

Supreme Court Report

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This *Report* summarizes opinions issued on March 29 and April 1 and 5, 2021 (Part I); and cases granted review on March 29 and April 5, 2021 (Part II).



I. Opinions

- *Google LLC v. Oracle America, Inc.*, 18–956. By a 6–2 vote, the Court held that Google’s copying of a portion of Java SE—a computer program owned by Oracle that uses the Java computer programming language—constituted fair use and therefore did not violate the copyright law. Google acquired Android, Inc. in 2005 in the hope of developing a software platform for smartphones. Google wanted the platform to be free and open so that “more and more developers . . . would develop ever more Android-based applications.” At the time, many software developers used the Java programming language, which Oracle’s predecessor, Sun Microsystems, invented. After talks between Google and Oracle broke down, Google went ahead and built its own platform. Google’s engineers wrote millions of lines of new code, but, critically, copied about 11,500 lines of code from the Java SE program. These lines of code are part of a tool called an Application Programming Interface, or API. The Federal Circuit described an API as a tool that “allow[s] programmers to use . . . prewritten code to build certain functions into their own programs, rather than write their own code to perform those functions from scratch.” More precisely, for each task a computer might perform, “there is a computer code, known as ‘implementing code,’ that in effect tells the computer how to execute the particular task you have asked it to perform.” To tell the computer which implementing code program to choose, you enter commands—known as “method calls”—that correspond to the specific task and calls it up. A method call actually locates and invokes the particular implementing code through “declaring code,” which “enables a set of shortcuts for programmers. By connecting complex implementing code with method codes, it allows a programmer to pick out from the API’s task library a particular task without having to learn anything more than a simple command.” Declaring code also “performs an organizational function,” by “divid[ing] the potential worlds of different tasks into an actual world.” Now back to the Android: Google wrote its own implementing programs and much of its own declaring code. But for 37 packages of its API, Google copied the Sun Java API’s declaring code.

Oracle sued Google. As relevant here, a district court judge ruled that the API’s declaring code was not copyrightable, but the Federal Circuit reversed. On remand, a jury found that Google’s use of the copyrighted code constituted permissible “fair use.” The

Federal Circuit again reversed. The Supreme Court granted certiorari to address both issues: copyrightability and fair use. In an opinion by Justice Breyer, the Court assumed the declaring code could be copyrighted but (reversing the Federal Circuit) found that Google's copying it constituted fair use.

The Court has "described the 'fair use' doctrine, originating in the courts, as an 'equitable rule of reason' that 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" It noted that "fair use can play an important role in determining the lawful scope of a computer program copyright" by "providing a context-based check that can help keep a copyright monopoly within its lawful bounds." Before applying the doctrine to the declaring code at issue, the Court agreed with the Federal Circuit "that the 'fair use' question was a mixed question of law and fact; that reviewing courts should appropriately defer to the jury's findings of underlying facts; but that the ultimate question whether those facts showed a 'fair use' is a legal question for judges to decide *de novo*." With that background, the Court considered four factors relevant to the fair-use inquiry set out in the statute that embodies the doctrine.

The Court first considered "the nature of the copyrighted work." It observed that, "unlike many programs, [declaring code's] use is inherently bound together with uncopyrightable ideas (general task division and organization) and new creative expression (Android's implementing code). Unlike many other programs, its value in significant part derives from the value that those who do not hold copyrights, namely, computer programmers, invest of their own time and effort to learn the API's system. And unlike many other programs, its value lies in its efforts to encourage programmers to learn and to use that system so that they will use (and continue to use) Sun-related implementing programs that Google did not copy." For those reasons, if declaring code is "copyrightable at all," it is "further than are most computer programs (such as implementing code) from the core of copyright." And all this means this factor "points in the direction of fair use."

The Court next looked to "the purpose and character of the use," which "ask[s] whether the copier's use 'fulfill[s] the objective of copyright law to stimulate creativity for public illumination.'" Was it "transformative," *i.e.*, did it "add[] something new and important"? The Court said yes. "Google's use of the Sun Java API seeks to create new products. It seeks to expand the use and usefulness of Android-based smartphones. Its new product offers programmers a highly creative and innovative tool for a smartphone environment." The third factor explored by the Court was "the amount and substantiality of the portion used." Google copied 11,500 lines of code, a significant amount unless one considers that the total amount of Sun Java API computer code amounts to 2.86 million lines. The Court found that larger number to be the proper denominator because "the Sun Java API is inseparably

bound to those task-implementing lines.” The Court added that “[t]he ‘substantiality’ factor will generally weigh in favor of fair use where, as here, the amount of copying was tethered to a valid, and transformative, purpose.”

Finally, the Court assessed “market effects.” The Court found that, “[a]s to the likely amount of loss, the jury could have found that Android did not harm the actual or potential markets for Java SE. And it could have found that Sun itself (now Oracle) would not have been able to enter those markets successfully whether Google did, or did not, copy a part of its API.” This is because “the evidence showed that Sun’s mobile phone business was declining, while the market increasingly demanded a new form of smartphone technology that Sun was never able to offer.” Plus, “the jury also heard evidence that Sun foresaw a benefit from the broader use of the Java programming language in a new platform like Android, as it would further expand the network of Java-trained programmers.” The Court concluded by saying: “[W]here Google reimplemented a user interface, taking only what was needed to allow users to put their accrued talents to work in a new and transformative program, Google’s copying of the Sun Java API was a fair use of that material as a matter of law.” (Justice Barrett took no part in the consideration of the case.)

Justice Thomas filed a dissenting opinion, which Justice Alito joined. Justice Thomas stated that the Court reached the wrong answer on fair use “in large part because it bypasses the antecedent question clearly before us: Is the software code at issue here protected by the Copyright Act?” The Court’s “fair-use analysis is wholly inconsistent with the substantial protection Congress gave to computer code.” He noted that “[t]he Copyright Act expressly protects computer code,” and rejected Google’s contention that declaring code falls outside that protection because it is a “method of operation.” Not so, said Justice Thomas. “Because declaring code incorporates implementing code, it has no function on its own. . . . The functionality of both declaring code and implementing code will thus typically rise and fall together.” And terms Congress used “suggest that ‘method of operation’ covers the functions and ideas implemented by computer code—such as math functions, accounting methods, or the idea of declaring code—not the specific expression Oracle created.”

Turning to fair use, Justice Thomas maintained that three of the four factors cut against it. On the nature of the copyrighted work, he acknowledged that computer code is mainly functional, which generally favors fair use. But he still disagreed with the majority’s view that “the nature of declaring code makes that code generally unworthy of protection.” “[I]f anything,” Justice Thomas wrote, “declaring code is *closer* to the ‘core of copyright’ than implementing code because it is “user facing” and “must be designed and organized in a way that is intuitive and understandable to developers so that they can invoke it.” On market effects, “the Federal Circuit correctly determined [that] ‘evidence of actual and

potential harm stemming from Google’s copying was overwhelming.’ By copying Oracle’s code to develop and release Android, Google ruined Oracle’s potential market in at least two ways.” (Citation omitted.) “First,” said Justice Thomas, “Google eliminated the reason manufacturers were willing to pay to install the Java platform.” Thus, for example, “after Google released Android, Amazon used the cost-free availability of Android to negotiate a 97.5% discount on its license fee with Oracle.” “Second, Google interfered with opportunities for Oracle to license the Java platform to developers of smartphone operating systems.” Next, Justice Thomas concluded that the purpose and character of the use strongly favors Oracle. That’s because the issue is “overwhelmingly commercial” (earning Google \$18 billion in 2015 alone); and because “Google’s repurposing of Java code from larger computers to smaller computers resembles none” of the examples of transformative acts provided by Congress. The majority’s understanding of “transformative—”a use that will help others ‘create new products’”—“eviscerates copyright.” Finally, on the amount and substantiality of the portion used, Justice Thomas wrote that “Google does not dispute the Federal Circuit’s conclusion that it copied the heart or focal points of Oracle’s work.”

- *Florida v. Georgia*, 142 Original. The Court unanimously overruled Florida’s exceptions to the Special Master’s Report, and dismissed the case. Florida filed this equitable apportionment original action alleging that Georgia is consuming too much water from the Apalachicola–Chattahoochee–Flint River Basin, which “causes sustained low flows in the Apalachicola River, which in turn harm its oyster fisheries and river ecosystem. As a remedy, Florida seeks an order requiring Georgia to reduce its consumption of Basin waters.” The second Special Master appointed in the case issued a report recommending that Florida be denied relief. One of the reasons he gave was that “Florida failed to prove by clear and convincing evidence that Georgia’s alleged overconsumption caused serious harms to Florida’s oyster fisheries or its river wildlife and plant life.” The Court conducted an independent review of the record and, in an opinion by Justice Barrett, overruled Florida’s exceptions and adopted the Special Master’s recommendation.

The Court explained that, to obtain an equitable apportionment, Florida must (1) “prove a threatened or actual injury ‘of serious magnitude’ caused by Georgia’s upstream water consumption”; and (2) “show that ‘the benefits of the [apportionment] substantially outweigh the harm that might result.’” The Court resolved the case on the first prong. It first looked at the collapse of Florida’s oyster fisheries, which occurred in 2012 during a severe drought. Florida claims that “Georgia’s unreasonable agricultural water consumption caused sustained low flows in the Apalachicola River; that these low flows increased the Bay’s salinity; and that higher salinity in the Bay attracted droves of saltwater oyster predators and disease, ultimately decimating the oyster population.” The Court agreed with Georgia, however, that “a more direct cause” existed—“Florida’s mismanagement of its oyster fisheries.” Specifically, “Florida’s own documents and witnesses reveal that Florida allowed unprecedented levels of

oyster harvesting in the years before the collapse.” The record also shows, the Court found, “that Florida failed to adequately reshell its oyster bars” (reshelling being the longstanding practice of replacing harvested oyster shells with clean shells). Indeed, Florida “was simultaneously reshelling its oyster bars at a historically low rate.” The Court noted that Florida failed “meaningfully” to rebut Georgia’s expert, who “found negligible differences in salinity among the bars he analyzed, suggesting increased salinity did not explain the variance in oyster densities.” After describing Florida’s responsive evidence, the Court stated that its fundamental problem “is that it establishes at most that increased salinity and predation contributed to the collapse, not that *Georgia’s overconsumption* caused the increased salinity and predation. None of the[] witnesses or reports point to Georgia’s overconsumption as a significant cause of the high salinity or predation.”

Finally, the Court found that Florida likewise failed to carry its burden of showing that “Georgia’s overconsumption has harmed river wildlife and plant life by disconnecting tributaries, swamps, and sloughs from the Apalachicola River, thereby drying out important habitats for river species.” The Court agreed with the Special Master, who “found ‘a complete lack of evidence’ that any river species suffered serious injury from Georgia’s alleged overconsumption.” Florida primarily relied on “species-specific ‘harm metrics’ developed by” one of its experts, but the expert “provided no data showing that the overall population of *any* river species has declined in recent years.” The Court concluded, “[w]ithout stronger evidence of actual past or threatened harm to species in the Apalachicola River, we cannot find it ‘highly probable’ that these species have suffered serious injury, let alone as a result of any overconsumption by Georgia.”

- *Mays v. Hines*, 20-507. By an 8-1 vote, the Court summarily reversed a Sixth Circuit ruling that had granted habeas relief to a capital defendant based on his ineffective-assistance-of-counsel claim. A Tennessee jury heard overwhelming evidence that respondent Anthony Hines murdered Katherine Jenkins at the CeBon Motel on March 1, 1985. Jenkins checked into the hotel carrying a hunting knife concealed in his shirt. In the early afternoon, another visitor found Jenkins’ body in one of the rooms, wrapped in a bloody bedsheet and with what a later autopsy found to be several knife wounds. A bag of money the hotel manager had given her was gone, along with her wallet and car keys. Later that afternoon, a group of travelers found Hines and Jenkins’ car (now broken down) by the side of the road. They offered to drive him to his sister’s home. During the trip, they saw dried blood on Hines’ shirt. When he returned to his family, his sister noticed the blood, and Hines admitted that he had stabbed someone at the motel (though he described the victim as a male employee who had assaulted him). And although he lacked money a few days earlier, he purchased a barbeque grill and told his sister that he had acquired a substantial sum of money. When the sheriff questioned him, Hines volunteered that “he took the automobile but didn’t murder the woman.” He then offered to confess to the murder if the sheriff “could

guarantee him the death penalty.” Police later found Jenkins’ wallet where Hines had abandoned her car. And a search of his motel room revealed stab marks on the wall that were similar in size to the wounds on Jenkins’ body. The jury also heard testimony from Kenneth Jones, the man who discovered Jenkins’ body. He claimed he stopped by the hotel because he knew the owners. When no one was in the office, he decided to use a bathroom and so took a key and entered the room. The jury found Hines guilty.

During post-conviction review in the Tennessee courts, it came out that Jones had lied: he was at the hotel with a woman who wasn’t his wife; the duo had met at the hotel nearly every Sunday for at least two years. When no one greeted him, he took a room key from the office, opened the door, and found the body. Jones returned to his car, called the authorities, drove his companion home, and returned to the hotel to talk with the sheriff. The post-conviction proceedings revealed that Hines’ attorney was generally aware of Jones’ affair but chose to spare him the embarrassment of pursuing the matter. Hines alleged that this constituted ineffective assistance of counsel, but the Tennessee post-conviction court found no prejudice, emphasizing “the strength of proof against [Hines].” A divided panel of the Sixth Circuit disagreed, ruling that a better investigation “could have helped the defense to credibly cast Jones as an alternative suspect, or at the very least seriously undermine his testimony.” The court’s analysis did not contain any discussion of “the voluminous evidence of Hines’ guilt.” Through a *per curiam* opinion, the Court reversed.

The Court reiterated that “a federal court may intrude on a State’s ‘sovereign power to punish offenders’ only when a decision ‘was so lacking in justification . . . beyond any possibility for fairminded disagreement.’” “If that rule means anything,” said the Court, “it is that a federal court must carefully consider all the reasons and evidence supporting the state court’s decision. . . . Any other approach would allow a federal court ‘to essentially evaluat[e] the merits *de novo*’ by omitting inconvenient details from its analysis.” Alas, “[t]he Sixth Circuit did precisely that. Nowhere in its 10-page discussion of Hines’ theory did the majority consider the substantial evidence linking him to the crime: His flight in a bloody shirt; his possession of the victim’s keys, wallet, and car; his recurring association with knives; or his everchanging stories about tussling with imaginary assailants.” The Court concluded that the “Tennessee court reasonably looked to the substantial evidence of Hines’ guilt” and “reasonably rejected the ‘farfetched’ possibility that Jones committed and self-reported a gruesome murder, in the presence of a witness, at a place where he was well known to the staff.” “In light of this straightforward, commonsense analysis,” said the Court, “the Sixth Circuit had no license to hypothesize an alternative theory of the crime in which Jones became a suspect 35 years after the fact—much less rely on that fanciful theory to grant relief.” The Court found “[s]imilarly untenable” the Sixth Circuit’s “backstop theory that a more aggressive attorney could have changed the result by casting doubt on Jones’ credibility.” The Court pointed out that “this conjecture ignores that Jones’ brief testimony

about discovering the body did not indicate that *Hines* was the culprit. Ample other evidence was what did that." Plus, the jury already had reason to be skeptical of Jones' original testimony, but it made no difference.

- *FCC v. Prometheus Radio Project*, 19–1231. The Court unanimously held that the FCC's decision to repeal or modify three rules that had restricted the ability of broadcasters to own multiple outlets in a single market was not arbitrary or capricious. The FCC has long maintained ownership rules that "limit the number of radio stations, television stations, and newspapers that a single entity may own in a given market." The FCC long justified these rules on the ground that they "promote competition, localism, and viewpoint diversity by ensuring that a small number of entities do not dominate a particular media market." This case involved three ownership rules: (1) the Newspaper/Broadcast Cross-Ownership Rule, initially adopted in 1975, which "prohibits a single entity from owning a radio or television broadcast station and a daily print newspaper in the same media market"; (2) the Radio/Television Cross-Ownership Rule, initially adopted in 1970, which "limits the number of combined radio stations and television stations that an entity may own in a single market"; and (3) the Local Television Ownership Rule, initially adopted in 1964, which "restricts the number of local television stations that an entity may own in a single market." The Court noted that the FCC adopted those rules "when media sources were more limited," *i.e.*, before advances such as cable television and the Internet. Recognizing this, the 1996 Telecommunications Act contained a provision (Section 202(h)) directing the FCC to review its ownership rules every four years to determine whether they remain "necessary in the public interest as the result of competition." The provision instructs the FCC to "repeal or modify" any rules that it finds are "no longer in the public interest." In 2002, the Commission declared that, as part of its Section 202(h) public interest analysis, it would assess the effects of its ownership rules on minority and female ownership. Since 2002, the FCC has several times sought to change the three ownership rules at issue here, but the Third Circuit rejected each effort as unlawful under the Administrative Procedure Act. Most recently, the FCC concluded in 2017 that "the three ownership rules no longer served the agency's public interest goals of fostering competition, localism, and viewpoint diversity." And it concluded that repealing or modifying them was not likely to harm minority and female ownership. The Commission therefore decided to repeal the Newspaper/Broadcast and Radio/Television Cross-Ownership Rules, and to modify the Local Television Ownership Rule. Several public interest groups petitioned for review, arguing that the FCC's decision was arbitrary and capricious under the APA. The Third Circuit vacated the FCC's order, solely on the ground that "the record did not support the FCC's conclusion that the rule changes would 'have minimal effect' on minority and female ownership." In an opinion by Justice Kavanaugh, the Court reversed.

The Court reiterated that “[t]he APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained,” and that judicial review is “deferential.” “A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, reasonably considered the relevant issues and reasonably explained the decision.” Here, found the Court, the FCC “addressed the possible impact on minority and female ownership.” It sought public comment on that issue but “no arguments were made’ that would lead the FCC to conclude that the existing rules were ‘necessary to protect or promote minority and female ownership.’” Indeed, the Commission “received several comments suggesting the opposite.” Respondents argued that the FCC relied on flawed data and ignored superior data, but the Court disagreed. It noted that the “FCC acknowledged the gaps in the data,” and that it “relied on the data it had (and the absence of any countervailing evidence).” Respondents pointed to two studies submitted to the FCC by Free Press (a media reform group), but the Court found that the Commission didn’t ignore the studies: it “simply interpreted them differently.” First, those studies showed “long-term increase in minority ownership after” two of the cross-ownership rules were relaxed. Second, “the Free Press studies were purely backward looking, and offered no statistical analysis of the likely future effects of the FCC’s proposed rule changes on minority and female ownership.”

The Court found what the FCC did to be “reasonable and reasonably explained”: “The FCC considered the record evidence on competition, localism, viewpoint diversity, and minority and female ownership, and reasonably concluded that the three ownership rules no longer serve the public interest. The FCC reasoned that the historical justifications for those ownership rules no longer apply in today’s media market, and that permitting efficient combinations among radio stations, television stations, and newspapers would benefit consumers. The Commission further explained that its best estimate, based on the sparse record evidence, was that repealing or modifying the three rules at issue here was not likely to harm minority and female ownership. The APA requires no more.” The Court acknowledged that the FCC had imperfect data, “[b]ut that is not unusual in day-to-day agency decisionmaking within the Executive Branch. The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies.” In short, “[i]n the absence of additional data from commenters, the FCC made a reasonable predictive judgment based on the evidence it had.”

Justice Thomas filed a concurring opinion. He pointed to “another, independent reason why reversal is warranted: The Third Circuit improperly imposed nonstatutory procedural requirements on the FCC by forcing it to consider ownership diversity in the first place.” He found nothing in Section 202(h) of the 1996 Telecommunications Act that “directs the FCC to consider rates of minority and female ownership.”

- *Facebook, Inc. v. Duguid*, 19–511. The Telephone Consumer Protection Act of 1991 (TCPA) generally prohibits calls made by an “automatic telephone dialing system.” The TCPA defines an “automatic telephone dialing system” as a piece of equipment with the capacity “to store or produce telephone numbers to be called, using a random or sequential number generator,” and to dial those numbers. At issue here was whether the phrase “using a random or sequential number generator” modified both “to store” and “produce,” or modified only “produce.” Without dissent, the Court adopted the former interpretation, meaning that Facebook did not violate the TCPA by maintaining a database that stored phone numbers and programming its equipment to send automated text messages.

Facebook provides “an optional security feature that sends users ‘login notification’ text messages when an attempt is made to access their Facebook account from an unknown device or browser.” In 2014, respondent Noah Duguid received several such login-notification text messages from Facebook, even though he never had a Facebook account or provided Facebook with his phone number. Duguid filed a putative class action against Facebook, alleging that Facebook violated the TCPA through its login notification system. Facebook moved to dismiss, arguing that Duguid failed to claim Facebook sent text messages to numbers that were randomly or sequentially generated. The district court ruled for Facebook, but the Ninth Circuit reversed, holding that an autodialer “need not be able to use a random or sequential generator to store numbers; it need only have the capacity to store numbers to be called and to dial such numbers automatically.” (Cleaned up.) Through an opinion by Justice Sotomayor, the Court reversed and remanded.

The Court relied on the “conventional rule[] of grammar” that “‘when there is a straightforward, parallel construction that involves all nouns or verbs in a series,’ a modifier at the end of the list ‘normally applies to the entire series.’ A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012).” The Court noted that it had applied that “series-qualifier canon” several times before. And it insisted that the “canon generally reflects the most natural reading of a sentence.” Applied here, the canon means “qualifying both antecedent verbs, ‘store’ and ‘produce,’ with the phrase ‘using a random or sequential number generator.’” The Court found this reading “confirmed by other aspects” of the provision’s text. First, the clause “store or produce telephone numbers to be called” is an “integrated clause” that “‘hangs together as a unified whole.’” Second, the phrase “using a random or sequential number generator” follows a comma placed after the prior integrated clause. And “several leading treatises explain” that “[a] qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one.” (Quotation marks omitted.) For those two reasons, the Court found that its “interpretation does not conflict with the so-called ‘rule of the last antecedent.’”

The Court next found that statutory context supported its interpretation. “Expanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers would take a chainsaw to these nuanced problems when Congress meant to use a scalpel.” Indeed, Duguid’s interpretation “would capture virtually all modern cell phones, which have the capacity to ‘store . . . telephone numbers to be called’ and ‘dial such numbers.’” The Court rejected Duguid’s contention that his interpretation is more in accord “with the ‘sense’ of the text” and that, “at the time of the TCPA’s enactment, the technical meaning of a ‘random number generator’ invoked ways of producing numbers, not means of storing them.” Nor was the Court swayed by Duguid’s invocation of Congress’ legislative purpose of “broad privacy–protection goals.” Said the Court: “That Congress was broadly concerned about intrusive telemarketing practices [] does not mean it adopted a broad autodialer definition.” Finally, the Court swatted away Duguid’s warning that adopting Facebook’s interpretation “will ‘unleash’ a ‘torrent of robocalls.’” The Court noted that the TCPA “separately prohibits calls using ‘an artificial or prerecorded voice’ to various types of phone lines, including home phones and cell phones, unless an exception applies.”

Justice Alito filed an opinion concurring in the judgment. He criticized the Court for its “heavy reliance” on the series–qualifier canon, pointing out that “it is very easy to think of sentences that clearly go against the canon.” (*E.g.*, “At the Super Bowl party, she ate, drank, and cheered raucously.”) Justice Alito noted that corpus linguistics analysis may one day allow us to evaluate the various canons’ “strength and validity.” In any event, he concluded that “the sense of the matter” reveals sentences’ proper meaning most of the time. Canons thus are merely “useful tools,” not “inflexible rules.”

II. Cases Granted Review



[Editor’s note: Some of the language in the background section of the summaries below was taken from the petitions for writ of certiorari and briefs in opposition.]

- *Cameron v. EMW Women’s Surgical Center, P.S.C.*, 20–601. The Court will address “[w]hether a state attorney general vested with the power to defend state law should be permitted to intervene after a federal court of appeals invalidates a state statute when no other state actor will defend the law.” In April 2018, Kentucky enacted House Bill 454, which “require[s] patients to undergo a procedure to end potential fetal life before they may receive an abortion performed through the method most common in the second trimester of pregnancy—dilation and evacuation.” EMW Women’s Surgical Center, P.S.C. and two of its doctors (together, EMW) filed suit to invalidate HB 454. EMW named various state officials as defendants, including Kentucky’s Attorney General and the Secretary of Kentucky’s Cabinet for Health and Family Services, both in their official capacities. At the time, Kentucky’s Attorney General was Andy Beshear. Shortly after being sued, Attorney General

Beshear and EMW agreed to a “Stipulation and Order of Dismissal Upon Conditions,” which dismissed the Attorney General without prejudice. The Secretary then led the Commonwealth’s defense of HB 454 during a five-day bench trial. The district court issued a permanent injunction, ruling that the law would effectively prohibit abortion in Kentucky after the first weeks of the second trimester. The Secretary appealed.

Shortly after briefing concluded in the Sixth Circuit, Kentucky held its general elections for statewide officers. Kentuckians elected then-Attorney General Beshear as their Governor and Daniel Cameron as their Attorney General. The new Secretary, who Governor Beshear had recently appointed, retained lawyers in the Attorney General’s office to handle oral argument. A divided panel of the Sixth Circuit affirmed the district court after “weighing ‘the burdens a law imposes on abortion access together with the benefits those laws confer.’” Shortly after the Sixth Circuit’s decision, the Secretary informed the Attorney General’s office that he would not file a petition for rehearing or a petition for a writ of certiorari. Within two days of learning that the Secretary would not continue defending HB 454, the Attorney General moved to intervene on behalf of the Commonwealth. He then tendered a timely petition for rehearing from the panel’s decision. The Sixth Circuit panel, again by a divided vote, denied the Attorney General’s motion to intervene. The court found the Attorney General’s motion untimely, emphasizing that the Attorney General’s motion “comes years into [the case’s] progress, after both the district court’s decision and—more critically—this Court’s decision.” The Court criticized the Attorney General for not moving to intervene earlier, stating that “there was every reason for the Attorney General’s office to inquire into and prepare for the Secretary’s intended course in the event of an adverse decision prior to undertaking his representation of the Secretary.” Five days later the Supreme Court decided *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). The Attorney General tendered a timely petition for rehearing from the panel’s denial of his motion to intervene, alerting the panel to this Court’s decision in *June Medical*. The panel, divided 2-1 again, refused to allow the Attorney General’s rehearing petition even to be filed and circulated to the en banc court.

In his petition, Attorney General Cameron argues that “[t]he panel’s refusal to allow Kentucky’s Attorney General to defend the constitutionality of Kentucky law is an affront to state sovereignty. The Sixth Circuit closed the courthouse doors to the very person that Kentucky law empowers to represent the Commonwealth’s interests in court. Still worse, the panel stuck to this holding even after *June Medical* undercut its rationale for invalidating HB 454.” As the Court has explained, a state “clearly has a legitimate interest in the continued enforceability of its own statutes.” *Maine v. Taylor*, 477 U.S. 131, 137 (1986). And, says General Cameron, “[i]nherent in the States’ power to enforce their laws is the power to choose who defends those laws when they are challenged in court.” Further, “[u]nder Kentucky law, the Attorney General is ‘the chief law officer of the Commonwealth of

Kentucky and all of its departments, commissions, agencies, and political subdivisions.’ Ky. Rev. Stat. 15.020.” That power includes the power to appeal, Ky. Rev. Stat. 15.090, which “means that if another state actor declines to appeal an adverse ruling, the Attorney General can override that decision by appealing on his own. *See id.*” What this means, says the Attorney General, is that when he “moved to intervene, he did not come to the court as an ordinary litigant. Instead, he brought to bear Kentucky’s powers as delegated to him by its General Assembly through Ky. Rev. Stat. 15.020 and Ky. Rev. Stat. 15.090. Put more directly, the Attorney General’s motion to intervene was not just a motion; it was an exercise of a sovereign state’s authority to defend its laws.” Put another way, “the panel majority treated the Attorney General’s request as some kind of last-minute gamesmanship, ignoring the sovereign interest that the Attorney General represents in merely attempting to ensure continuity in defense of the Commonwealth’s duly enacted laws.”

- *Brown v. Davenport*, 20–826. This case concerns how federal habeas courts should review state court rulings that constitutional errors were harmless. The question presented is whether “a federal habeas court [may] grant relief based solely on its conclusion that the *Brecht* test is satisfied, as the Sixth Circuit held, or must the court also find that the state court’s *Chapman* application was unreasonable under §2254(d)(1), as the Second, Third, Seventh, Ninth, and Tenth Circuits have held?” A jury convicted respondent Ervine Davenport of first-degree murder, rejecting his claim of self-defense for his admitted strangling and killing Annette White. On appeal, the Michigan Court of Appeals found that Davenport had been unconstitutionally shackled during trial; but it found the error harmless. The Michigan Supreme Court remanded the case to the trial court for an evidentiary hearing on whether Davenport was prejudiced by the shackling. On remand, all 12 jurors testified. Only five said they observed Davenport’s shackles during the trial, but they testified that his shackles were not discussed during deliberations and did not influence their verdict. The trial court ruled that the prosecution had proved beyond a reasonable doubt that the shackling did not affect the jury’s verdict. The Michigan Court of Appeals affirmed, and the Michigan Supreme Court denied Davenport’s application for leave to appeal. Davenport sought federal habeas relief. The district court denied his petition, but the Sixth Circuit reversed in a 2-1 vote, holding that the unconstitutional shackling was not harmless. 964 F.3d 448.

The Sixth Circuit majority applied *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the traditional test for harmlessness on habeas, which asks whether the defendant suffered “actual prejudice.” Having found actual prejudice, the court did not additionally assess whether the state courts’ finding of harmlessness was objectively unreasonable under AEDPA, §2254(d)(1). The Court stated that, under *Davis v. Ayala*, 576 U.S. 257 (2015), “the *Brecht* standard ‘subsumes’ AEDPA’s unreasonableness inquiry,” and that therefore “a habeas court need not also ask whether the state court’s decision was unreasonable.” In

finding actual prejudice under *Brecht*, the court pointed to the “closeness of the case” and stated that in *Holbrook v. Flynn*, 475 U.S. 560 (1986), “the Supreme Court has made clear that jurors’ subjective testimony about the effect shackling had on them bears little weight.” The Sixth Circuit denied en banc review by an 8–7 vote.

Michigan argues in its petition that the Sixth Circuit, by granting habeas relief without assessing whether the state courts’ harmless ruling was objectively unreasonable, violated AEDPA’s plain text and *Ayala*. In *Ayala*, the Court declared that AEDPA “sets forth a precondition to the grant of habeas relief,” meaning—the state says—“that relief cannot be granted unless the state court unreasonably applied the harmless-error standard prescribed in *Chapman v. California*, 386 U.S. 18, 24 (1967).” And while *Ayala* said that a prisoner “must meet the *Brecht* standard,” it added an important caveat—“but that does not mean, as the Ninth Circuit thought, that a state court’s harmless determination has no significance under *Brecht*.” Yet here, the Sixth Circuit “did not consider the state court decisions at all.” Michigan adds that the outcome would have been different had the Sixth Circuit applied AEDPA. First, the Sixth Circuit relied on circuit precedent and social science studies, which §2254(d)(1) forbids. Second, the Sixth Circuit extended the Court’s decision in *Holbrook v. Flynn*, which addressed the weight given to jurors’ assessment during *voir dire* of the effect of the presence of uniformed state troopers in the courtroom for security. As Judge Thapar put it in his dissent from the denial of rehearing en banc: “That is a far cry from post-trial testimony from jurors about how shackling actually affected their verdict.” Finally, argues Michigan, by “[t]aking its *Brecht*-only approach, the Sixth Circuit failed to explain why the Michigan court determinations fell outside the substantial leeway it was allowed in applying *Chapman* to the facts.”

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