence
12 had articulated, if -- if I, a federal judge,
13 believe they are wrong, they must still ask the
14 question, is it beyond all fair-minded
15 disagreement, or could fair -- fair-minded, not
16 biased, fair-minded jurists agree with the state
17 court's conclusion? And that's --

18 JUSTICE KAGAN: But, Ms. Hammoud --

19 MS. HAMMOUD: -- that's at the heart
20 of AEDPA.

21 JUSTICE KAGAN: -- this is not really
22 a case where somebody's saying, look, I believe
23 one thing, let's call it X, but, at the same
24 time, I think a fair-minded person could
25 disagree with me, because what you're looking to

1 the fair-minded person to decide is something
2 completely different.

3 The standard in Brecht is so much
4 higher than the standard in Chapman that even
5 when you import that level of deference, what
6 the Court said in Ayala, what the Court said in
7 Fry is even when you import some deference, the
8 stand -- there's such a gap between the Chapman
9 and the Brecht standard that the Brecht standard
10 is necessarily going to be the greater one.

11 MS. HAMMOUD: Thank you, Justice
12 Kagan. I agree with you when you're comparing
13 Brecht and Chapman. Those are two harmless
14 error tests. AEDPA is completely different.

15 JUSTICE KAGAN: Right, but --

16 MS. HAMMOUD: AEDPA is an overlay.

17 JUSTICE KAGAN: -- AEDPA -- you're
18 exactly right. AEDPA is an overlay on Chapman.
19 And, essentially, what we decided in Ayala and
20 in Fry is that even with that AEDPA overlay, the
21 Brecht standard doesn't get close to -- the
22 Chapman standard doesn't get close to the Brecht
23 standard.

24 MS. HAMMOUD: Thank you, Your Honor.
25 The question -- AEDPA was not at play in Fry.

1 And never once, and the Court in Ayala
2 reaffirmed that, did it displace AEDPA.

3 And the Court in Ayala went through an
4 extensive analysis, and I understand the two
5 sentences that talk about "subsumes." And this
6 is why this case is a perfect vehicle for this
7 Court to apply both of the tests and distinguish
8 between the different standards, the different
9 limitations, the different burdens, but this
10 Court in Ayala went through and did an extensive
11 analysis showing how Ayala did not meet the test
12 under Brecht and separately under AEDPA/Chapman.

13 And that's what we're asking the Court
14 to do here today because those differences
15 matter and because there is confusion and
16 tension. And this Court should clarify, we
17 believe, through its -- through its application
18 and articulate the test, that you have
19 articulated but not answered this question. And
20 the Sixth Circuit certainly did not give the
21 states deference. Thank you, Your Honors.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 10:52 a.m., the case
25 was submitted.)

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1 10:00 [2] 1:15 3:2 10:52 [1] 52:24 11 [1] 25:8 2 20 [1] 30:9 20-826 [1] 3:6 2021 [1] 1:11 2254 [2] 7:9 45:19 2254(d) [9] 10:2,5 11:3,5 15:9 30:17 33:25 42:19 45:16 2254(d)(1) [4] 3:17 6:14 17:16 43:1 28 [1] 2:7 3 3 [1] 2:4 4 48 [1] 2:10 5 5 [1] 1:11 A a.m [3] 1:15 3:2 52:24 abide [1] 19:7 able [2] 44:15,20 above-entitled [1] 1:13 abrogate [1] 14:15 absolutely [1] 35:19 absolves [1] 3:16 according [1] 17:15 act [1] 32:14 ACTING [1] 1:3 actions [1] 18:18 actual [6] 4:21 17:9 29:3 30:14 42:17 47:14 actually [5] 20:2 27:19 28:24 43:7 45:9 add [1] 41:3 address [2] 16:10 48:10 addressed [2] 7:3 39:3 adjudicated [1] 15:11 adjudication [18] 7:12,15,18,22 12:2 16:15 20:5,18 21:4 22:7 29:4 43:11 45:13,15 48:14,18 49:5 50:2 adjudications [1] 3:16 advocate [1] 42:16 advocating [2] 36:3 42:3 AEDPA [69] 3:13,19 4:3,7,18 5:2,19,24 6:8,16 7:6,19 8:13,21 9:5,20,20,23 10:10,14 13:15,17,21 14:15 16:24 18:5 20:4 26:3,17 29:15 30:17,24 31:20 33:21 36:25 38:7,16 39:2,11,18 40:7 41:3,13,20 42:11,20,24 43:8,10 45:1,3,10,14,19 46:22 47:7,11 48:16,19 49:9,22 50:20 51:14,16,17,18,20,25 52:2 AEDPA's [8] 3:24 4:10,10,20 8:20 9:21 42:12 49:5 AEDPA/Chapman [12] 27:3,20,	22 28:21 29:8 30:12 31:7 34:4 36:18 37:13 50:3 52:12 affected [3] 37:10 44:10,17 affirm [1] 46:19 agree [8] 29:16,23 35:23 42:15 45:15 46:11 50:16 51:12 agreed [1] 23:22 agrees [1] 43:22 Ah [1] 35:23 Ahh [1] 23:15 ALITO [15] 8:24 9:11 10:1,17 11:2,14,16 36:11,13,19 37:15 38:4,12 45:23 47:21 Alito's [3] 30:22 40:15 48:11 already [4] 18:17 24:25 25:12 50:8 analysis [6] 3:20 17:7 21:7 45:10 52:4,11 answer [10] 10:9 11:3 18:21 19:10 32:10,25 34:2,3 42:19 49:17 answered [3] 6:1 33:25 52:19 answers [3] 8:2 30:17 45:18 Anybody [1] 28:8 appeal [1] 21:17 appeals [3] 21:6 28:25 34:15 appeals' [2] 20:25 21:13 APPEARANCES [1] 1:17 apples-to-apples [1] 37:8 applicable [1] 39:2 application [22] 9:8 11:17 15:17 17:12,18 29:5 33:10 38:19 39:10,10,11 40:19 42:22 43:3,9 44:1 47:7,9,15 48:14 49:1 52:17 applied [12] 5:24 6:4 8:12 20:4 39:14 43:17,21 45:20 46:11,13,15 49:19 applies [4] 6:18 7:10,16 36:17 apply [26] 4:6 5:19 7:12 9:5 10:4 11:12 12:2 16:23 17:5,24 18:4,12 19:1,21 23:24 42:10,11,13 45:1,3,5,14,16,21 49:3 52:7 applying [13] 5:7,13,14 18:16 19:11 27:20,22 30:8 41:5 42:16 45:7 46:22,22 approach [5] 3:14 4:13 36:3 42:16 45:11 aren't [2] 16:1 37:5 argue [1] 41:18 arguing [2] 33:24 41:17 argument [14] 1:14 2:2,5,8 3:5,8 13:7 14:2,4,6 28:17 37:24 39:19 48:6 articulate [9] 4:22 18:3 19:4,12,24 26:13 44:21 49:4 52:18 articulated [3] 50:8,12 52:19 articulating [1] 26:9 aside [1] 41:23 asks [5] 10:10 13:21 29:15,17 31:13 assume [1] 32:5 assuming [1] 41:23 assurance [1] 43:6 attention [8] 24:2,5,10,14,17,22	25:19 31:24 aware [1] 44:11 Ayala [24] 4:9 8:6,8,10,11,12,14 12:6,7 14:3,13,14 16:21 17:7,8 18:20 27:9 30:7 51:6,19 52:1,3,10,11 B back [2] 10:19 16:12 BAHAL [37] 1:21 2:6 26:23 28:16,17,19 31:5,13,25 32:9,17 33:9,14,17,22 35:7,13 36:2,12,15 37:7,23 38:6 39:8 40:17 41:16 42:15,24 43:5 44:1,3,6 45:12 46:4,24 47:6 48:3 banc [3] 4:19 26:7 42:1 bar [3] 19:3 42:12 43:19 BARRETT [9] 8:3,6,23 20:10,17 21:18 41:16 42:23,25 based [2] 21:6 38:18 basic [2] 7:19 48:16 basically [3] 14:7 15:23 20:22 basis [3] 11:4,8 17:8 began [1] 22:19 behalf [8] 1:20,21 2:4,7,10 3:9 28:18 48:7 behind [1] 43:19 believable [3] 35:18,19,22 believe [13] 3:21 10:14 18:5 19:2 22:9,10 26:11 31:15 34:18 48:15 50:13,22 52:17 believed [2] 25:9 34:19 below [3] 17:24 19:21 20:20 bench [1] 19:3 benefit [1] 26:8 best [1] 19:9 between [10] 11:23 17:10 19:5 29:8 30:5 31:11 35:4 36:7 51:8 52:8 beyond [16] 14:24 23:7,10,11,18 24:8 29:11 30:4 38:2,10 39:16 41:7 46:2,17 48:23 50:14 biased [1] 50:16 bit [1] 21:20 Boston [1] 1:21 both [38] 4:7 8:12 11:12,25 12:3 13:4 14:5 16:10,23 17:5,24 18:4,13,16 19:1 28:21,22 31:3,6,7,8,16,25 32:12,17,18 33:8,10 39:10 41:1 42:10,14 45:7,14,20,21,21 52:7 Brecht [98] 3:12,20 4:7,11,21 5:2,18,24 6:7,15,15,18,18 7:7,11,15 8:19 9:7,22 10:3,4,8 11:6,8 12:1,13,14,17,18,22,25 13:2,11,18 14:8,10 15:21 16:21,22,24 17:24 18:4 22:22 25:16 26:16 27:2 28:21 29:1,2,8,9,17 30:12,14,17,23 31:6,13,18 34:2,3 36:17,19 37:11,12 38:6,25 39:20,21 41:18,19,21 42:5,13,16,17,23 43:1,3,7 45:6,10,17,18,20 47:10 49:2,12,17,21 50:4 51:3,9,9,13,21,22 52:12 Brecht-only [2] 3:14 4:12 BREYER [13] 22:8,22 23:1,5,10 25:10,14,23 28:7 34:8 35:8,12,14	Breyer's [1] 42:8 brief [2] 20:11,23 briefing [5] 21:3,11 30:10 33:24 46:9 bring [1] 23:21 broad [1] 7:4 BROWN [2] 1:3 3:6 burden [3] 3:17 14:19 46:16 burdens [3] 6:21 14:18 52:9 C California [1] 17:11 call [1] 50:23 called [2] 41:4,9 calls [1] 36:19 came [2] 1:13 24:7 cannot [3] 25:5 38:8 46:2 care [2] 39:22 40:9 carried [1] 21:8 carries [1] 14:19 Case [33] 3:6 5:6,7 9:9,25 17:23 20:1 21:5,17,20 22:7,9 25:8 27:1,5,5,6,8 29:22 30:11 31:5,9 32:2 33:7 40:21 41:10,13 45:8 49:24 50:22 52:6,23,24 cases [5] 14:6 34:8 35:3 40:8 49:24 category [1] 36:6 causal [1] 17:10 cause [1] 48:23 caused [1] 15:25 certain [1] 38:20 Certainly [3] 9:18 46:14 52:20 change [1] 39:18 Chapman [28] 13:1,12,19 15:22 25:16 29:5,9,16 36:9,17 39:14 40:22 41:5,14 43:15,23 45:3 46:11,13 48:22 49:1,1,20 51:4,8,13,18,22 Chapman/AEDPA [1] 17:25 check [1] 43:7 CHIEF [24] 3:3,10 6:3,22 20:8,11 28:2,6,10,11,13,15,19 39:17 44:24 46:20 47:1,18,20,21 48:2,4,8 52:22 choose [1] 31:11 circuit [18] 4:15,24 5:18 9:19 17:14 18:13 19:6,15,25 20:2,7 27:22,23 32:24 49:11,15,17 52:20 Circuit's [3] 4:12 20:13 41:20 circumstances [2] 10:22 12:22 cite [1] 46:14 cited [2] 17:16 46:4 claim [1] 15:10 clarify [2] 8:17 52:16 clarifying [1] 26:9 clarity [2] 42:7,9 clean [2] 5:1 6:10 clear [3] 8:13 29:7 44:7 clearer [1] 6:25 clearly [6] 15:17 36:9 39:13 40:19 41:22 43:12 client [1] 33:1
---	--	---	--

Official - Subject to Final Review

close [2] 51:21,22 closing [1] 37:24 coexist [2] 7:7,9 collateral [3] 7:14,16 12:4 colleagues [1] 22:11 come [1] 24:23 comes [1] 22:20 coming [1] 43:14 command [2] 16:14 31:23 comment [1] 30:22 common [2] 19:18,18 compare [1] 13:19 compared [1] 13:12 comparing [3] 13:18 29:20 51:12 comparison [2] 30:24 37:8 compatible [1] 32:5 completely [3] 9:19 51:2,14 component [3] 9:13 10:2,3 comprehended [1] 14:23 conceded [1] 20:22 concedes [1] 46:9 conceding [1] 32:10 concept [2] 16:5 38:14 concession [2] 3:12 21:1 conclude [1] 16:7 concluding [1] 38:9 conclusion [6] 4:2 5:9 9:10 37:4, 21 50:17 concurring [1] 26:6 conduct [1] 45:9 conducted [1] 4:15 confidence [1] 25:3 confirms [3] 39:11 43:10 44:2 conflict [1] 11:22 conform [1] 27:23 confronted [1] 30:2 confuse [1] 10:18 confused [1] 38:13 confusing [1] 42:5 confusion [1] 52:15 Congress [4] 4:3 6:14 26:3 32:14 congressional [2] 11:12 48:13 congressionally [1] 19:8 consider [7] 6:16 14:12,13 17:16 18:18 26:19 30:16 considered [4] 20:24 22:6 33:21 41:22 consistent [1] 22:3 constitutional [8] 15:23 35:10 36:5,16 37:9 40:22 43:18 46:7 consume [1] 9:18 contest [1] 12:20 context [4] 36:2,4 41:14 46:5 continues [1] 38:25 contra-Ayala [1] 33:6 contra-Fry [1] 33:6 contradictory [1] 23:15 contrary [4] 5:22 15:13 39:13 43:11 contravenes [1] 4:8 contributed [4] 29:13,19,22,24 controlling [1] 17:12	coordinate [1] 5:1 correct [7] 4:23 13:10 15:14 19:13, 23 22:25 23:3 couldn't [1] 37:1 Counsel [5] 15:1 28:12 30:21 41:1 52:23 course [1] 34:14 COURT [120] 1:1,14 3:11 4:22 5:8, 15,21 6:19 7:13,21 8:9,12,13,14, 17,18,19 9:5,22 10:4,12,13 11:4, 11,18 12:16,18,23 13:1 14:3,5,11, 12,14,16,20 15:21 17:2,4,6,11,21 18:3,7 19:4,10,12,20,24 20:1,3,12, 25 21:3,5,13 23:6,16,23 24:3,4,22, 25 25:1,19 26:1,3,12,14,16,17 27:1,12,15,17,19 28:20,25 29:2,4 30:6 31:19 34:14 39:5,12,23 40:8,10, 18 41:4,9,23 43:10 44:7,18 45:4,9, 24 46:6,13,19 47:13 48:14,18,21 49:2,3,4,19,25 50:2,6 51:6,6 52:1, 3,7,10,13,16 court's [25] 4:2,8,14 5:9,23 7:10, 12,15,17 11:1 12:1 14:21 16:15 20:4,21 21:4 22:4 25:6 30:19 32:15 43:16 45:1 46:25 50:11,17 courtroom [1] 43:20 courts [15] 4:13 17:24 19:7 21:25 22:2 27:22 30:8 32:18 33:8,9,11, 23 34:5 40:9 42:10 courts' [1] 3:15 created [1] 11:6 credibility [1] 36:6 criminal [1] 13:20 crucial [1] 4:5 D D.C [1] 1:10 DA [1] 23:6 data [1] 18:14 DAVENPORT [3] 1:6 3:6 28:23 Davenport's [1] 3:12 Davis [6] 12:6,7 14:3 16:3,18,18 de [1] 25:4 deal [1] 22:20 debated [1] 9:16 decades [1] 26:2 decide [2] 21:16 51:1 decided [2] 6:23 51:19 decision [15] 9:10 15:12 17:10 20:3 21:5,6,13,14,16 23:17 31:19 32:24 38:18,25 41:20 decisions [2] 13:5 27:21 Deck [2] 44:8,19 defendant [4] 13:20 31:15 38:1 44:12 defer [1] 4:13 deference [12] 3:15 4:5 7:24 13:14 19:7 21:10,15 41:2,4 51:5,7 52:21 deferential [2] 3:25 49:6 defined [1] 38:19 definition [3] 9:12,16 16:1 denial [5] 5:6,7 21:24 26:7 42:1	denied [2] 5:12 21:17 deny [1] 5:11 described [1] 36:8 deserve [1] 21:10 determination [15] 6:19 7:11 13:13 25:7 29:2,17 39:4,21,24 40:7, 11,24 45:8 47:8,17 determine [2] 43:17 46:7 dictionary [1] 9:12 difference [3] 19:5 31:22 46:23 differences [2] 41:25 52:14 different [30] 6:12,13,21 7:25 8:1, 2 13:21 14:18 15:2 18:17,18 22:14 34:10,20 35:16,17 37:1,5,11 39:20 40:2,23 41:11 49:23 50:9 51:2,14 52:8,8,9 differently [2] 10:8 30:1 difficult [1] 31:14 difficulty [1] 22:9 direct [2] 29:10 49:1 disagree [4] 4:1 25:6 39:8 50:25 disagreed [1] 50:11 disagreement [5] 10:16 13:24 14:25 15:6 50:15 disagrees [1] 39:23 discussion [1] 32:6 displace [1] 52:2 dispute [1] 3:13 dissent [2] 4:19 42:1 distinct [5] 4:11 6:12 10:11 13:17 14:17 distinguish [1] 52:7 district [5] 20:1 21:3,4 24:3,20 doctrine [1] 30:24 done [1] 25:1 doubt [17] 22:16 23:7,12,19 24:9 29:11 30:4 36:22 37:19 38:3,8,11 39:16 41:7 46:3,17 48:23 down [2] 6:9,23 dual [1] 41:4 E Each [2] 6:20 14:19 earlier [1] 21:1 Easterbrook [1] 42:11 effect [9] 15:25 36:24 37:3,18 44:9, 12,13,19 50:7 effort [2] 33:23 34:2 either [2] 5:16 22:17 elevated [1] 40:10 en [3] 4:19 26:7 42:1 enacted [4] 4:3 6:14 11:23 26:3 encompasses [1] 49:21 end [3] 19:11 21:24 22:6 ended [1] 20:11 energy [2] 33:23 34:1 enough [4] 3:21 12:17,18 14:10 entirely [2] 10:21 17:12 entitled [1] 9:6 equally [1] 31:16 equitable [5] 11:20 30:24 31:2,20 38:25 equity [1] 11:18	error [18] 3:22 13:13 14:22 29:11, 13,19,21,24 30:3 33:14 34:6 37:10 39:15 41:7 43:12 46:10,17 51:14 errors [1] 33:20 ERVINE [1] 1:6 Esparza [1] 5:8 especially [1] 12:4 ESQ [3] 2:3,6,9 ESQUIRE [1] 1:21 essentially [3] 14:6 27:12 51:19 established [6] 15:17 36:10 39:13 40:20 41:22 43:12 Even [8] 3:18 19:10 22:5 42:11 50:11 51:4,7,20 evidence [1] 41:10 exactly [8] 8:19 16:17 17:1,4 18:24 19:6,24 51:18 example [2] 5:5 48:22 except [1] 10:22 exercises [1] 11:18 exist [1] 12:3 existing [1] 14:23 experience [1] 30:8 Explain [4] 15:20 42:10 47:3,4 extended [1] 4:14 extensive [2] 52:4,10 extrajudicial [1] 4:16 F fact [11] 8:12 11:11 12:23 13:12 14:13 22:5 24:5,22 25:19 27:16 44:4 factors [1] 43:14 FADWA [5] 1:19 2:3,9 3:8 48:6 failed [2] 4:13 19:6 Failing [1] 4:7 fair [1] 50:15 fair-minded [15] 4:1 10:16 13:23 14:24 15:6 29:15,23 30:1 37:3 38:9 50:14,15,16,24 51:1 fall [1] 36:6 far [5] 19:11 27:16 31:22 35:4,4 federal [31] 3:18,21 4:4,19 8:18 9:22 10:13,21 11:4,9,18,19 15:18 16:23 24:3,5,14 25:2 26:8,16 30:8 36:20,21 38:17,19,21,22 40:6,20 50:10,12 federally [1] 11:12 few [1] 35:4 figure [1] 26:21 filed [1] 21:3 find [4] 4:20 9:12 22:24 30:3 finding [6] 17:8 29:3 30:13,15 38:8 47:14 finds [3] 16:8 42:17 50:6 fine [2] 34:5 39:22 finish [1] 36:14 first [12] 3:5 10:20 16:12 19:19 27:18 33:25 35:10,23 44:7 45:8 46:8 48:19 fit [1] 22:15 follow [3] 11:5,5 49:24 force [1] 39:1
--	---	--	--

Official - Subject to Final Review

forget ^[1] 38:23 formal ^[7] 33:9 39:10,11 42:22 43:9,23 47:6 formality ^[2] 5:8,15 formally ^[4] 5:13 9:5 16:23 46:22 forth ^[2] 15:23 16:24 found ^[5] 5:9 23:18 25:20 28:25 43:12 four ^[1] 43:19 frankly ^[1] 26:23 friend ^[3] 39:20 43:22 49:10 friendlier ^[1] 13:20 front ^[2] 22:11 26:14 Fry ^[19] 7:13 12:7 13:10,12,13,14,18 14:4,11,14 16:4 27:11 30:6 39:3 46:25 49:2 51:7,20,25 further ^[5] 28:9 46:18,21 47:24,25 G gap ^[1] 51:8 gave ^[1] 35:8 General ^[1] 1:19 generally ^[1] 33:5 give ^[5] 4:4 7:24 16:2 19:6 52:20 given ^[1] 31:3 gives ^[1] 3:15 got ^[1] 34:20 grant ^[13] 5:16,17,19 8:15,18 9:8 16:25 18:3 19:1 24:18 25:5 27:2 38:17 granted ^[5] 15:10 16:14 27:1 32:2 38:22 granting ^[2] 3:23 31:16 grants ^[1] 27:19 grave ^[3] 36:22 37:18 38:8 greater ^[1] 51:10 guardrails ^[2] 4:20 41:19 guess ^[4] 7:4 33:3,4 46:20 guidance ^[3] 19:4 22:2,6 guilty ^[1] 38:2 H habeas ^[28] 3:16 4:6,8 10:21 11:9,19 15:9 16:23,25 22:16,23,24,24 24:1,5,14 28:22 31:7,17 32:1 34:10 35:18 36:20,21 38:17,22 39:18 40:6 HAMMOUD ^[68] 1:19 2:3,9 3:7,8,10 5:3,6,12 6:11 7:8 8:3,5,9 9:2,15 10:6,25 11:10,15,25 12:6,13,15 13:9 14:11 15:2,14,19 16:9,19 17:1,6,21 18:2,7,10,16,24 19:16,22 20:14,17 21:2,23 22:21,25 23:3,9 24:25 25:13,21,25 26:18,19 27:4,10,14,18 28:13 48:5,6,8 50:18,19 51:11,16,24 hand ^[2] 37:19 38:9 handle ^[1] 8:7 happen ^[1] 34:25 happened ^[3] 34:22,23 50:5 happening ^[1] 18:19 happens ^[1] 35:3 happy ^[3] 18:8 25:23 30:19	hard ^[2] 24:19 42:8 hardly ^[1] 34:23 harm ^[2] 30:3 38:10 harmful ^[6] 23:2,9,21 24:8 34:13 35:21 harmless ^[16] 13:13 23:8,11,18 24:9 25:9 29:11 30:4 34:13 38:10 39:15 41:8 43:13 46:10,17 51:13 harmlessness ^[5] 25:7 39:4 45:2,5,9 hasty ^[1] 12:21 Havers ^[1] 16:24 hear ^[4] 3:5 13:25 14:1 28:16 heart ^[2] 7:18 50:19 helpful ^[1] 10:19 higher ^[5] 29:9 31:12,22 37:12 51:4 highly ^[2] 3:24 49:5 Holbrook ^[5] 43:17 44:8,18 46:5,6 hold ^[3] 6:20 20:25 46:16 holding ^[1] 12:8 holdings ^[1] 4:14 honest ^[1] 36:1 Honor ^[17] 5:25 9:2,16 11:10 13:11 15:3 17:15 18:25 19:23,23 20:16 21:2 23:4 26:1 27:4 31:6 51:24 Honors ^[1] 52:21 hope ^[1] 5:25 hours ^[1] 25:17 However ^[3] 5:15 9:3 13:21 hurdle ^[5] 29:9 31:14 37:12,13,14 hurdles ^[1] 37:11 hybrid ^[1] 42:4 hypothetical ^[1] 35:7 I idea ^[2] 23:25 40:12 identified ^[1] 30:11 ignore ^[3] 4:20 9:3,23 ignored ^[1] 7:23 ignoring ^[1] 4:4 imagine ^[4] 27:13 33:6 35:3,5 impermissible ^[2] 42:19 43:14 implicit ^[2] 7:6 44:19 import ^[2] 51:5,7 importance ^[1] 40:10 important ^[6] 26:12 31:16 32:11,12,14 49:25 include ^[2] 9:13 10:1 included ^[4] 9:22 10:2 13:10 18:17 including ^[1] 4:9 incompatible ^[1] 32:7 inconsistent ^[1] 37:22 independent ^[3] 4:15 10:12 49:13 indication ^[2] 46:12,15 inefficient ^[1] 40:25 influence ^[1] 44:5 influenced ^[1] 3:23 informal ^[3] 40:12 47:9,15 informally ^[2] 45:20 46:21 injured ^[1] 15:24 injurious ^[2] 15:25 50:7	injury ^[1] 16:7 innocent ^[1] 38:1 inquiry ^[13] 3:20 6:7,8 30:17 34:4 36:18 38:7 40:2 42:17,20 43:8 45:19 47:11 instance ^[2] 19:19 40:24 instead ^[1] 24:15 interest ^[1] 33:1 interpretation ^[1] 16:2 introducing ^[1] 38:14 involved ^[1] 15:16 irrational ^[1] 37:21 Isn't ^[8] 10:21 16:3,4 19:18 24:4 37:16 39:2,5 issue ^[1] 45:4 issued ^[1] 45:2 itself ^[1] 45:12 J Jackland ^[1] 41:1 Jackson ^[2] 40:25 41:2 joined ^[1] 44:25 Judge ^[32] 4:18 8:1 9:17 10:13 13:23 16:8,9 22:24 24:1,5,14 25:21 26:5,8 27:8 34:10 35:18,23 36:20,21 37:1,1,16 39:23 40:6 41:25 42:11 44:24,25 49:14 50:10,12 judges ^[9] 3:18,21 4:4,19 22:16 24:6,21 25:2,9 judgment ^[5] 18:22 20:13 27:13 33:2 36:21 judicial ^[1] 10:18 judicially ^[1] 11:6 jurisprudence ^[3] 4:9 22:5 50:11 jurisprudentially ^[1] 20:15 jurist ^[9] 23:17,22 29:16,23 30:1 37:3,20 38:9 39:25 jurists ^[2] 4:1 50:16 juror ^[7] 34:11,19 35:25 44:9,11,14,20 jurors ^[2] 44:4,13 JUSTICE ^[121] 3:3,3,10 4:25 5:4,10 6:2,3,22 8:3,6,23,24 9:11 10:1,17 11:2,14,16 12:5,14,16 13:9,25 15:1,4,15,20 16:10,17,20 17:3,19,22 18:6,8,11,21 19:14,17 20:8,10,11,17 21:18 22:8,21,22 23:1,5,10,13 25:10,14,23 26:18,20 27:7,11,15 28:2,4,5,6,6,8,9,11,14,15,19 30:21,22 31:10,18 32:3,16 33:12,15,18 34:8 35:8,12,14 36:11,13,19 37:15 38:4,12 39:17 40:15 41:16 42:7,23,25 43:25 44:3,6,23 45:23 46:20 47:1,18,18,20,21,21,23,25 48:2,4,9,10,11 50:18,21 51:11,15,17 52:22 justification ^[1] 14:22 K KAGAN ^[20] 12:5,14,16 13:9,25 23:14 26:18,20 27:7,11,15 32:16 33:12,15,18 50:18,21 51:12,15,17 Kavanaugh ^[9] 3:4 28:8,9 43:25	44:3,7,23 47:23,25 keeping ^[1] 33:1 Kethledge ^[1] 44:25 kicks ^[1] 49:6 kind ^[6] 9:9 32:19,20 41:18 42:4,10 L lacking ^[1] 14:21 laid ^[1] 39:9 language ^[12] 8:8,17 12:6,8 13:10 14:5 15:5,7,16 25:16 26:6,10 Lansing ^[1] 1:19 last ^[7] 20:18 21:6,14 22:7 47:9,12,17 Laughter ^[1] 47:5 law ^[13] 14:23 15:18 30:15 36:10 38:19 39:13,13,18 40:20 41:23 42:18 43:12,23 laws ^[1] 22:4 lawyers ^[1] 22:10 lay ^[1] 19:20 layman's ^[2] 15:21 16:16 lead ^[3] 8:2 34:9 41:10 leapfrog ^[3] 9:20,23 26:17 least ^[1] 9:24 leave ^[4] 7:6 21:17 24:18,20 legal ^[2] 21:12 24:15 legislature ^[1] 6:5 lens ^[2] 3:25 41:13 less ^[1] 32:11 level ^[2] 7:4 51:5 light ^[1] 46:25 limitations ^[5] 4:10 6:16 8:21 9:21 52:9 limited ^[3] 36:3,8 41:19 line ^[1] 18:22 little ^[2] 6:25 36:1 logical ^[2] 29:7 39:9 long ^[1] 23:17 look ^[9] 3:24 9:11 10:7,15 14:7 23:16 27:11 40:8 50:22 looked ^[2] 12:10 40:5 looking ^[4] 34:17 37:5,9 50:25 looks ^[1] 36:25 lot ^[1] 22:16 lots ^[1] 24:20 lower ^[2] 22:2 40:9 M made ^[10] 6:25 8:13 14:3,4 21:16 27:13 30:14 39:21 40:6 44:7 mandate ^[1] 48:13 mandated ^[2] 11:12 19:8 many ^[1] 22:17 Massachusetts ^[1] 1:21 material ^[1] 3:19 materials ^[2] 40:3,5 matter ^[6] 1:13 5:11,14 22:18 47:11 52:15 matters ^[2] 26:21,24 mean ^[16] 9:3,17,18,24 10:3 13:6 20:19 21:19,21 26:20 27:9 32:16
---	---	---	--

Official - Subject to Final Review

33:3,12 35:16 46:2 meaning [2] 8:25 9:14 means [6] 9:4,19 10:1 29:3,12 47:11 meant [3] 16:3,4 47:4 meet [2] 16:22 52:11 meld [1] 43:3 mentioned [1] 45:23 menu [1] 7:24 mere [2] 5:8,15 merely [1] 25:6 merit [1] 48:17 merits [21] 3:16 7:10,12,15,18,21 12:2 15:11 20:4,19 21:22 22:7 29:4 43:11 45:4,14,15 48:14,18 49:5 50:2 met [1] 28:23 Michigan [8] 1:20 4:13 20:21 21:5,13 22:3 25:9 39:12 might [5] 12:20,20 35:25 36:6 42:24 MIKE [1] 1:3 mind [1] 10:14 minds [1] 3:22 minute [1] 23:8 modern [1] 4:8 modified [1] 3:14 morning [1] 3:5 motions [1] 32:21 move [2] 49:9 50:4 Ms [98] 3:7,10 5:3,6,12 6:11 7:8 8:3,5,9 9:2,15 10:6,25 11:10,15,25 12:5,13,15 13:9 14:11 15:2,14,19 16:9,19 17:1,6,21 18:2,7,10,16,24 19:16,22 20:10,14,17 21:2,23 22:21,25 23:3,9 24:25 25:13,21,25 26:18,19,22 27:4,10,14,18 28:13,16,19 31:5,13,25 32:9,17 33:9,14,17,22 35:7,13 36:2,12,15 37:7,23 38:6 39:8 40:17 41:16 42:15,24 43:5 44:1,3,6 45:12 46:4,24 47:6 48:3,4,8 50:18,19 51:11,16,24 much [3] 26:24 28:12 51:3 multiple [1] 30:10 must [16] 3:24 4:6 5:16,18,24 7:24 11:11,11,25 18:4 19:1 29:12 32:1,13 48:19 50:13 myself [1] 23:21 N narrows [1] 3:13 nation [1] 26:8 necessarily [2] 29:3 51:10 Neder [1] 41:9 need [5] 7:11 12:1 16:23 25:17 41:9 needs [2] 7:22 41:13 never [5] 6:15 8:11 30:11 34:23 52:1 nevertheless [1] 16:24 new [2] 43:4,6 next [2] 5:17 49:9 nobody [3] 15:6 25:16 34:24	nothing [1] 47:20 novo [1] 25:4 null [2] 9:3 26:19 O O'Neal [1] 10:13 objective [1] 24:21 objectively [1] 20:5 October [1] 1:11 odd [1] 7:5 offer [5] 7:23 19:2,3 22:2,6 offered [3] 21:18,21,24 officers [1] 43:19 often [2] 8:2 21:25 okay [4] 6:6 11:2 25:11 41:21 omission [1] 35:20 once [2] 7:17 52:1 One [27] 5:3,5 6:11 10:11,11 11:11 12:24 13:18,19 19:24 21:9 24:12,16 31:1,11,23 32:11 33:4 35:21 38:8,14 39:23 45:19 46:21,21 50:23 51:10 only [7] 3:18 12:18 13:4 14:17 25:8 40:8 41:22 operative [1] 15:16 opinion [11] 21:21 26:7 31:19 39:12 43:17 44:24 46:1,13 47:9,12,17 opinions [3] 10:18 38:13 46:25 opposed [1] 10:14 opposite [5] 24:7,23 25:20 37:4,20 option [1] 4:4 options [1] 7:24 oral [5] 1:14 2:2,5 3:8 28:17 order [2] 12:2 42:14 other [18] 3:25 5:5,7,13 6:6 7:5 12:25 31:2,12 32:12 33:5 35:21 37:19 38:10,15,24 41:15 43:22 otherwise [1] 10:23 out [10] 19:20 24:7,23 26:21 34:17 39:9 40:1 41:25 42:8 46:2 outcome [1] 36:24 over [8] 3:20 23:23 24:6 31:1,2 34:15 49:9 50:4 overlay [6] 13:15,17,21 51:16,18,20 override [2] 8:6,10 own [3] 3:22 10:14 25:3 P PAGE [1] 2:2 pages [1] 32:20 participating [1] 3:4 parties [1] 33:22 pass [1] 42:13 pay [7] 24:2,4,10,14,17,21 25:18 perfect [2] 27:5 52:6 perhaps [1] 32:24 Period [1] 38:20 permissible [2] 3:19 30:16 permit [1] 42:12 person [4] 22:23 23:23 50:24 51:1	personal [1] 36:20 personally [4] 36:22,23 37:2,17 Petitioner [13] 1:4,20 2:4,10 3:9 5:23 9:6 26:15 48:7,20,25 49:8 50:3 petitioners [1] 3:17 petitions [1] 25:5 phrase [1] 45:25 place [4] 6:17 33:20 35:10 46:8 play [2] 43:14 51:25 please [5] 3:11 24:14 28:20 36:13 46:19 point [6] 13:5 17:16 26:23 30:22 40:15 48:19 pointed [1] 42:8 points [1] 41:25 position [3] 13:16 21:9 31:5 possibility [7] 14:24 29:13,18,21,24 30:3 38:1 possible [1] 37:16 practical [1] 30:8 practice [2] 19:18,19 preceded [1] 43:1 precedent [7] 4:15 5:23 17:13 18:13 32:8,15 48:12 precondition [5] 4:6 5:19 8:14,21 16:25 preconditions [2] 28:22 31:7 preference [1] 31:1 prejudice [6] 4:21 17:9 29:3 30:14 42:17 47:14 prejudiced [1] 28:24 prejudicial [1] 44:22 presented [1] 8:11 prevail [3] 11:24,25 26:15 prevails [4] 5:24 48:21 49:8 50:3 previous [2] 11:20,21 principles [1] 10:20 prior [5] 5:25 18:3,25 20:1,6 probable [1] 48:23 probably [1] 20:21 problem [4] 22:20 23:5,20 36:1 proceedings [1] 44:16 prohibited [1] 4:18 prosecutor [1] 37:24 protect [1] 7:19 protected [1] 7:22 prove [6] 23:7,10,11 29:10 39:15 41:7 proved [2] 23:1 38:2 provides [1] 11:19 proving [1] 46:16 provision [1] 39:2 prudent [1] 19:2 pure [1] 49:1 purporting [1] 10:4 purpose [2] 23:25 24:4 put [5] 6:10 25:22 26:5,25 30:1 putting [1] 41:23 Q question [41] 6:1 7:4 8:10 10:15 14:12,13 18:22 19:12 20:15 21:12 26:13,21 31:13,14 32:10,25 33:4,	11,13,17,25 34:2,3,6 35:8 40:14,16,18 41:8 44:24 45:2,5,16,18 48:11 49:12,13 50:8,14 51:25 52:19 questions [17] 6:13 8:1,2 10:9 13:22 16:11 18:18 20:6 24:12 26:22 28:10 30:18,20 33:24 46:18 48:149:23 quite [1] 23:15 quotes [1] 12:7 R range [1] 40:5 rational [1] 6:5 rationally [1] 41:10 reach [4] 25:4 37:3,4,20 read [3] 11:20 13:3,4 reading [3] 9:4 15:9 16:13 Reader [1] 9:17 reads [1] 32:24 reaffirmed [2] 4:9 52:2 real [1] 33:1 really [9] 5:10 6:23 25:16 34:9 35:21 42:5 43:2 45:7 50:21 reason [4] 27:9,20 45:25 49:18 reasonable [30] 16:3,6 17:12 23:7,11,12,17,19,22 24:8,9 29:11,13,18,21,24 30:2,4 34:18 35:25 37:20,25 38:3,11 39:16,25 41:7 46:3,17 48:23 reasonably [1] 37:4 reasoned [5] 21:6,14 47:9,12,17 reasons [1] 44:21 REBUTTAL [5] 2:8 28:1,3 48:4,6 recognized [3] 30:6,7 44:18 reconcile [1] 7:2 reconsideration [1] 21:12 record [2] 4:16 35:13 referred [1] 45:24 refers [1] 12:8 reflection [1] 20:24 regardless [1] 34:25 reiterate [1] 8:20 rejects [1] 14:6 relationship [4] 29:8 30:5 36:7 39:9 relied [3] 3:18 4:14 42:21 relief [28] 3:23 4:6 5:7,16,17,20,25 8:14,15,18,22 9:6,8 10:21 11:19 18:4 19:1 27:1,3,19 28:22 31:8,17 32:1 38:18,21,22 42:14 relitigation [1] 42:12 rely [1] 18:13 relying [2] 42:18 44:8 remains [1] 8:21 remand [3] 18:12 20:13 44:15 remotely [1] 3:4 repeat [1] 25:12 repeatedly [2] 14:16 26:2 repeating [1] 40:15 represented [1] 17:11 require [7] 33:16,22 34:1 39:9 41:2 42:25 47:16 required [1] 41:12
--	--	---	---

Official - Subject to Final Review

requires ^[7] 29:10 31:14 39:15 40:22 41:6 45:13 47:8 reserve ^[1] 27:25 respect ^[2] 15:10 40:3 respond ^[1] 30:22 Respondent ^[4] 1:7,22 2:7 28:18 rest ^[2] 27:25 30:15 result ^[5] 25:4 34:10 39:12 43:10 44:2 resulted ^[1] 15:12 results ^[1] 34:20 reversal ^[1] 41:12 reverse ^[3] 4:23 20:12,14 review ^[13] 4:16 7:14,16 10:12 12:4 21:4 24:20 25:5 29:1,10 40:7,23 42:1 Richter ^[1] 25:1 rid ^[1] 38:15 risk ^[3] 43:13 45:25 46:2 ROBERTS ^[17] 3:3 6:3,22 20:8,11 28:2,6,11,15 39:17 46:20 47:1,18, 21 48:2,4 52:22 round ^[1] 34:1 rounds ^[1] 30:10 rule ^[1] 11:20 ruled ^[1] 46:2 ruling ^[3] 14:21 45:2,4 S sake ^[3] 32:6 42:6,9 same ^[11] 6:20 7:4 10:7 12:3 16:5 31:3 38:5 40:3,14,16 50:23 sat ^[1] 6:23 satisfied ^[9] 30:12,13 31:8 32:1,13, 17,19 38:23 45:22 satisfy ^[2] 10:5 31:15 satisfying ^[1] 37:13 saw ^[3] 34:11,12 44:16 saying ^[10] 7:1 13:6 15:5 16:1 20:20,23 27:15 34:21 37:25 50:22 says ^[13] 12:9 14:7 15:8,23 20:23 22:23 34:11,14,23 35:18,21 38:16 40:7 science ^[2] 4:17 18:14 sea ^[1] 39:18 second ^[2] 35:24 44:23 see ^[7] 27:16,24 34:16,19 35:16,25 36:1 seeing ^[1] 44:12 seem ^[2] 7:5 35:4 seemed ^[2] 20:20 44:25 seems ^[3] 32:19 34:4 42:4 sees ^[1] 35:11 sense ^[2] 42:24 49:7 sentences ^[1] 52:5 separate ^[3] 6:8 9:7 33:24 separately ^[1] 52:12 set ^[3] 6:5,16 15:22 sets ^[1] 16:24 setting ^[2] 29:9 37:10 shackle ^[3] 34:11,12,16 shackles ^[5] 35:11 44:5,10,12,17 shackling ^[3] 28:25 44:19,21	shall ^[3] 15:9,9 16:14 short ^[1] 46:1 shouldn't ^[3] 20:19,25 38:15 show ^[1] 29:12 showing ^[1] 52:11 side ^[2] 8:7 43:22 sides ^[1] 45:14 significant ^[1] 20:15 simplify ^[1] 39:6 simply ^[2] 4:19 49:22 since ^[1] 21:8 single ^[1] 30:11 sits ^[1] 34:10 sitting ^[3] 6:9 7:1 43:19 situation ^[2] 24:13 39:1 Sixth ^[17] 4:12,23 5:18 9:18 17:14 19:6,15,25 20:2,7,13 27:23 32:23 41:20 49:10,15 52:20 slate ^[2] 5:1 6:10 Smith ^[2] 34:11,16 social ^[2] 4:17 18:14 Solicitor ^[1] 1:19 somebody ^[1] 6:9 somebody's ^[1] 50:22 someone ^[2] 32:6 35:11 sometimes ^[4] 10:17 21:25 22:1,1 sorry ^[4] 15:12 18:10 27:2 36:13 sort ^[2] 35:2 44:13 SOTOMAYOR ^[16] 15:1,4,15,20 16:10,17,20 17:3,19,22 18:6,8,11, 21 19:14,17 sought ^[1] 29:1 sources ^[3] 30:15 42:18,21 specific ^[2] 13:22 49:24 specifically ^[5] 7:10 14:14 25:2 47:16 49:16 spent ^[1] 22:12 stand ^[2] 23:19 51:8 standard ^[25] 4:23 5:22 11:6 12:11,14 14:8,10 16:21,22 19:13 24:15 26:9 29:6 38:7 41:6 42:3 43:16 48:24 51:3,4,9,9,21,22,23 standards ^[12] 19:5,20 22:15 28:23 29:20 30:5,9 36:8 37:7 41:15 49:6 52:8 standing ^[1] 37:24 start ^[3] 48:19 49:7 50:2 state ^[64] 3:15 4:2 5:9,21 6:19 7:10, 11,14,17,21 12:1 13:14 14:20 15:11 16:15 17:21 18:19 19:3,7 20:3, 4 21:11 22:4 23:6,16,23 24:4,22 25:6,19 26:12,16 29:1,4,10,12 30:11 34:15 38:2 39:5,15,23 40:4,10, 18 41:3,6 43:10 45:1,4,9,24 46:9, 16 47:12 48:14,17,18,21 49:4,19 50:2,5,16 stated ^[10] 13:11 14:14,16 18:25 25:2 26:6 48:22 49:2,10,16 statement ^[1] 17:10 STATES ^[3] 1:1,15 52:21 stature ^[2] 30:23 31:23 status ^[2] 30:23 31:12	statute ^[14] 11:3,9,13,21,21,23 15:8,8 16:13,13 17:15 19:8 38:16 45:12 statutory ^[4] 10:22 30:25 31:2,21 still ^[4] 10:4 21:10 38:2 50:13 Stop ^[1] 25:11 straight-up ^[1] 41:18 Strickland ^[2] 41:1,2 stricter ^[3] 12:11,22,25 structure ^[2] 7:20 48:16 stuck ^[1] 35:3 studies ^[1] 4:17 study ^[1] 25:18 subconscious ^[1] 44:13 subject ^[1] 13:14 submitted ^[2] 52:23,25 subsequently ^[1] 11:23 substantial ^[5] 15:25 36:23 37:2, 18 50:6 substantially ^[2] 3:22 15:24 substantive ^[1] 42:3 subsume ^[7] 3:13 9:1,4,14 36:17 43:8 47:11 subsumed ^[1] 9:9 subsumes ^[9] 5:5 8:8,16 12:24 16:4 33:5 38:7,24 52:5 subsuming ^[2] 38:14,24 suffered ^[1] 17:9 sufficiency ^[1] 40:25 sufficient ^[1] 13:2 suggest ^[1] 44:25 suggested ^[1] 50:1 suggesting ^[1] 14:1 suggests ^[1] 3:15 supposed ^[2] 35:1,5 SUPREME ^[9] 1:1,14 17:11 20:21 39:12 40:8 41:22 45:24 46:12 surpass ^[1] 37:12 surprising ^[2] 34:24 44:14 suspect ^[1] 26:7 suspension ^[1] 10:23 Sutton ^[3] 25:21 26:5 44:24 system ^[2] 6:5,10 T talked ^[1] 16:20 TASHA ^[3] 1:21 2:6 28:17 technicalities ^[1] 25:15 tension ^[1] 52:16 term ^[3] 8:25 9:14 15:21 terminology ^[2] 46:24 47:2 terms ^[7] 8:16 12:24 14:18 16:16 38:17 48:11 49:3 terrible ^[1] 22:13 test ^[27] 5:17 12:25 13:1,2 14:19 15:22 25:3,3 32:11 34:25 43:4,6,7, 15 46:4,6,6,10,10,12 47:10 48:15, 22 49:9,18 52:11,18 testified ^[1] 44:4 testify ^[1] 44:15 testimony ^[1] 44:9 tests ^[13] 6:12,13 10:8 12:10 14:17 15:3 34:20 39:10 45:21,21 49:25	51:14 52:7 Thapar ^[3] 4:18 8:1 41:25 there's ^[11] 6:19 7:14 17:8 31:21 38:21 39:22,25 46:12,14 48:12 51:8 Therefore ^[2] 30:13 35:20 thinks ^[3] 9:19 13:23 32:7 THOMAS ^[12] 4:25 5:4,10 6:2 28:4, 5 30:21 31:10,18 32:3 47:19,20 Thomas's ^[1] 48:11 three ^[1] 6:14 today ^[4] 3:4 17:23 18:1 52:14 together ^[3] 6:10 22:15 43:4 top ^[1] 41:3 totally ^[1] 40:2 treated ^[1] 31:3 trial ^[1] 37:9 true ^[3] 32:17 33:7 49:22 trying ^[3] 26:21 43:3 48:20 Tuesday ^[1] 1:11 turn ^[1] 29:17 twice ^[2] 12:23 32:21 two ^[17] 6:20 7:2 10:6,8 12:3,10 14:17 17:10 19:5,25 25:17 33:24 34:20 37:5 43:4 51:13 52:4 Two-and-a-half ^[1] 26:2 U unacceptable ^[2] 43:13 45:24 uncertain ^[1] 12:24 unconstitutional ^[1] 28:24 under ^[29] 3:17,19 4:18,21 5:16,18, 24 6:7,8,8 8:19 9:6 14:19 15:21, 21,22 26:16 27:1 28:25 30:14,16 39:21 40:25 41:1 42:19 45:3 49:8 52:12,12 underlying ^[8] 35:9 36:4,9,16 40:21,24 41:6 43:23 understand ^[15] 11:7 13:5,7 22:10,11,17 24:16 25:17 31:10 32:22 34:24 41:17 46:23 47:7 52:4 understanding ^[5] 8:25 11:16,17 22:14 47:10 understood ^[2] 14:23 46:1 undisputed ^[1] 35:13 unequivocal ^[1] 38:17 unfair ^[1] 32:24 uniformed ^[1] 43:19 UNITED ^[2] 1:1,15 unless ^[3] 16:15 38:18,22 unlike ^[1] 41:14 unnecessary ^[1] 34:4 unpack ^[1] 42:8 unreasonable ^[8] 15:17 17:17 20:5 29:5 38:19 39:25 40:19 47:13 unreasonably ^[1] 49:19 unreliable ^[1] 44:10 unusual ^[1] 21:19 up ^[9] 6:5 9:11 22:20 23:19 24:19 27:24 33:10 34:8 37:24 V vehicle ^[1] 52:6
---	---	---	--

verdict ^[13] 3:23 16:1,8 29:14,19, 22,25 37:10 41:11 44:5,10,17 50:7
version ^[1] 11:21
versus ^[1] 3:6
vexing ^[1] 26:6
view ^[1] 13:3
viewed ^[1] 41:14
views ^[1] 21:22
violation ^[7] 15:24 35:10 36:5,16 40:22 43:18 46:8

W

wait ^[1] 23:8
WARDEN ^[1] 1:3
Washington ^[1] 1:10
waste ^[1] 32:20
way ^[12] 6:6 13:3,4 15:7 19:9 27:12 32:23 33:21 38:20,21 45:19 48:15
weighing ^[1] 36:5
weight ^[1] 31:4
whatever ^[2] 16:2 25:15
whenever ^[1] 4:20
Whereupon ^[1] 52:24
whether ^[18] 3:25 6:18 7:14 13:23 17:17 29:15,17 33:11,15 34:6 35:9 37:9 39:22 40:18 41:10 44:9 46:7 49:19
whichever ^[1] 21:9
whole ^[2] 24:1 34:1
wide ^[1] 40:5
will ^[10] 9:12 22:16,17,18 34:3 43:7 44:11,20 45:14 47:11
window ^[1] 34:17
wish ^[1] 25:25
within ^[1] 3:19
without ^[3] 27:19 37:13 42:18
witness ^[2] 35:17,20
word ^[2] 21:16 49:16
words ^[2] 6:6 7:5
work ^[2] 14:9 48:15
worked ^[1] 26:1
writ ^[2] 10:24 16:14
writing ^[2] 4:25 24:15

Y

years ^[2] 6:15 30:9