No. 20-826

In the Supreme Court of the United States

MIKE BROWN,
Acting Warden

Petitioner,

v.

ERVINE DAVENPORT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE STATES OF ARKANSAS, ALABAMA, ALASKA, ARIZONA, GEORGIA, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LESLIE RUTLEDGE
Arkansas Attorney General
NICHOLAS J. BRONNI
Solicitor General
Counsel of Record
VINCENT M. WAGNER
Deputy Solicitor General
ASHER L. STEINBERG
Assistant Solicitor General

OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center Street
Suite 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

Counsel for Amici Curiae

[Additional Counsel Listed after Signature Page]

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INTERESTS OF *AMICI CURIAE*

Amici are the States of Arkansas, Alabama, Alaska, Arizona, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and Utah. As States, each defends habeas petitions in federal court and has an interest in ensuring that state-court judgments are accorded appropriate deference under Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The decision below, uniquely in lower-court habeas jurisprudence, holds that federal courts may refuse to deferentially review state-court decisions on a particular issue, harmless error, so long as on de novo review, a federal court finds prejudice under a more demanding standard than the one state courts are required to apply. Amici States do not believe de novo review of prejudice, even under a higher standard than that applicable in state court, suffices to ensure States the deference their courts' decisions are owed.

SUMMARY OF THE ARGUMENT

Below, the Sixth Circuit held that if a habeas court has grave doubt about whether an error caused prejudice under *Brecht*, it's necessarily unreasonable under AEDPA for a state court to have concluded beyond a reasonable doubt that the error was harmless. For multiple reasons, that is wrong. But even if the Court is inclined to think it is right, it should reverse the Sixth Circuit and require courts to demonstrate that AEDPA has been satisfied before granting relief.

I. The Sixth Circuit's rule rests on the proposition that a state court's assessment of prejudice can only differ so much from a habeas court's before it becomes

unreasonable under AEDPA. If *Brecht* and AEDPA review of state-court decisions applied the same law, that argument would have surface appeal—though nothing more. But in reality, *Brecht* analysis is informed by a large body of law that federal courts can't consider when addressing reasonableness under AEDPA. And those materials can determine outcomes, whether by instructing courts on what evidence of prejudice they can consider, or providing presumptions and rules of thumb for assessing the likely effects of certain errors. So however broad reasonable legal disagreements can be in the abstract, substantial reasonable disagreements *here* are entirely possible.

II. Even if courts only considered this Court's holdings when applying *Brecht*, finding grave doubt about prejudice de novo would not mean a state court's harmlessness determination was necessarily unreasonable. The Sixth Circuit's rule presumes that the gap between grave doubt and no reasonable doubt is simply too great a gap for reasonable disagreement to bridge. But no rule of law or logic says that reasonable minds can only differ by small margins. This Court's precedent on sufficiency-of-the-evidence review shows just the opposite; a court can have grave doubts about a defendant's guilt, yet conclude a reasonable jury could find it beyond a reasonable doubt. Reasonable disagreements of this magnitude are possible because a reviewing court will not always be certain its own view is correct; the weaker its confidence in its own view, the wider range of differing views it will deem reasonable. And prejudice determinations, in particular, are an area where it is especially difficult to make confident judgments.

III. Even confident prejudice determinations under *Brecht* do not ensure a state court's harmlessness

determination is unreasonable. Rather, the only way to really determine whether a state court's reasoning is reasonable is to actually review it. Even if a court feels certain grave doubt about prejudice is warranted, that certainty may be unearned. Until a court has demonstrated that reasonable jurists could not accept the state court's reasoning for finding harmlessness, it cannot be certain its own assessment of prejudice is correct.

IV. Even if the Court is inclined to conclude that finding prejudice under *Brecht* means that findings of harmlessness beyond a reasonable doubt are unreasonable, the Court should still require lower courts to review state-court harmlessness determinations under AEDPA before granting relief. If the Sixth Circuit is correct, requiring lower courts to apply AEDPA will not result in any errant denials of relief; it will merely confirm the Sixth Circuit's rule. But if there is any risk the Sixth Circuit's equation between *Brecht* and AEDPA will fail in some cases, dispensing with AEDPA review risks errant grants of relief.

ARGUMENT

I. Finding prejudice under *Brecht* does not ensure that a state court's harmlessness determination is unreasonable under AEDPA because *Brecht* allows courts to consult a broader universe of materials.

When a habeas petitioner persuades a federal court that a constitutional error occurred in his state-court trial, this Court has held he must surmount two distinct harmless-error hurdles before the court may grant him relief. *See Davis v. Ayala*, 576 U.S. 257, 267-70 (2015). First, he must show "actual prejudice" under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See*

Ayala, 576 U.S. at 267. Under that uniquely federal standard, a court may only grant relief if it has at least "grave doubt about whether a trial error" affected the trial's outcome. *O'Neal v. McAnich*, 513 U.S. 432, 436 (1995). That is, at a minimum, the court must be in "equipoise as to the harmlessness of the error." *Id.* at 435. Second, if the state courts found an error harmless, under AEDPA, the petitioner must demonstrate that their determination was unreasonable. *See Ayala*, 576 U.S. at 269.

The Sixth Circuit purported to honor these two distinct tests. Yet it held that if a court finds the first is satisfied, a court need not apply the second because that finding "necessarily" satisfies the second as well. Pet. App. 17a. Its reasoning went as follows. In order for a state court to find a constitutional error harmless on direct review, it must conclude the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). It is "significantly harder," the Sixth Circuit observed, for a habeas petitioner to satisfy *Brecht* than *Chapman*—"[s]o much so," it believed, that if a court finds an error prejudicial under *Brecht*, a determination that the same error is harmless under *Chapman* is "necessarily objectively unreasonable." Pet. App. 17a.

If *Chapman*, as reviewed under AEDPA, and *Brecht* were simply more or less stringent versions of the same basic test, the Sixth Circuit's reasoning would have a superficial appeal, though it would still fail, *see infra* §§ II-III. But *Brecht* is *not* simply a toughened-up version of AEDPA/*Chapman*. Quite the contrary, they apply different considerations and materials.

A. *Brecht* and AEDPA/*Chapman* look to different sets of legal materials.

Asking "different questions . . . sometimes demand[s] different answers," Pet. App. 137a (Thapar, J., dissenting from the denial of rehearing en banc), and the questions *Brecht* and AEDPA/*Chapman* ask differ immensely. The two don't merely depart in how great a likelihood of prejudice they require a habeas petitioner to show. Rather, they are informed by different sets of legal and, potentially, factual materials.

Under *Brecht*, a court may consider a broader array of case law than it may under AEDPA. It might in certain narrow circumstances also consider new arguments not squarely raised in state court that an error was prejudicial. And in some limited circumstances, it might even potentially consider new evidence. By contrast, under AEDPA, a habeas petitioner attempting to show a state court's *Chapman* determination was unreasonable can only rely on a minute fraction of those materials: holdings of *this* Court extant when the state court made its decision, facts in the state-court record, and arguments the petitioner previously made. Nothing more. And given the two tests' diverging inputs, it is entirely possible that they could produce different outputs.

First take AEDPA/*Chapman*. A federal habeas court's review of a state court's harmlessness determination is confined to whether that determination "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). Only if it was may a court grant relief. *Id.* That "precondition to the grant of habeas relief," *Ayala*, 576 U.S. at 268, limits the universe of law, fact

and argument a habeas court could consider were it applying *Chapman* de novo to a fraction of its scope.

More specifically, the law a habeas court may apply is only "the holdings . . . of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). It does not include logical extensions of those holdings, *White v. Woodall*, 572 U.S. 415, 426-27 (2014), the Court's dicta, *Williams*, 529 U.S. at 412, or circuit precedents that "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced," *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam). AEDPA places equally stringent limits on the evidence and arguments a habeas court can consider. Because "review under § 2254(d)(1) focuses on what a state court knew and did," *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), habeas courts cannot consider "new evidence" in deciding whether a state court's decision was reasonable. *Id.* Nor can they "consider[] arguments against the state court's decision that [the petitioner] never even made" in state court. *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam). Rather, they may only consider "the state-court record," *Pinholster*, 563 U.S. at 182, and the petitioner's state-court arguments.

Now take *Brecht*. *Brecht* does not govern state-court proceedings. It only governs federal-court "*collateral review* of a state-court criminal judgment under 28 U.S.C. § 2254." *Fry v. Pliler*, 551 U.S. 112, 116 (2007). Because there are no state-court applications of *Brecht* to review, habeas courts do not apply *Brecht* "through the deferential lens of § 2254(d)," *Pinholster*, 563 U.S. at 190 (internal quotation marks omitted), and all its many limits on the legal and factual materials a court may deploy are simply inapplicable.

As Judge Thapar explained below, courts applying *Brecht* may offer their best readings of general or unclear standards from this Court; apply this Court's dicta; and follow controlling circuit precedent. Pet. App. 129a-132a. And, as Judge Thapar also observed, so long as a habeas petitioner has exhausted his *claims*, *see* 28 U.S.C. 2254(b)(1), and satisfied AEDPA's preconditions on a habeas court's taking new evidence, *see* 28 U.S.C. 2254(e)(2), a habeas court applying *Brecht* could potentially consider new evidence and arguments that an error was prejudicial, Pet. App. 132a—though comity may counsel against its doing so.

B. The differences in applicable legal materials can lead to different results.

These considerable differences in the toolkits courts use when applying *Brecht* de novo versus reviewing a *Chapman* determination under AEDPA might seem less relevant when the question is harmless error. What great difference, one might ask, does the applicable *law* or even the petitioner's arguments make when a court is essentially making a predictive judgment of fact about the chance the jury would have reached a different verdict?

The answer is a great deal of difference. For the law has much to say about measuring prejudice—particularly the law made by lower courts. Courts applying *Brecht* regularly mint new law on what sorts of evidence suggest an error was harmful or harmless, what kinds of errors create strong or weak presumptions of prejudice, how strong the state's case for guilt needs to be to defeat such presumptions, or simply which fact patterns present likely cases of prejudice. Indeed, the Sixth Circuit's decision broke new ground or applied circuit precedent on all of these fronts. And

given the deceptive complexity of harmless-error analysis, a petitioner's arguments for prejudice—and thus whether a habeas court can consider new ones—can make a great difference as well. For these reasons, AEDPA can easily make the difference between a winning *Brecht* argument and a losing AEDPA/*Chapman* argument.

1. Extraneous evidence.

Perhaps the most fertile area for lower-court lawmaking in applying *Brecht* or *Chapman* is whether to consider extraneous evidence of the effect an error had on a jury. Both *Chapman* and *Brecht* are actual-prejudice tests. They ask whether an error was harmless or prejudicial in fact, not whether a reasonable jury would have convicted absent the error in theory. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (holding *Chapman* asks "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error"); *Kotteakos v. United States*, 328 U.S. 750, 764 (1946) (holding that under the test *Brecht* later adopted, the question is "what effect the error had," not whether the jury was "right in their judgment, regardless of the error," nor "the impact of [the error] . . . on one's own [mind]"). Consequently, courts applying *Brecht* or *Chapman* often look not just at the severity of the error and the strength of the state's evidence, but at things the jury said or did that might reveal how prejudiced it actually was. But what sorts of extraneous evidence count, and how? This Court has never really said—and the state and lower federal courts have stepped into that vacuum.

One sort of extraneous evidence that lower courts applying *Brecht* have sometimes found telling is the

length of jury deliberations. Below, the Sixth Circuit, citing a circuit precedent where it held deliberations of just *three* hours suggested a jury on the edge, reasoned that the jury's deliberating for six hours "demonstrated" the "closeness of the case." Pet. App. 32a (citing *Ruimveld v. Birkett*, 404 F.3d 1006, 1016 (6th Cir. 2005)); *see also* Pet. App. 37a (citing Ninth Circuit precedent that found hints of prejudice in nine-hour deliberations).

Though the Sixth Circuit appears to be unique in holding such brief deliberations suggest a case was hard rather than easy, it isn't alone in looking to deliberations' length. In *Fry*, where the jury deliberated for five weeks, 551 U.S. at 123 (Stevens, J., concurring in part and dissenting in part), the petitioner argued that the deliberations' length made a conclusion of prejudice under *Brecht* inescapable.[1] Brief for Petitioner at 29-31, *Fry* (No. 06-5247). His basis for that argument was a lengthy string-cite to circuit precedent. *Id.* at 30 & n.22. But even if some or all of that string-cite correctly applied *Brecht* or *Chapman*, none of it is relevant under AEDPA. Indeed, even if there were a lower-court consensus on the relevance of jury deliberations' length, a court applying AEDPA "may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct." *Rodgers*, 569 U.S. at 64.

Another sort of extraneous evidence that has provoked lower-court disagreement is juror testimony. And no case more starkly illustrates that disagreement than this one. Indeed, how much weight to give

[1] The Court declined to reach the question. *Id.* at 120-21.

juror testimony was virtually the dispositive issue below. The Michigan Court of Appeals, which issued the last state-court decision on the merits, found the jurors' testimony (which the trial court below credited) that Davenport's shackling didn't affect their verdict conclusive. Pet. App. 97a-99a. Not only did the minority of jurors who even noticed Davenport was shackled testify that the shackling didn't affect their verdicts, but they also testified that they (mistakenly) believed shackling was a routine precaution in murder cases and not a response to Davenport's individual propensity for violence. Pet. App. 98a.

The Sixth Circuit, however, faced with the same record, reached a sharply different conclusion on prejudice by giving the juror testimony "little" (and really no) "weight," Pet. App. 34a, leaving only the strength of the state's case on premeditation and the length of deliberations to inform its judgment. Whether or not that decision was a correct application of *Brecht*, the grounds on which it rested could not be considered under AEDPA.

In discounting the value of the juror testimony to zero, the Sixth Circuit relied on a paragraph of this Court's opinion in *Holbrook v. Flynn*, 475 U.S. 560 (1986). In *Flynn*, the Court held that the presence of several state troopers in the spectator's section at a trial was *not* prejudicial. However, in reversing the First Circuit's contrary decision, the Court paused to approve that court's choice to discount *voir dire* responses that jurors had given about how they believed the troopers' presence *would* affect their ability to fairly evaluate the case. *Id.* at 570; *see also id.* at 565 (describing the responses). The First Circuit "was correct" to discount the responses, the Court said, partly because jurors may "not necessarily be fully

conscious of the effect" of a courtroom practice "on their attitude," but "especially" because the jurors had been "questioned at the very beginning of proceedings," when they could "only speculate on how they will feel after being exposed to a practice daily over the course of a long trial." *Id.* at 570. The Sixth Circuit found the passage's more general language controlling on the weight to give juror testimony here. Pet. App. 34a ("[T]he Supreme Court has made clear that jurors' subjective testimony . . . bears little weight.").

Though perhaps a permissible source of guidance under *Brecht*, that language could not have informed the Sixth Circuit's judgment under AEDPA for two reasons. First, it is textbook dictum. The Court held the troopers' presence was *not* prejudicial; that bottom-line result and the Court's reasoning in support of that conclusion are *Flynn*'s holding. The Court's passing agreement with aspects of the lower court's reasoning that the troopers' presence *was* prejudicial did not contribute to the outcome and is dictum. And under AEDPA, the Court's dicta, particularly defendant-friendly statements in "a case in which we *rejected* a [defendant's] claim," do not contribute to the clearly established federal law habeas courts must exclusively apply. *Metrish v. Lancaster*, 569 U.S. 351, 367 (2013).

Second, if *Flynn* contains a holding on juror testimony, it is only the Court's decision to not consider the jurors' speculation about how they would react to practices to which they hadn't yet been exposed. *Flynn*, 475 U.S. at 570. The Sixth Circuit's extension of the Court's remarks on the weight of pretrial juror testimony to the context of post-trial testimony was, at best, an extension of the Court's holding to a new context. That is permissible under

Brecht; it is not under AEDPA. *See Woodall*, 572 U.S. at 424-27.

2. Presumptions of prejudice.

As lower courts apply *Brecht* case by case, they will inevitably develop certain presumptions about which errors tend to cause prejudice and how the state can rebut them. But when that doctrine is fed into *Brecht*, habeas courts will subvert AEDPA if they use *Brecht* as a proxy for AEDPA review of state-court harmlessness determinations under *Chapman*. This case aptly illustrates how that subversion can occur.

After canvassing precedent on shackling and prejudice, the Sixth Circuit—though careful not to utter the word "presumption"—derived "the proposition that the shackling of a defendant without justification is highly prejudicial if viewed by the jury." Pet. App. 24a. And, it discerned the following pattern in habeas cases presenting shackling error: the error was deemed harmless where "the evidence of guilt is overwhelming," Pet. App. 23a (quoting *Lakin v. Stine*, 431 F.3d 959, 966 (6th Cir. 2005)), but deemed harmful in "a close case," Pet. App. 24a (quoting *Ruimveld*, 404 F.3d at 1017), or even a merely "disputed" one. Pet. App. 37a (citing *Rhoden v. Rowland*, 172 F.3d 633 (9th Cir. 1999)).

The Sixth Circuit purported to derive these rules from two sources. The first was this Court's terse statement in *Deck v. Missouri*—quoting a dictum from *Flynn*, a non-shackling case—that "shackling is inherently prejudicial." Pet. App. 24a (quoting 544 U.S. 622, 635 (2005) (internal quotation marks omitted)). But this statement, which Judge Sutton aptly described below as having "left matters at a Mt. Everest-level of generality," Pet. App. 112a, did

not instruct lower courts to presume shackling is prejudicial.

Rather, the Court explained that by calling shackling "inherently prejudicial" in *Flynn*, it had meant "the practice will often have negative effects" that cannot easily be shown. *Deck*, 544 U.S. at 635. It therefore held that on direct review the state must prove harmlessness under *Chapman*, rather than requiring the defendant to demonstrate prejudice. *Id.* It did not say that a court should start with any presumption over and above the heavy burden that *Chapman* already imposes on the state. So while presuming that shackling is "highly prejudicial" and can't be deemed harmless absent "overwhelming" evidence might be one way to implement *Chapman* in shackling cases, such a presumption was hardly clearly established by *Deck*. *Cf. Premo v. Moore*, 562 U.S. 115, 130 (2011) (cautioning against mistaking an "observation" that a type of error can often have prejudicial effects for "a *per se* rule of prejudice, or something close to it").

The other source of the Sixth Circuit's rules of thumb, as the citations above suggest, was a collection of circuit cases—mostly its own—"that analyze harmlessness by assessing the weight of a shackling error in light of the evidence presented." Pet. App. 23a. This "Law of Shackling," Pet. App. 20a, coalesced around a pattern of finding harmlessness in cases with overwhelming evidence of guilt and prejudice when the evidence was weaker or the jury deliberated for longer. Pet. App. 23a-24a, 32a, 37a. Even if that were a sensible way to apply *Brecht*, that circuit precedent doesn't control here.

Below, in an attempt to backfill, the author of the panel's opinion claimed the panel had merely "looked

to circuit precedent to ascertain whether [the Sixth Circuit] had already held that the particular point in issue is clearly established by Supreme Court precedent." Pet. App. 108a (Stranch, J., concurring in the denial of rehearing en banc) (alterations omitted) (quoting *Rodgers*, 569 U.S. at 64). But that simply isn't true. The cases on which the panel relied to hold shackling is typically prejudicial in a "close" or "disputed" case said so in the context of applying *Brecht*. They didn't hold this Court had clearly established such a presumption in *Deck* or under *Chapman*. *See Ruimveld*, 404 F.3d at 1014-18; *Rhoden*, 172 F.3d at 637-38. In fact, both preceded *Deck*, prior to which this Court hadn't even held that shackling errors were reviewed under *Chapman*.

3. New arguments.

Finally, new arguments for prejudice can also tip the scales in favor of a petitioner. Those arguments couldn't be considered under AEDPA, but in limited circumstances, they might be considered under *Brecht*.

At trial, Davenport claimed self-defense, Pet. App. 5a; on appeal it appears he argued that but for his shackles branding him as violent, the jury might have credited that defense. But as even the Sixth Circuit recognized, that theory of prejudice was a non-starter given that "unrebutted expert testimony" proved his claim of self-defense impossible. Pet. App. 27a-28a. It wasn't until Davenport sought habeas relief, Pet. App. 132a (Thapar, J., dissenting from the denial of rehearing en banc), that he developed the more creative and somewhat counterintuitive theory the Sixth Circuit accepted: that by "impl[ying] . . . that court authorities consider[ed] him a danger," shackling Davenport could have led the jury to conclude

Davenport committed a *premeditated* violent murder rather than an impulsive one. Pet. App. 37a (alterations omitted) (quoting *Deck*, 544 U.S. at 633).

Whatever that theory's merits, had the Sixth Circuit reviewed the state courts' *Chapman* determination under AEDPA it could not have faulted the state court for failing to conjure that creative theory on its own. *See Beaudreaux*, 138 S. Ct. at 2560 (barring consideration under AEDPA of "arguments against [a] state court's decision that [a petitioner] never even made" in state court). Yet that theory was the Sixth Circuit's sole basis for finding prejudice under *Brecht*.

* * *

For all these reasons, AEDPA's stringent limits on the legal materials and arguments a habeas court can consider can sometimes cause AEDPA/*Chapman* and *Brecht* analyses to diverge, even when taking into account *Brecht*'s higher bar for showing prejudice than *Chapman*'s. Relying on evidence of prejudice that state courts could reasonably discount under this Court's precedents can tip the balance. So can refusing to consider evidence of harmlessness that state courts could reasonably consider, or following lower-court precedent that presumes prejudice from certain errors or on certain fact patterns. Indeed, each of those things happened below. All are permissible under *Brecht*; none may be countenanced under AEDPA. The Court should hold that satisfying *Brecht* does not guarantee a petitioner has satisfied AEDPA/*Chapman* and reverse.

II. Reasonable disagreements can be large as well as small, so finding prejudice under *Brecht* does not ensure that a state court's harmlessness determination under *Chapman* is unreasonable.

The Sixth Circuit's reliance under *Brecht* on grounds that aren't available under AEDPA alone requires reversal. But reversing on that ground alone would fail to address whether the Sixth Circuit's equation between *Brecht* and AEDPA/*Chapman* holds water when habeas courts refrain from considering AEDPA-barred materials under *Brecht*. And it might give courts the perverse incentive to treat *Brecht* as if it were controlled by AEDPA in order to avoid having to actually perform deferential AEDPA review. That approach would both generate less accurate and informed *Brecht* determinations, and still fail to give state-court harmlessness determinations the deference AEDPA commands. For merely narrowing the compass of law a habeas court can apply does not exhaust AEDPA deference. To the contrary, AEDPA requires deference to reasonable—even if seemingly incorrect—applications of clearly established federal law.

The Court, then, should address whether even absent the influence of AEDPA-barred materials, *Brecht* and AEDPA/*Chapman* can diverge, and hold they can. Having one view of prejudice does not ensure the unreasonableness of a very different one, because reasonable people are not confined to disagreeing with each other by small margins. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("[E]ven [finding] a strong case for relief does not mean the state court's contrary conclusion was unreasonable.").

A. Bracketing the confounding influence of AEDPA-barred materials, the Sixth Circuit's argument for equating *Brecht* prejudice with unreasonable application of *Chapman* goes as follows. It's "significantly harder" for a petitioner to prevail under *Brecht* than under *Chapman*. The latter requires only a reasonable doubt about harmlessness, and the former a grave doubt, or numerically, a 50% likelihood of prejudice. Pet. App. 17a. Certainly, if a court finds prejudice under *Brecht*, that court would also believe there's prejudice under *Chapman*. But the Sixth Circuit didn't stop there. Instead, it went one step further and reasoned that because *Brecht* is "[s]o much" harder to satisfy than *Chapman*, if a court finds prejudice under *Brecht*, it should not only disagree with a contrary *Chapman* harmlessness determination, but deem it "necessarily objectively reasonable." *Id.*

The Sixth Circuit's reasoning presumes a peculiar theory of reasonableness—one where a view is automatically unreasonable if it differs a great deal from one's own. But nothing in law or logic imposes a hard cap on how much reasonable people can disagree. Rather, whether we think a view is reasonable depends on whether we believe it might be right. And we can believe a view that differs greatly from our own might be right if we are not very certain of our own views.

B. Indeed, the possibility of reasonable disagreements as great as those the Sixth Circuit claimed were impossible is already well-established in the law. Sufficiency-of-the-evidence review, for instance, aptly illustrates how substantial reasonable disagreements can occur. Sufficiency review is, analytically, almost identical to AEDPA review of a *Chapman* determination. In both, courts ask whether any rational deci-

sionmaker could have made a finding—there, guilt, under AEDPA/*Chapman*, harmlessness—beyond a reasonable doubt.[2] *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). If the Sixth Circuit's logic were valid, a reviewing court that had grave doubt a defendant was innocent would be compelled to find a verdict of guilt beyond a reasonable doubt unreasonable; a court that reached such a conclusion de novo wouldn't even need to do sufficiency-of-the-evidence review.

Yet just the opposite is the law. When a reviewing court finds substantial evidence in favor of both innocence and guilt, that is precisely when this Court's precedent teaches rational juries could find guilt beyond a reasonable doubt. *Cavazos v. Smith* is a classic example. 565 U.S. 1 (2011) (per curiam). There, an infant died from unclear causes. Three prosecution experts testified he died from shaken baby syndrome; two defense experts testified he did not. *Id.* at 3-5. The prosecution experts conceded many of the telltale signs of shaken baby syndrome were absent, *id.* at 4, but defense experts conceded that shaken

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[2] Davenport may respond that sufficiency review is inapposite because sufficiency review and *Chapman* are dissimilar. *See* Pet. App. 33a (noting the differences between the two). And it is true that sufficiency review and *Chapman* differ in key respects; one asks whether a reasonable jury *could* have found guilt beyond a reasonable doubt, while the other asks whether any reasonable jury *would* absent an error. But sufficiency review is not dissimilar from *AEDPA* review of a *Chapman* determination—the analogy drawn here—nor is *Chapman* dissimilar from the underlying finding of guilt a court reviews under *Jackson*. A court applying *Chapman*, like a jury, must make a finding beyond a reasonable doubt. AEDPA review of that determination, precisely like sufficiency review of a guilty verdict, then asks whether any reasonable jurist *could* have made that beyond-a-reasonable-doubt finding.

baby syndrome absent those signs was possible, *id.* at 5. In spite of this conflicting evidence, a jury found the infant's grandmother guilty of shaking him to death. *Id.*

Reviewing that conviction, the Court agreed with her that "[d]oubts about whether [she was] in fact guilty are understandable"—or in other words, reasonable. *Id.* at 8. Indeed, the Court's own account of the evidence paints a picture of an extremely close case. But recognizing that "rational people can sometimes disagree," *id.* at 2, and "that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold," *id.*, the Court held that a rational jury could simply "believe" the prosecution's experts and discredit the defense's, *id.* at 7.

C. That reasonable disagreement can span the distance between grave doubt and no doubt also makes logical sense. Under AEDPA, at a minimum a state court's "interpretation of the trial record" is reasonable if it is "possible"—that is, possibly correct. *Renico v. Lett*, 559 U.S. 766, 777 (2010). If a court has grave doubt about whether a defendant is guilty or suffered prejudice, it doesn't necessarily follow that it's impossible to find guilt or harmlessness beyond a reasonable doubt. Or put in numerical terms, if a court believes the chances a defendant is guilty or didn't suffer prejudice are 50/50, it doesn't necessarily follow that it's impossible the chances are more like 90/10. Rather, how possible that is will depend on how sure the court is of its own view.

To see why, consider again sufficiency-of-the-evidence review. Suppose, for example, that overwhelming evidence shows one of two identical twins committed a crime, but none shows which did it. If

one twin were convicted, a court would rightly say their conviction was irrational. But that isn't merely because the court would have grave doubt about his guilt; it's because a court faced with those facts would be *certain* grave doubt was the only rational response to the evidence. Compare that scenario with *Cavazos*. There, a court could plausibly reason that with two sets of experts giving conflicting testimony, the chances the defendant was guilty were just 50/50. But a court couldn't be remotely confident those were the chances; there, the court's assessment would only reflect its deep uncertainty, not its certitude that grave doubt was warranted. And as this Court did in *Cavazos*, it would have to allow that reasonable people could credit the prosecution's experts and find the odds of guilt much greater.

Findings of prejudice under *Brecht* are far more likely to look like *Cavazos* than the case of the twins. To find prejudice under *Brecht*, a court must be in at least "grave doubt about the likely effect of an error on the jury's verdict." *O'Neal*, 513 U.S. at 435. The Court glossed grave doubt in *O'Neal* as a state of bafflement; "in the judge's mind, the matter [must be] so evenly balanced that he feels himself in virtual equipoise," *id.*, and "the judge's conscientious answer" to whether an error affected the outcome must be "It is extremely difficult to say," *id.* at 442. Such a state of mind does not cohabit easily with confident rejections of others' views. Yet below, grave doubt was all the Sixth Circuit found. Indeed, at the end of its lengthy de novo review, all it could say is that Michigan had "failed to carry its burden to show that the shackles did *not*" affect the outcome. Pet. App. 38a (emphasis added).

Of course, not every finding of prejudice under *Brecht* will rest on grave doubt. In theory, a court

could believe that the chances an error was harmful are well above 50/50 (though *Brecht* never requires a court to make such an estimate). But even then, the nature of the prejudice inquiry will often make it difficult for courts to feel certain that differing views are incorrect. By its terms, harmless-error review requires courts to engage in "the hypothesizing of events that never in fact occurred"—how a jury would have behaved if some error hadn't happened. *United States v. Dominguez Benitez*, 542 U.S. 74, 87 (2004) (Scalia, J., concurring in the judgment). "Such an enterprise is not factfinding, but closer to divination." *Id.*

Not only is gauging prejudice a difficult task in theory, it is also difficult in practice because it rests on a series of hard individual judgments, each fraught with room for error. First, a court must assess the strength of the state's case, keeping in mind that the jury that heard it convicted—a task that alone can provoke a wide range of reasonable disagreement, as sufficiency review illustrates.

Second, a court must attempt to estimate "the impact of the [error] on the minds of other men," *Kotteakos*, 328 U.S. at 764, even though the jurors themselves may "not necessarily be fully conscious of the effect" it had on them. *Flynn*, 475 U.S. at 570. When an error, like shackling, tends to affect the jury's "attitude" rather than their view of the facts, *id.*, that task will be particularly difficult.

Third, a court will often have to grapple with extraneous evidence. For example, in this case, what effect should it have on one's estimate of prejudice that seven jurors who didn't see Davenport's shackles voted to convict? What does it suggest that the jury deliberated for six hours? Does the answer change if one thinks

the issues before the jury were "simple"? Pet. App. 32a. Can the jurors be relied upon to accurately gauge the effect Davenport's shackles had on them, and how much does it matter that the one judge who heard their testimony found it credible? Whatever judgment a court reaches at the conclusion of this uncertainty-laden analysis is not likely to be especially confident, and should typically allow for a wide range of differing views.

* * *

Even setting aside the confounding influence of potentially applying different law, a court that finds actual prejudice under *Brecht* is not logically compelled to reject as unreasonable a harmlessness determination under *Chapman*. Though *Brecht* is significantly harder to satisfy than *Chapman*, no rule of logic says that reasonable jurists cannot disagree by significant margins. Rather, a court can believe the chances of prejudice are substantial and still find a *Chapman* harmlessness determination reasonable if it is not very sure of its own view. And both *Brecht*'s grave-doubt threshold, and the nature of the prejudice inquiry, mean that will often be the case. The Court should reverse.

III. Determining whether a state court's harmlessness determination is unreasonable requires actually considering the state court's rationale.

Last, even if a court forms a "firm conviction," *Williams*, 529 U.S. at 389 (opinion of Stevens, J.), not just a tentative guess, that an error caused actual prejudice under *Brecht*, and even if it avoids relying on any AEDPA-barred materials in reaching that conclusion, a court still must perform AEDPA review

of a state court's harmlessness determination before granting relief. For this Court has held that forming a firm conviction a state court erred under de novo review is no substitute for deferentially reviewing a state court's reasoning.

A. This Court has held a habeas court cannot treat AEDPA deference "as a test of its confidence in the result it would reach under *de novo* review"; reasoning that because one has "little doubt that [a] claim has merit . . . the state court must have been unreasonable in rejecting it" is not an inference AEDPA allows federal courts to make. *Richter*, 562 U.S. at 102. Indeed, it "is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (internal quotation marks omitted). So even a confident assessment of prejudice under *Brecht* does not suffice to dispense with review under AEDPA.

This may seem paradoxical. If a habeas court is sure (setting aside AEDPA-barred legal materials) a state court was wrong, how might it still conclude the state court was arguably right? The answer is not that the judicial mind can hold those two thoughts at once, but that purely de novo review is an inadequate test of a court's certainty. To be truly certain it is right and the state court wrong, a habeas court must review the state court's reasoning and explain why it's impossible for "fairminded jurists" to agree with it. *Richter*, 562 U.S. at 102.

A court that feels confident a defendant suffered prejudice may struggle to see how a court could reasonably say he didn't. But as Wittgenstein explained, even "complete conviction, the total absence of doubt," is only "*subjective* certainty." Ludwig Wittgenstein,

On Certainty 27 (1969). For something to be "objectively certain," "mistake [must] be *logically* excluded." *Id.* AEDPA requires the latter; a habeas court may only grant relief where the state court's view was "objectively unreasonable," not just when it appears to be. *Williams*, 529 U.S. at 409. The only way for a court to assure itself of that—and to be sure that *it's* not the one in error—is to review the state court's reasoning. "After all, there is no way to hold that a decision was 'lacking in justification' without identifying—let alone rebutting—all of the justifications." *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (per curiam). Failing to do so runs the risk of "overlook[ing] arguments that would otherwise justify the state court's result"—or that at least are reasonable, if not correct. *Richter*, 562 U.S. at 102.

The necessity for federal courts to review state courts' reasoning before declaring their judgments unreasonable is a mainstay of this Court's AEDPA jurisprudence. From the very beginning, even Justices who believed that AEDPA permitted independent review conceded that AEDPA mandated "federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions, before" granting relief. *Williams*, 529 U.S. at 386 (opinion of Stevens, J.). And this Court has never granted relief under AEDPA without reviewing a state court's reasoning and explaining why it was unreasonable. *See Porter v. McCollum*, 558 U.S. 30, 42-44 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 388-90 (2005); *Wiggins v. Smith*, 539 U.S. 510, 527-29 (2003); *Williams*, 529 U.S. at 391-98. Indeed, the Court has never simply stopped at its own review of a claim, even where its own review revealed compelling reasons for granting relief.

B. Davenport doesn't dispute that before deeming a state court's harmlessness determination unreasonable, a habeas court must consider the state court's reasons for finding harmlessness, albeit if only when applying *Brecht*. He claims, however, that the Sixth Circuit did so. BIO 30. Of course, what the Sixth Circuit happened to do in this case does not suffice to uphold its rule for all cases, and nothing in *Brecht* requires a habeas court to engage with a state court's *Chapman* reasoning.

But the problem is more fundamental than that. Even if a habeas court considers and rejects a state court's *Chapman* reasoning under *Brecht*, that does not ensure the state court's reasoning is unreasonable. The Sixth Circuit, for example, considered and rejected the state courts' reliance on juror testimony. Yet it did not consider—because under *Brecht* it didn't have to—whether reliance on that testimony was objectively unreasonable. It merely concluded that under *its* reading of *Flynn*, relying on the testimony was unwise. Whether fairminded jurists could read *Flynn* differently (to say nothing of whether *Flynn* even contained a holding on the subject) was a question that solely applying *Brecht* allowed the court to duck.

IV. If the Court has any doubt about whether the Sixth Circuit's rule is correct, the Court should reject its rule.

Suppose that despite all the reasons that *Brecht* and AEDPA review of a *Chapman* determination can diverge, the Court is inclined to believe that if a court finds prejudice under *Brecht*, it could never find a *Chapman* harmlessness determination reasonable under AEDPA. Even if the Court concludes that is

probably correct, if it has any doubt about whether it is, it should reverse. That's because even if the Sixth Circuit is right, requiring courts to apply AEDPA before granting relief would never result in error; it would merely ensure that the Sixth Circuit's rule isn't mistaken. But if there is any risk that the Sixth Circuit is wrong, allowing courts to skip applying AEDPA risks granting relief that AEDPA prohibits.

Assume it's the case that no court that finds prejudice under *Brecht* would ever find a *Chapman* harmlessness determination unreasonable. Even if that's true, what harm would it cause to make a habeas court "show its work" before declaring AEDPA satisfied? Pet. App. 50a (Readler, J., dissenting). If the Sixth Circuit is right, applying AEDPA should never lead to an incorrect result; courts that find prejudice under *Brecht* will necessarily find prejudice under AEDPA/*Chapman* and grant relief. It will merely confirm that the Sixth Circuit's rule is correct. And the Sixth Circuit's rule, however plausible as an intuitive matter, is a rule that can use some confirming. Nothing in its opinion shows why it is necessarily the case that satisfying *Brecht* ensures satisfaction of AEDPA/*Chapman*.

The only cost of the States' rule would be requiring habeas courts, in the exceedingly rare cases where they both find an error under AEDPA and actual prejudice under *Brecht*, to take the time to explain why reasonable jurists could not agree with the state courts' harmlessness determination—assuming the state courts have even made one. Such a requirement would impose very little upon the federal courts' resources, and requiring formal compliance with a congressional precondition to granting habeas relief before granting it does not seem much to ask.

On the other hand, suppose that in a small fraction of cases where a court finds prejudice under *Brecht*, if it went on to conscientiously apply AEDPA it would find it could not say the state courts' harmlessness determination was unreasonable. Affirming the Sixth Circuit's rule would get those cases wrong. And in each case, courts would grant habeas relief in violation of AEDPA—without ever even applying AEDPA to see if the relief they were granting violated it. This Court has seen many lower-court attempts to subvert AEDPA. But never before has it seen an outright refusal to apply AEDPA, on the theory that independent review can somehow serve in its place.[3] "[T]his wolf comes as a wolf," *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting), and this Court should not sanction it.

[3] There is one exception. In *Ayala*, the Ninth Circuit, just like the Sixth Circuit here, claimed that by "apply[ing] the *Brecht* test without regard for the state court's harmlessness determination" and finding prejudice, *Ayala v. Wong*, 756 F.3d 656, 674 (9th Cir. 2014), it "necessarily determine[d]" the state courts' harmlessness determination "to be an unreasonable application of *Chapman*," *id.* at 674 n.13. This Court reversed, holding the Ninth Circuit was incorrect in believing the "state court's harmlessness determination has no significance." *Ayala*, 576 U.S. at 268.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General
NICHOLAS J. BRONNI
Solicitor General
Counsel of Record
VINCENT M. WAGNER
Deputy Solicitor General
ASHER L. STEINBERG
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street
Suite 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@
arkansasag.gov

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[Additional Counsel Listed on Following Page]

STEVE MARSHALL
Alabama Attorney General

TREG TAYLOR
Alaska Attorney General

MARK BRNOVICH
Arizona Attorney General

CHRISTOPHER M. CARR
Georgia Attorney General

TODD ROKITA
Indiana Attorney General

TOM MILLER
Iowa Attorney General

DEREK SCHMIDT
Kansas Attorney General

DANIEL CAMERON
Kentucky Attorney General

JEFF LANDRY
Louisiana Attorney General

LYNN FITCH
Mississippi Attorney General

ERIC S. SCHMITT
Missouri Attorney General

AUSTIN KNUDSEN
Montana Attorney General

DOUGLAS J. PETERSON
Nebraska Attorney General

AARON FORD
Nevada Attorney General

DAVE YOST
Ohio Attorney General

DAWN CASH
Oklahoma Acting Attorney General

JOSH SHAPIRO
Pennsylvania Attorney General

ALAN WILSON
South Carolina Attorney General

JASON RAVNSBORG
South Dakota Attorney General

HERBERT H. SLATERY III
Tennessee Attorney General

KEN PAXTON
Texas Attorney General

SEAN D. REYES
Utah Attorney General