

No. _____

**In the
Supreme Court of the United States**

FLORENCE WASHINGTON AND
SANTANE GLASGOW,

Petitioners,

v.

WAL-MART ASSOCIATES, INC. ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to the
Court of Appeal of the State of California,
Second Appellate District, Division Seven**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether fundamental fairness under the Fourteenth Amendment may be assessed in a civil trial by considering trial restrictions only in isolation when the asserted due-process violation arises from their combined effect.

2. Whether the Due Process Clause permits a State to enter judgment on a state-created civil claim when the jury instructions and special verdict define liability more narrowly than the State's governing law.

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

- Florence Washington aka Jane Doe
- Santane Glasgow aka Jane Roe

They proceeded under the pseudonyms Jane Doe and Jane Roe during portions of the state-court proceedings. Their names and the record as presented are in the public record.

Respondent and Defendants-Respondents below

- Wal-Mart Associates, Inc. (NYSE: WMT)
- Lamar Davenport
- Flor Garcia Solares

CORPORATE DISCLOSURE STATEMENT

Petitioners are individuals; there are no corporate petitioners.

LIST OF PROCEEDINGS

Supreme Court of California

No. S296889

Doe et al. *Plaintiffs and Appellants* v. Wal-Mart Associates Inc. et al., *Defendants and Respondents*

Order Denying Review: July 8, 2026

California Court of Appeal, Second Appellate District,
Division Seven

No. B323435

Doe et al. *Plaintiffs and Appellants* v. Wal-Mart Associates Inc. et al., *Defendants and Respondents*

Opinion: April 22, 2026

Order Denying Rehearing: May 11, 2026

Superior Court of California, County of Los Angeles

No. BC698048 (Lead Case No.),

No. BC716975 (Consolidated Case No.)

Jane Doe, *Plaintiff* v. Wal-Mart Associates, Inc.,
et al., *Defendants*

Judgment: June 15, 2022

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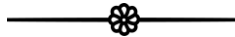


OPINIONS BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division Seven, filed April 22, 2026, is unpublished and is reproduced at App.2a-50a. The Court of Appeal affirmed the judgment entered after a jury trial on Petitioners' consolidated employment claims.

The Court of Appeal's order denying rehearing on May 11, 2026, is reproduced at App.63a-64a. The order of the Supreme Court of California denying review on July 8, 2026, No. S296889, is reproduced at App.1. The Superior Court judgment entered June 15, 2022, is reproduced at App.51a-62a.

The Court of Appeal opinion has not been published in the official California reports and states that it was not certified for publication under California Rule of Court 8.1115.



JURISDICTION

The California Court of Appeal filed its opinion affirming the judgment on April 22, 2026, and denied Petitioners' timely petition for rehearing on May 11, 2026. Petitioners then timely sought discretionary review in the Supreme Court of California. That court denied review on July 8, 2026. (App.2a-50a; App63a-64a; App.1a.)

This Court has jurisdiction under 28 U.S.C. § 1257(a). Under Supreme Court Rule 13.1, a petition

seeking review of a lower state-court judgment subject to discretionary review by the State’s court of last resort is timely when filed within 90 days after entry of the order denying discretionary review. The July 8, 2026 denial makes this petition due October 6, 2026. No extension order has been identified in the supplied record.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution; California Government Code §§ 12940(j)(1), 12940(j)(4)(C), 12923(c), and 12926(r) are involved. (App.65a-67a.)



INTRODUCTION

This case presents two unresolved Fourteenth Amendment due-process questions in civil adjudication.

In *Chambers v. Mississippi*, 410 U.S. 284, 298, 302-03 (1973), this Court recognized that constitutional unfairness may arise from the combined operation of procedural restrictions rather than from any one restriction considered alone. *Taylor v. Kentucky*, 436 U.S. 478, 487 & n.15 (1978), likewise assessed the “cumulative effect” of different features of a proceeding in determining whether due process had been satisfied.

Those cases arose in criminal proceedings. But this Court has independently held that the Fourteenth

Amendment protects state-created civil interests and constrains the procedures governing their adjudication. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-37 (1982), held that a state-created employment-discrimination cause of action may constitute an interest protected by the Fourteenth Amendment and that the “[m]inimum [procedural] requirements” governing its deprivation remain “a matter of federal law.” *Id.* at 432. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420-35 (1994), confirms that a completed civil jury adjudication does not categorically end procedural-due-process scrutiny of the procedures that produced the judgment.

This Court has never resolved the question at the intersection of those principles: whether fundamental fairness under the Fourteenth Amendment may be assessed in a civil trial by considering trial restrictions only in isolation when the asserted due-process violation arises from their combined effect.

That unresolved question arises against an acknowledged disagreement over aggregate review in civil cases. Multiple circuits permit consideration of the combined effect of identified trial errors; the Third Circuit rejects cumulative-error doctrine “at least in the context of a civil trial”; and the Fourth Circuit has expressly acknowledged the disagreement without choosing a side. *Ward v. AutoZoners, LLC*, 958 F.3d 254, 273-74 & n.7 (4th Cir. 2020); *SEC v. Infinity Group Co.*, 212 F.3d 180, 196 (3d Cir. 2000). Courts permitting aggregate review have emphasized that a civil trial cannot always be evaluated in “artificial isolation.” *Jerden v. Amstutz*, 430 F.3d 1231, 1240-41 (9th Cir. 2005).

Question 2 concerns the procedure through which a State submits a protected civil claim to a jury for

decision. *Bell v. Burson*, 402 U.S. 535, 540-42 (1971), constrains procedures that eliminate meaningful consideration of a matter state law makes material; *Logan* supplies the state-right/federal-process distinction. This Court has not addressed whether those principles constrain jury instructions and a special verdict alleged to define liability more narrowly than governing state law.

This case presents that question concretely. California prohibits workplace harassment “because of . . . sex” and requires hostile-environment claims to be evaluated under the “totality of the circumstances.” Cal. Gov’t Code §§ 12940(j)(1), 12923(c). Petitioners requested the statutory “because of sex” formulation. The court instead required proof of harassment “because they are women,” and the special verdict made the corresponding “because she is a woman” formulation the liability question the jury actually answered. (4 Supp. RT 963–970; 973-977; 9 AA 10519-10523, 10528-10531, 10587-10590; App.92a-106a.)

Other rulings affected the legal framework, contextual framework, and proof bearing upon the same hostile-environment claims, and the Court of Appeal reviewed the challenged restrictions individually. (App.27a-30a, 39a-48a.)

The Questions Presented concern constitutional rules governing civil adjudication, not correction of individual state-law rulings.



STATEMENT OF THE CASE

A. Petitioners' FEHA Claims

Petitioners Florence Washington and Santane Glasgow worked at a Walmart store in Torrance, California. Their consolidated actions alleged, among other claims, hostile-environment sexual harassment, failure to prevent harassment, and retaliation under California's Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940. (App.4a-7a.)

Davenport was a department manager at the Torrance store during the relevant period; Solares worked there as a front-end cashier. Both later moved into other positions at Walmart. (12 RT 3373:4-6, 3397:22-3398:26; 12 RT 3487:5-19; 13 RT 3620:28-3623:8; 12 RT 3412:12-24, 3456:19-24, 3462:6-10.)

Washington alleged that she had a sexual relationship with Davenport and sent him intimate photographs at his request. Davenport denied both the relationship and receiving nude photographs from Washington. (20 RT 5796-5799; 12 RT 3406, 3436-3437.)

Solares was also in a relationship with Davenport. Petitioners alleged that Solares obtained Washington's photographs and used them in workplace conduct forming part of the alleged hostile environment. Glasgow testified that Solares showed her an intimate photograph of Washington, made a derogatory sexual remark about Washington, continued scrolling through photographs and making jokes, and discussed posting

the photographs online. (21 RT 6078:2-6082:12, 6084:5-6086:19, 6093:7-14; App.121a-129a; Op. 9-11.)

The consolidated case proceeded to a jury trial in March and April 2022. (Op. 2, 15-17.)

B. The Instructions and Special Verdict Used the “Because They Are Women” Formulation

FEHA makes it unlawful for a covered employer or person, “because of . . . sex,” to harass an employee. Cal. Gov’t Code § 12940(j)(1). California separately provides that “[t]he existence of a hostile work environment depends upon the totality of the circumstances.” *Id.* § 12923(c).

During the instruction conference, Petitioners objected to defining the operative inquiry as whether they had been harassed “because they are women” and requested the statutory “because of sex” formulation. They explained that their claims involved sexual conversations, intimate photographs, and sexualized workplace conduct that did not depend solely upon hostility directed at them because they were women. Counsel explained: “If there were men that were hearing the sex talk, it wouldn’t be because they were men . . . It’s because of sex.” (4 Supp. RT 960, 969; App.95a.) Walmart responded that the relevant element concerned “the protected status, not about the conduct that’s being alleged.” (4 Supp. RT 968-970; App.94a-96a.) The trial court rejected Petitioners’ requested “because of sex” formulation and, after directing counsel to choose between “their gender” and “their sex,” required a formulation different from the one Petitioners had requested. Petitioners repeatedly objected that the case was not limited to harassment “because they were women” or because of gender, but

concerned harassment “because of sex.” (4 Supp. RT 967–970, 973–977; App.92a-101a.)

The final CACI No. 2521A initially described Petitioners’ claim as harassment “based on sex,” but its operative element required proof that Washington and Glasgow “was subjected to harassing conduct because they are women.” (9 AA 10587-10588; App.102a-103a.) CACI No. 2522A used the corresponding formulation for the individual defendants. (9 AA 10589-10590; App.104a-105a.)

Petitioners also requested CACI Nos. 2521B and 2522B concerning hostile-environment harassment involving conduct directed toward coworkers. The trial court declined to give those instructions. (4 Supp. RT 19-21, 365-374, 972-973; 9 AA 10354-10357; App. 79a-92a, 96a.)

The disputed formulation was also incorporated into the special verdict. Washington’s verdict first asked whether Davenport and Solares intentionally distributed one or more photographs of Washington. The jury answered “No.” The verdict then proceeded to separate FEHA hostile-environment questions. Questions 13, 20, and 27 asked:

“Was Florence Washington subjected to harassing conduct because she is a woman?”

The jury answered “No.” (9 AA 10519-10523; Op. 15-16.)

Glasgow’s verdict independently submitted her hostile-environment claims using the corresponding “because she is a woman” formulation. (9 AA 10528-10531.)

Walmart relied on the same formulation in closing argument, arguing that the challenged conduct had to be “because she’s a woman”, and also “because she’s female”. (23 RT 6734-6735, 6750-6751; App.70a-73a.)

The jury returned a defense verdict, and judgment was entered on June 15, 2022. (App.17a-19a; App.51a-62a.)

C. Other Rulings Affected the Framework and Proof Presented to the Jury

Petitioners sought to introduce Exhibit 145, Washington’s service-provider telephone records, to corroborate Washington’s testimony and impeach Davenport’s denial of their relationship and his denial that Washington sent him intimate photographs. (11 AA 12364-12428; 21 RT 6007-6020; App.108a-121a; App.165a-168a.) At trial, Davenport acknowledged that (323) 503-8770 was a number he may have used and agreed that it was the number through which he communicated with Washington. (12 RT 3410:18–28.) Washington separately identified (323) 503-8770 as Davenport’s number during the relevant period after refreshing her recollection with her phone records. (21 RT 6069:3–6070:11.

The records reflected text activity to Davenport’s telephone number on November 27 and December 24, 2016, corresponding to timestamps on communications and an intimate photograph Washington testified she sent him. The Court of Appeal acknowledged those correspondences. (11 AA 12408, 12425; App.167a-169a; App.27a-28a.) The trial court excluded Exhibit 145 after Walmart objected that the records had not been produced during discovery, and the Court of Appeal

affirmed. (21 RT 6007-6020 App.108a-121a; App.27a-30a.)

The consolidated trial involved two plaintiffs, three defendants, and multiple claims arising from overlapping and distinct factual circumstances. Petitioners estimated that they required approximately 36 hours to present their case; Walmart likewise requested approximately 36 hours. The trial court initially allocated 25 hours per side and later provided Petitioners six additional hours. (6 RT 1505-1508; 19 RT 5632, 5639, 5655-5656; Op. 37-39.)

Petitioners' remaining time expired during re-cross-examination of Walmart's damages expert. (22 RT 6425-6428; App.131a-134a; Op. 37-39.) Walmart thereafter called Cindy Lehigh, Tammy Johnson, and Wakouisha Walker.

Lehigh, who issued Glasgow's final coaching and termination, testified concerning the asserted cash-shortage basis for Glasgow's discharge. (22 RT 6492-6499; App.135a-145a.) Johnson testified concerning incidents involving Washington and another employee and a customer. (22 RT 6499-6512; App.145a-155a.) Walker testified concerning customer complaints about Washington. (22 RT 6513-6515; App. 155a-158a.)

Petitioners were not permitted to cross-examine any of the three witnesses. They moved to strike the testimony, and the trial court denied the motions. (22 RT 6501, 6511-6512, 6515; App.145a, 154a-155a, 158a.) The Court of Appeal affirmed enforcement of the trial-time limitation. (App.39a-41a.)

D. The Court of Appeal Affirmed the Challenged Rulings Under Separate Analyses

The California Court of Appeal affirmed the judgment in an unpublished opinion. (App.3a, 50a.)

The court rejected Petitioners' challenge to CACI No. 2521A. Although acknowledging that Petitioners requested "because of sex" rather than "because they are women," it concluded that the instructions, read together, permitted the jury to consider sex- and sexuality-related harassment. (App.44a-46a.) Because it found the instruction proper, it also rejected the corresponding special-verdict challenge. (App.46a n.14.)

The court separately affirmed refusal of CACI Nos. 2521B and 2522B. It recognized that a plaintiff may experience hostile-environment harassment through conduct directed toward coworkers, but concluded that the evidentiary record did not warrant the requested instructions. (App.46a-48a.)

The court separately affirmed exclusion of Exhibit 145. (App.27a-30a.) It also rejected Petitioners' due-process challenge to enforcement of the trial-time limitation, acknowledging that Petitioners were unable to cross-examine Walmart's final three witnesses and that their motions to strike were denied, but concluding that the trial court had not abused its discretion. (App.39a-41a.)

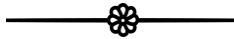
Finally, in affirming denial of Petitioners' motion for new trial, the Court of Appeal relied upon those preceding determinations:

"Because we have concluded the trial court did not abuse its discretion in its evidentiary rulings, trial management, or in instructing

the jury, the court did not abuse its discretion in denying the motion for new trial on the same grounds.” (App.48a-49a.)

E. Petitioners Continued the Federal Questions Through State Review

Petitioners then continued the combined-effect contention in the Supreme Court of California. Their Petition for Review addressed the interaction among the challenged trial restrictions and their effect upon meaningful adjudication of Petitioners’ FEHA claims. (Pet. Review 36-46; App.185a-194a.) Their Reply explained that the restrictions “operated together,” identifying the instruction, special verdict, conduct-directed-at-others framework, evidentiary restrictions, and trial-time limitation. (Reply Supp. Pet. Review 15-17; App.195a-197a.) The Supreme Court of California denied review on July 8, 2026. (Cal. Sup. Ct. Order Denying Review, No. S296889; App.1a.)



REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve Whether Fundamental Fairness in a Civil Trial May Be Assessed by Considering Trial Restrictions Only in Isolation

The first Question Presented asks whether fundamental fairness under the Fourteenth Amendment may be assessed one restriction at a time when the asserted due-process violation arises from their combined effect.

Logan protects a state-created employment-discrimination interest and the opportunity to have its merits fairly judged; *Oberg* confirms that procedures governing civil-jury adjudication remain subject to procedural-due-process scrutiny; *Chambers* demonstrates that interaction among restrictions may itself produce constitutional unfairness. *Logan*, 455 U.S. at 428-35; *Honda*, at 420-35; *Chambers*, 410 U.S. at 302-03.

A. This Court’s Civil Due-Process Decisions Protect State-Created Civil Interests and Scrutinize the Procedures Governing Their Adjudication

The Court stated that the Due Process Clause affords an aggrieved party an opportunity to present the case and have its merits “fairly judged.” *Logan*, 455 U.S. at 433. The particular procedures required depend upon accommodation of the competing interests, for which *Logan* cited *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). *Logan*, 455 U.S. at 434.

Mathews addresses what procedures due process requires in context. Question 1 asks a different question about the procedures actually afforded: when their interaction is the asserted source of deprivation, may constitutional adequacy be assessed only one at a time?

The question prescribes no particular instruction, evidentiary rule, amount of trial time, or scope of examination as a constitutional minimum. It concerns whether the procedures actually afforded, considered both individually and in combination, satisfied due process.

Oberg confirms that providing a civil jury trial does not, by itself, end procedural-due-process scrutiny.

Oregon law provided a civil jury trial but eliminated a traditional safeguard against arbitrary punitive-damages awards—judicial review of the amount awarded. This Court held that removal of that safeguard violated procedural due process. 512 U.S. at 420-35.

Oberg’s significance here is limited but important: completion of a civil jury trial does not categorically place the procedures producing the judgment beyond procedural-due-process scrutiny.

Logan and *Oberg* thus establish the civil setting: a state-created civil claim may be a protected interest, and the procedures governing its adjudication remain subject to due-process scrutiny. Neither decision addresses whether a claimed constitutional deficiency arising from the interaction of those procedures may be assessed only in isolation.

B. *Chambers* Demonstrates that Due-Process Analysis May Turn on the Combined Operation of Procedural Restrictions

The Court in *Chambers* examined what those restrictions accomplished together. It emphasized the “cumulative effect” of the rulings and concluded that exclusion of critical evidence, “coupled with” the refusal to permit *Chambers* to cross-examine McDonald, denied him a trial consistent with “traditional and fundamental standards of due process.” *Chambers*, 410 U.S. at 290 n.3, 298, 302-03.

Chambers and Taylor arose in criminal proceedings, and Petitioners do not import criminal procedural protections wholesale into civil litigation. The narrower point is that, when interaction among restrictions is itself the asserted source of constitutional unfairness,

their combined operation may enter the due-process inquiry.

That proposition is distinct from ordinary cumulative-error doctrine. Ordinary cumulative-error review generally begins with multiple rulings already determined to be erroneous and asks whether their combined prejudicial effect warrants reversal, even though no individual error would do so. *Chambers* addressed a different inquiry. It considered the interaction of procedural restrictions in determining whether the defendant had been denied due process in the first place; it did not treat a prior finding that each restriction independently constituted constitutional or reversible error as a prerequisite to considering their combined operation. 410 U.S. at 298, 302-03.

The unresolved question is whether that interaction principle extends to procedural-due-process analysis of a protected civil interest. *Chambers* and *Taylor* establish the interaction principle; *Logan* and *Oberg* establish the civil constitutional setting. This Court has not supplied the rule connecting them.

C. The Acknowledged Disagreement Over Aggregate Civil Review Demonstrates the Recurring Importance of the Unresolved Question

The lower-court disagreement is not on the precise constitutional question presented. Those cases principally ask, after errors have been identified, whether their combined effect may be considered in assessing prejudice. Question 1 is antecedent: whether restrictions not independently unconstitutional or reversible may nevertheless be considered together

when their interaction is itself the asserted due-process deprivation.

The Ninth Circuit permits aggregate review. In *Jerden v. Amstutz*, the court identified two evidentiary errors in a civil jury trial and considered them cumulatively. *Id.* at 1240-41. Quoting the Sixth Circuit, it explained that because a jury reaches its verdict from the evidence as a whole, it “makes no sense to try to analyze errors in artificial isolation” when determining whether they were harmless. *Id.* (quoting *Beck v. Haik*, 377 F.3d 624, 645 (6th Cir. 2004)). The Sixth Circuit likewise held in *Beck* that cumulative-error doctrine applies in civil cases. 377 F.3d at 644-45, overruled on other grounds by *Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009) (en banc).

The Third Circuit takes the contrary position. In *SEC v. Infinity Group Co*, civil defendants argued that several procedural and evidentiary errors collectively impaired their ability to present an adequate defense. The court explained that, “unlike some of our sister courts of appeals,” the Third Circuit had rejected cumulative-error doctrine “at least in the context of a civil trial.” *Id.* at 196.

The Fourth Circuit has expressly recognized the disagreement without choosing a side. In *Ward v. AutoZoners, LLC*, 958 F.3d 254 (4th Cir. 2020), a Title VII sexual-harassment case, the court observed that the circuits are divided over application of cumulative-error doctrine in civil cases and that the Fourth Circuit had not precedentially resolved the question. *Id.* at 273-74 & n.7. It assumed without deciding that the doctrine applied. *Id.* Other circuits likewise permit aggregate consideration of identified errors in civil cases. *See, e.g., Nichols v. American National Insurance*

Co., 154 F.3d 875, 889-90 (8th Cir. 1998); *Williams v. Drake*, 146 F.3d 44, 49 (1st Cir. 1998); *Malek v. Federal Insurance Co.*, 994 F.2d 49, 55 (2d Cir. 1993); *Hendler v. United States*, 952 F.2d 1364, 1383 (Fed. Cir. 1991); *see also Ward*, 958 F.3d at 274 n.7 (collecting cases).

In *Sidibe v. Sutter Health*, 103 F.4th 675 (9th Cir. 2024), by contrast, an instructional error omitted a legally relevant consideration from the framework supplied to the jury, while an evidentiary error excluded proof bearing upon that consideration. Once those errors had been identified, the Ninth Circuit concluded in assessing prejudice that their effects “cannot be disentangled.” *Id.* at 705.

Petitioners do not ask California to adopt any circuit’s cumulative-error doctrine or federal harmless-error standard. The disagreement instead demonstrates that federal courts repeatedly confront whether combined effects matter in civil review. Question 1 asks the distinct constitutional question whether interaction among trial restrictions may itself deprive a civil litigant of Fourteenth Amendment process.

D. The Requirement of Independently Identified Errors in Ordinary Cumulative-Error Doctrine Does Not Answer Question 1

The lower-court cumulative-error decisions discussed above concern aggregate review after individual rulings have been tested for error. Question 1 concerns the logically prior inquiry whether interaction among procedural restrictions may itself be constitutionally relevant in determining whether the procedures afforded satisfied due process.

Chambers shows the distinction: its combined-effect analysis addressed whether due process had been denied, not merely prejudice after multiple independently reversible errors. 410 U.S. at 298, 302-03. Question 1 asks whether combined operation may be considered without first finding each restriction unconstitutional or reversible on its own.

The Court of Appeal's disposition makes that distinction concrete. It resolved the challenged instruction and special verdict, refusal of CACI Nos. 2521B and 2522B, exclusion of Exhibit 145, and enforcement of the trial-time limitation under their respective doctrinal standards. (App.26a-29a, 38a-47a.) In affirming denial of a new trial, it relied on those preceding determinations that the trial court had not abused its discretion in its "evidentiary rulings, trial management, or in instructing the jury." (App.47a.)

The federal fair-trial and combined-effect substance, however, was already presented in Petitioners' appellate briefing: the Reply invoked due process, constitutional error, "separately and in combination," and the "cumulative effect" of the challenged restrictions. (ARB 9-11, 24, 38-39; App.196a-198a, 201a-203a.) On rehearing, Petitioners expressly identified the Fourteenth Amendment as the constitutional source of the already-presented fair-trial objection and argued that the restrictions compounded the asserted deprivation. (Pet. Reh'g 4-5, 14; App.205a-207a.) They continued the combined-operation contention before the Supreme Court of California. (Pet. Review 36-46; App.209a-219a; Reply Supp. Pet. Review 15-17; App.221a-223a.)

E. This Case Presents the Combined-Effect Question Through Fixed, Documented Trial Procedures

The record presents Question 1 through three interacting features of Petitioners' hostile-environment claims: the liability framework submitted to the jury, the requested framework for considering hostile-environment conduct involving others, and corroborating and impeachment proof bearing on the alleged environment.

First, the instruction and special verdict defined the liability inquiry the jury was required to answer. Petitioners requested the statutory "because of sex" formulation and explained why, in their view, "because they are women" did not capture their hostile-environment theory, which involved sexual conversations, intimate photographs, and sexualized workplace conduct involving both women and men. The trial court rejected that request. (4 Supp. RT 967–970, 973-977.) The final instruction required Petitioners to establish that they were subjected to harassing conduct "because they are women," and the special verdict repeated the corresponding formulation as the FEHA liability question. (9 AA 10519-10523, 10528-10531, 10587-10590.) Walmart invoked that formulation in closing argument. (23 RT 6734-6735, 6750-6751; App.128a-131a.)

Second, Petitioners requested CACI Nos. 2521B and 2522B concerning hostile-environment harassment involving conduct directed toward others. The trial court declined to give those instructions. (4 Supp. RT 19-21, 365-374, 972-973; 9 AA 10354-10357; App.89a-106a, 113a-114a.) The Court of Appeal recognized that conduct directed toward others can contribute to a plaintiff's hostile environment but concluded that

the evidentiary record did not warrant the requested instructions. (App.45a-47a.)

Question 1 does not require this Court to decide whether CACI Nos. 2521B and 2522B were required under California law. Their relevance is narrower: they identify the contextual framework Petitioners sought for conduct involving others and one component of the asserted combined deprivation.

Third, exclusion of Exhibit 145 affected the corroborating and impeachment proof available to Petitioners. The significance of the records was heightened by earlier restrictions on Petitioners' efforts to impeach Davenport's credibility. Petitioners sought to impeach Davenport with evidence that he had denied felony convictions on his Walmart employment application despite later acknowledging that the application answer was untrue, and with inconsistent statements concerning his convictions and identity. The trial court treated the employment-application impeachment and remote convictions as collateral or unduly prejudicial, although it permitted limited inquiry concerning inconsistencies in Davenport's name. The court stated that Petitioners could instead challenge Davenport's truthfulness by comparing his testimony with other testimony and with "the physical evidence in this case." (7 RT 1839:1–1840:11, App.163a) Exhibit 145 supplied precisely that kind of objective evidence, and it too was excluded.

The service-provider records showed text activity to Davenport's number at times corresponding to timestamps on communications and an intimate photograph Washington testified she sent him. (11 AA 12364-12428; Op. 25-26.) Petitioners offered the

records to corroborate Washington and impeach Davenport.

The records therefore bore directly on Davenport's credibility by providing objective evidence against which the jury could test his denials concerning his communications with Washington and his receipt of her intimate photographs—after another avenue of credibility impeachment had already been restricted. The trial court excluded the records, and the Court of Appeal separately affirmed. (21 RT 6007-6020; App.134a-147a; App.26a-29a.)

The broader combined-effect theory preserved in state court also included a restriction on adversarial testing. After Petitioners' trial time expired, Walmart presented Cindy Lehigh, Tammy Johnson, and Wakouisha Walker concerning disciplinary matters involving Petitioners. Petitioners were not permitted to cross-examine those witnesses, and their motions to strike the testimony were denied. (22 RT 6492-6515; App.163a-186a.) The Court of Appeal separately affirmed enforcement of the time limitation. (App.38a-40a.) Petitioners' appellate Reply included the examination restriction among the rulings alleged to operate "[s]eparately and in combination," and the combined-operation theory presented during further state review likewise included the trial-time limitation. (ARB 9-10, 38-39; App.196a-197a, 202a-203a; Pet. Reh'g 14; App.207a; Reply Supp. Pet. Review 15-17; App.221a-223a.)

The preserved theory also included the cross-examination restriction, but the narrower interaction sufficient to present Question 1 does not depend upon it. The liability framework, requested hostile-envirom-

ment context, and corroborating and impeachment proof independently present the question.

The relevant trial rulings and materials are fixed in the record. The instruction conference and B-instruction proceedings are transcribed; the final instructions and special verdicts are written; and the Exhibit 145 dispute is transcribed and the exhibit identified in the appellate record. (4 Supp. RT 19–21, 365–374, 967–970, 973-977; 9 AA 10587-10590; 9 AA 10635, 10637-10639, 10649, 10651; 21 RT 6007-6020; 11 AA 12364-12428.) The combined-effect question therefore does not depend upon reconstructing events outside the record or determining judicial motive.

Each component may be examined for the function it performed. Question 1 asks only whether each must first be held independently unconstitutional or reversible before its interaction with the others may be considered.

Petitioners contend *Chambers* imposes no such categorical prerequisite when interaction itself is the asserted constitutional deprivation. *Chambers* examined combined operation in determining whether due process had been denied. 410 U.S. at 298, 302-03. Interaction does not automatically establish a violation; it permits the interaction itself to be considered. Whether that principle governs fundamental fairness in a civil trial remains unresolved.

F. The Court Should Resolve the Constitutional Rule

The acknowledged circuit disagreement reinforces the recurring importance of the unresolved question without purporting to answer it. Courts repeatedly confront whether combined effects enter civil review,

while cumulative-error decisions generally operate only after errors have been independently identified. *See Ward*, 958 F.3d at 273-74 & n.7.

The Court should grant review to resolve the constitutional rule.

II. This Court Should Resolve Whether the Due Process Clause Permits a State to Enter Judgment on a State-Created Civil Claim When the Jury Instructions and Special Verdict Define Liability More Narrowly than the State’s Governing Law

Bell, *Logan*, and *Oberg* frame Question 2. *Bell* constrains a procedure that prevents meaningful consideration of a matter state law makes material to a protected interest. 402 U.S. at 540-42. *Logan* applies the state-right/federal-process distinction to a state-created employment-discrimination interest. 455 U.S. at 428-37. *Oberg* confirms that a civil jury trial does not categorically end procedural-due-process scrutiny. 512 U.S. at 420-35.

A. *Bell* Establishes that Due Process May Constrain a Procedure that Prevents Meaningful Consideration of Matters the State’s Own Law Makes Material to the Determination

In *Bell*, Georgia provided a hearing before suspending an uninsured motorist’s driver’s license, but the hearing did not permit consideration of whether there was a reasonable possibility that the motorist would be held liable for the accident. That omission mattered because Georgia law made potential liability material to whether the motorist could be

required to post security as a condition of retaining his license. 402 U.S. at 540-42. This Court therefore held that due process required a hearing “appropriate to the nature of the case” at which the liability question could meaningfully be considered. 402 U.S. at 541-42. Question 2 asks whether that principle applies when jury instructions and a special verdict foreclose a basis for liability recognized by state law.

B. *Logan* and *Oberg* Define the Civil Setting in Which the Unresolved Question Arises

Logan carries *Bell*’s state-right/federal-process distinction into the employment-discrimination setting. As discussed in Reason I, *Logan* held that a state-created employment-discrimination cause of action may constitute an interest protected by the Fourteenth Amendment. 455 U.S. at 428-31. Its particular significance here is that although state law creates and defines the substantive interest, the “[m]inimum [procedural] requirements” governing its deprivation remain “a matter of federal law.” *Id.* at 432. Due process affords the claimant an opportunity to present the case and have its merits “fairly judged.” *Id.* at 433.

Oberg supplies the remaining boundary: a completed civil jury trial does not categorically end procedural-due-process scrutiny. 512 U.S. at 420-35. Question 2 nevertheless does not federalize every state-law mistake. Petitioners contend that the jury was never given the full state-law liability question because the instruction and special verdict narrowed the basis on which harassment could be found.

Bell supplies the corresponding principle: when state law makes an issue material to liability, the procedure must permit meaningful consideration of it.

Question 2 asks whether that principle reaches jury instructions and a special verdict that withheld part of the state-law liability inquiry.

C. California Law Supplies the Substantive Baseline

FEHA makes it unlawful for an employer or other covered person, “because of . . . sex,” to harass an employee. Cal. Gov’t Code § 12940(j)(1). The statute further provides that “‘harassment’ because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions,” and that “[s]exually harassing conduct need not be motivated by sexual desire.” *Id.* § 12940(j)(4)(C). California separately requires the existence of a hostile work environment to be determined from the “totality of the circumstances,” *id.* § 12923(c), and expressly addresses “sexually related commentary or conduct” as part of the sexual-harassment framework, *id.* § 12923.

Lyle v. Warner Bros. Television Productions, 38 Cal.4th 264 (2006), confirms several propositions relevant here. FEHA requires harassment to occur “because of sex,” *id.* at 278–81, and the statutory scheme recognizes sexual harassment and gender harassment as forms of harassment because of sex. See Cal. Gov’t Code § 12940(j)(4)(C). Lyle cautions that sexual content alone does not automatically establish actionable harassment; the requisite causal nexus must still exist. 38 Cal.4th at 279–81. But that limitation does not collapse sexual harassment into gender harassment or make “because she is a woman” synonymous with the full statutory category “because of sex.” Lyle also recognizes that conduct need not be personally directed at the plaintiff to contribute to a hostile

environment, *id.* at 284–85, and *Beyda v. City of Los Angeles*, 65 Cal.App.4th 511, 519–21 (1998), explains that a plaintiff’s work environment may be affected by harassment involving others of which she is aware, even if she did not personally witness the conduct. See *Lyle*, 38 Cal.4th at 285 n.7.

In *Miller v. Department of Corrections*, 36 Cal.4th 446 (2005), the court reiterated that hostile-environment claims must be evaluated “in light of the totality of the circumstances.” *Id.* at 462. The plaintiffs themselves had not been propositioned but alleged that widespread sexual favoritism involving other women altered their workplace environment. *Id.* at 451-52. The court held that sufficiently widespread sexual favoritism could create an actionable hostile environment where, viewed in context, it conveyed a demeaning sex-based message throughout the workplace. *Id.* at 462-66.

Roby v. McKesson Corp., 47 Cal.4th 686 (2009), further describes harassment as affecting the “social environment of the workplace” and recognizes that evidence bearing upon another employment theory may also bear upon the hostile environment experienced by the plaintiff. *Id.* at 706, 709-10.

Together, the statutes and California precedent establish that harassment “because of sex” encompasses both sexual harassment and gender harassment, that actionable harassment must satisfy the causal “because of sex” requirement, that hostile-environment liability is evaluated under the totality of the circumstances, and that qualifying conduct involving others may contribute to the environment experienced by the plaintiff.

They do not decide the federal question or require an authoritative California decision specifically condemning “because she is a woman.” The asserted narrowing concerns the difference between what California law makes material to harassment liability and what the jury was instructed and required to decide.

**D. The Special Verdict Independently
Identifies the Liability Question the Jury
was Required to Decide**

During the instruction conference, Petitioners requested the statutory “because of sex” formulation and objected to “because they are women.” Counsel explained the asserted distinction in the context of the claims being tried: “If there were men that were hearing the sex talk, it wouldn’t be because they were men It’s because of sex.” (4 Supp. RT 969; App.95a.) Walmart responded that the relevant element concerned “the protected status, not about the conduct that’s being alleged.” (4 Supp. RT 968-970; App.94a-96a.) The trial court adopted the “because they are women” formulation. (4 Supp. RT 967-970; 973-977; App.92a-101a.)

The dispute concerned the formulation of FEHA’s causal inquiry within the hostile-environment framework California law supplies.

The resulting instruction contained both formulations. CACI No. 2521A introduced Petitioners’ claim as harassment “based on sex,” but its operative element required proof that Washington and Glasgow “was subjected to harassing conduct because they are women.” (9 AA 10587-10588; App.102a-103a.) CACI No. 2522A used the corresponding formulation for the

individual defendants. (9 AA 10589-10590; App.104a-105a.)

The special verdict independently identified the liability question the jury was required to answer. Washington's verdict asked whether she was subjected to harassing conduct "because she is a woman." The jury answered "No." (9 AA 10519-10523; Op. 15-16.)

Glasgow's verdict independently submitted her hostile-environment claims through the corresponding question whether she was subjected to harassing conduct "because she is a woman." (9 AA 10528-10531.)

Walmart's closing employed the same operative formulation as to both petitioners. Respondents told the jury that each plaintiff had to prove that she "was subjected to harassing conduct because she's female," emphasizing that if the conduct was "not because of gender then it doesn't meet this element." (23 RT 6730:4-18; App.69a.) Applying that formulation to Glasgow, respondents acknowledged evidence that Solares discussed her sex life and shared photographs, but argued that the conduct was "not because of Santane's gender" and that "[t]his has to be gender-base[d] because of her being female." Respondents then applied the same formulation to Washington, arguing: "Again, it has to be harassing conduct because she's a woman." (23 RT 6734:4-26; App.70a-71a.) Respondents further argued that this was not a case involving conduct directed at women because they were women and that there was nothing directed at Washington because she was a woman. (23 RT 6735:5-7, 6750:26-6751:1; App.71a-73a.)

The narrowing can be seen directly by comparing California's governing liability standard with the

question the jury was instructed and required to decide. California prohibits workplace harassment “because of . . . sex,” Cal. Gov’t Code § 12940(j)(1), and expressly provides that harassment because of sex includes both sexual harassment and gender harassment, *id.* § 12940(j)(4)(C). It also directs that the existence of a hostile environment be determined from the “totality of the circumstances.” *Id.* § 12923(c). The operative instruction required proof that Petitioners were subjected to harassing conduct “because they are women,” and the special verdict required the jury to determine whether each Petitioner was subjected to harassing conduct “because she is a woman.” (9 AA 10519–10523, 10528–10531, 10587–10590.)

E. The Whole-Charge Analysis Does Not Answer the Federal Question Presented by the Special Verdict

The Court of Appeal acknowledged that Petitioners requested “because of sex” rather than “because they are women,” but concluded that the instructions, considered as a whole, permitted the jury to consider sex-and sexuality-related harassment. (App.44a-46a.) It relied upon portions of the charge describing potentially harassing conduct and language introducing the claims as harassment “based on sex.” (Op. 43-44; 9 AA 10587-10590.)

That reasoning addresses the conduct the jury could consider. The special verdict presents a different question: the causal proposition the jury had to find before that conduct could support liability.

As subsection C establishes, California law supplies the relevant substantive predicates. Harassment must occur “because of . . . sex.” Cal. Gov’t Code § 12940(j)(1).

See also Lyle, 38 Cal.4th at 278-81. Hostile-environment liability is evaluated under the “totality of the circumstances,” Cal. Gov’t Code § 12923(c), and qualifying sex-based conduct involving others may contribute to the environment experienced by a plaintiff. *Miller*, 36 Cal.4th at 462-66; *Lyle*, 38 Cal.4th at 284-85.

Petitioners contend that “because she is a woman” focused the liability inquiry on harassment tied to the particular plaintiff’s gender status, while California separately recognizes sexual harassment and gender harassment as forms of harassment “because of sex.” Cal. Gov’t Code § 12940(j)(4)(C). The difference therefore was not semantic. Petitioners’ theory was that qualifying sexualized conduct—including explicit sexual conversations, intimate photographs, sexualized commentary, and conduct involving both men and women—could contribute to a hostile environment even if the jury did not find that Petitioners were targeted simply because they were women.

No California decision specifically condemning the phrase “because she is a woman” is necessary to frame the federal issue. California’s statutes and controlling decisions define the state-created claim; the federal question is whether due process permits entry of judgment when the jury instructions and special verdict foreclose a basis for establishing liability that California law recognizes.

The special verdict makes that question concrete. CACI No. 2521A introduced the claim as harassment “based on sex” and described conduct potentially constituting harassment, but its operative element required proof that Petitioners were subjected to harassing conduct “because they are women.” (9 AA 10587-10588; App.102a-103a.) CACI No. 2523 separately

defined “harassing conduct” and described conduct that may constitute harassment. (9 AA 10591; App.106a.) The special verdict independently required the jury to determine whether each Petitioner was subjected to harassing conduct “because she is a woman.” (9 AA 10519-10523, 10528-10531.) The jury returned negative findings on that proposition.

The special verdict therefore matters independently of ordinary instructional error. Surrounding language may clarify an ambiguous instruction; the separate written verdict, however, specified the proposition on which the jury had to return its liability finding.

The Court of Appeal rejected the special-verdict challenge because it had concluded that the instructions, read as a whole, permitted consideration of sex- and sexuality-related harassment. (App.46a & n.14.) But permitting consideration of conduct and defining the causal proposition necessary for that conduct to support liability perform different functions. The whole-charge analysis therefore does not itself resolve the federal question.

F. The Separate Intentional-Distribution Findings Do Not Resolve the FEHA Claims Adjudicated Under the Challenged Formulation

Neither petitioner’s hostile-environment claim depended upon proving that Davenport or Solares intentionally distributed Washington’s photographs. Glasgow demonstrates the distinction particularly clearly because she asserted her own hostile-environment claim based on workplace conduct she personally experienced. Glasgow testified that Solares repeatedly discussed explicit sexual matters with her; displayed

Washington’s intimate photograph to her; continued scrolling through photographs and making jokes; and discussed posting the photographs online. (21 RT 6078:2-6082:12, 6084:5-6086:19; App.121a-129a; Op. 9-11.) The verdict separately submitted Glasgow’s FEHA hostile-environment claims and required the jury to determine whether she was subjected to harassing conduct “because she is a woman.” (9 AA 10528-10531.)

The no-distribution findings resolved the separately submitted intentional-distribution theory, not whether other qualifying workplace conduct created an actionable hostile environment.

Question 2 therefore does not require this Court to reconsider the distribution findings, reweigh evidence, or decide ultimate FEHA liability. Those findings may remain intact.

G. Question 2 Presents a Limited Procedural-Due-Process Question, Not a Federal Guarantee of Correct State-Law Adjudication

Question 2 does not seek a federal guarantee of correct state-law adjudication. It rests on the narrower principle that, once state law creates a protected interest and makes a matter material to its adjudication, federal due process may constrain the procedure by which the State deprives a person of that interest.

Bell illustrates the distinction. Georgia law made potential liability important to the decision whether to suspend a driver’s license. This Court held that the State could not, consistently with due process, “eliminate consideration” of that factor from the hearing preceding deprivation. *Bell*, 402 U.S. at 541-42. The

constitutional defect was not an erroneous interpretation of Georgia law; it was a procedure that excluded from the adjudication a matter Georgia's own law made material.

Logan carries that distinction into the adjudication of a state-created employment-discrimination interest. State law defined the substantive interest, while federal due process constrained the procedure governing its deprivation. 455 U.S. at 428-34. Together, *Bell* and *Logan* establish the distinction relevant here: state law identifies the protected interest and matters material to its adjudication; federal law supplies the minimum procedural protection against deprivation of that interest.

Question 2 asks whether *Bell*'s procedural principle reaches this configuration. It does not make every incorrect state-law instruction a federal violation. A dispute over state substantive law, evidentiary weight, or ambiguous language remains a state-law question unless the challenged procedure excludes a matter independently material under state law.

The narrower question is whether due process permits the State to enter judgment when the jury instructions and special verdict foreclose a basis for establishing liability that California law recognizes.

As subsection C explains, California law independently supplies the substantive predicates. Question 2 neither asks this Court to hold that California specifically prohibits the phrase "because she is a woman" nor to decide Petitioners' ultimate FEHA entitlement. It asks whether due process is satisfied when the decisional procedure excludes a matter state law makes material to liability.

The special verdict matters because it identifies the liability proposition actually submitted to the jury without speculation about deliberations or evidentiary weight.

Oberg confirms that a completed civil jury adjudication is not categorically immune from procedural-due-process scrutiny. 512 U.S. at 420-35. Its relevance is limited to that boundary; it does not create a federal entitlement to correct application of state substantive law.

The limiting principle follows. State-law error alone is not a federal due-process violation. The federal question arises when state law establishes what is material to liability but the procedure for deciding the claim does not permit the decisionmaker to consider it. Whether that occurred here is the merits question presented by Question 2.

III. This Case Cleanly Presents Both Questions, and No Adequate and Independent State Ground Precludes Review

A. The Federal Claims Framed by Both Questions Presented Were Preserved in the State Courts

Question 1. The constituent restrictions were challenged at trial; after their interaction occurred, Petitioners' appellate briefing presented the federal fair-trial and combined-effect consequences. The Opening Brief separately challenged the hostile-environment instructions given and refused, including CACI Nos. 2521B and 2522B. AOB 79–83; App.170a-174a) The Reply argued that evidentiary rulings “DENIED PLAINTIFFS DUE PROCESS,” that the

cross-examination restriction implicated “due process requirements,” and that the errors “[s]eparately and in combination” warranted reversal. (ARB 9-10, 24, 38-39; App.175a, 178a-180a.) The immediately following section argued that the hostile-environment instructions given and refused “DEPRIVED PLAINTIFFS OF A FAIR TRIAL.” (ARB 11; App.176a.) Thus, both the federal fairness claim and its asserted combined operation were before the Court of Appeal before rehearing.

On rehearing, Petitioners expressly identified the Fourteenth Amendment as the constitutional source of that already-presented objection. They argued that the challenged formulation “violated Plaintiffs’ rights to due process and a fair trial under the Fourteenth Amendment to the United States Constitution,” deprived them of a “meaningful opportunity to present their claims,” and that refusal of CACI Nos. 2521B and 2522B “compounded the error.” (Pet. Reh’g 4-5, 14; App.181a-183a.) Petitioners then continued the combined-effect contention in the California Supreme Court, arguing that the restrictions “operated together.” (Pet. Review 36-46; App.185a-194a; Reply Supp. Pet. Review 15-17; App.195a-197a.)

The federal claim was therefore presented below. *Chambers* and Taylor supply this Court’s precedent for analyzing that preserved claim. As Yee explains, once a federal claim has been properly presented, a petitioner is not confined to the “precise arguments” made below. *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992).

Question 2. At trial, Petitioners requested “because of sex,” objected to “because they are women,” and explained the distinction. (4 Supp. RT 967-970, 973-

977.) The instruction and special verdict then used the challenged formulation. (9 AA 10519-10531, 10587-10590.)

Petitioners carried that issue into the Court of Appeal. Their Opening Brief challenged the instruction and expressly relied on § 12940(j)(4)(C), explaining that FEHA provides that harassment ‘because of sex includes sexual harassment [and] gender harassment,’ and arguing that the ‘because she was a woman’ formulation failed to capture the sexual-harassment theory presented by the case. (AOB 79–83; App.170a-174a.) Their Reply specifically challenged CACI Nos. 2521A and 2522A and the special verdict for requiring Petitioners to prove harassment “because they are women,” under the heading that the hostile-environment instructions given and refused “DEPRIVED PLAINTIFFS OF A FAIR TRIAL.” (ARB 11, 13-14; App.176a-178a.) The Court of Appeal addressed the issue on the merits, expressly identifying Petitioners’ contention that the jury should have been instructed “because of sex” rather than “because they are women.” (App.44a-46a.)

The rehearing petition then expressly identified the Fourteenth Amendment as the constitutional source of that already-presented fair-trial objection. It argued that narrowing “sex” to “women” removed legally cognizable theories from the jury’s consideration and “violated Plaintiffs’ rights to due process and a fair trial under the Fourteenth Amendment to the United States Constitution.” (Pet. Reh’g 4-5; App.181a-183a.) Petitioners explained that the asserted due-process violation was “not a new claim, but rather the constitutional consequence of the instructional error

raised and preserved throughout the proceedings.” (Pet. Reh’g 4; App.181a-182a.)

Thus, although the Fourteenth Amendment was expressly identified on rehearing, the substance of the objection—the instruction and special verdict, the asserted restriction on the liability inquiry, and the resulting deprivation of a fair trial—had already been presented on appeal. The federal due-process claim was therefore preserved; *Bell*, *Logan*, and *Oberg* supply arguments supporting that claim in this Court. See *Yee*, 503 U.S. at 534-35.

B. No Adequate and Independent State Ground or Alternative Ground Prevents Review

The Court of Appeal’s forfeiture rulings concerned other evidentiary contentions and allegations of trial-court misconduct that Petitioners do not ask this Court to review. (App.33a-36a, 49a.) By contrast, the court reached the trial-time due-process challenge, exclusion of Exhibit 145, the hostile-environment instructions, the requested instructions concerning harassment involving others, and the special-verdict challenge, rejecting each separately. (App.27a-30a, 36a-41a, 44a-48a.) Neither Question Presented therefore depends upon a contention the state court declined to reach on forfeiture grounds.

Nor do the intentional-distribution findings provide an alternative basis for sustaining the judgment on the FEHA hostile-environment claims.

Washington’s verdict confirms the separation: after answering “No” to the intentional-distribution questions, the jury proceeded to distinct FEHA hostile-environment questions against Walmart, Davenport,

and Solares and answered “No” when asked whether Washington was subjected to harassing conduct “because she is a woman.” (9 AA 10519-10523; Op. 15-16.) Glasgow’s claims were independent of Washington’s intentional-distribution theory and were separately adjudicated through the corresponding “because she is a woman” formulation. (9 AA 10528-10531.) Thus, the distribution findings did not terminate or independently resolve either petitioner’s FEHA hostile-environment claim.

The individual state-law rulings likewise do not prevent review of Question 1. This Court may assume, for purposes of the federal question, that Exhibit 145 was excludable under state discovery law and that CACI Nos. 2521B and 2522B were not required under the Court of Appeal’s substantial-evidence analysis. The trial-time ruling likewise may remain intact as a state-law ruling and, as explained in I.E, is not necessary to the narrower interaction sufficient to present Question 1. Question 1 asks whether those individual determinations exhaust the Fourteenth Amendment inquiry when the asserted constitutional injury arises from the interaction among the liability framework, requested hostile-environment context, and proof bearing on the same protected claims. Treating the separate state-law rulings as independently dispositive would assume the answer to the federal question presented.

Question 2 is narrower still. It does not depend upon reversal of the ruling concerning CACI Nos. 2521B and 2522B, and the intentional-distribution findings may remain untouched. The principal candidate for an alternative state ground is the Court of Appeal’s conclusion that the hostile-environment charge, read

as a whole, adequately conveyed California law. But that conclusion was not an alternative basis for rejecting the special-verdict challenge; it was the basis for doing so. The court stated: “Because we find the jury instruction was not erroneous, we reject Washington and Glasgow’s contention the special verdict form was defective because it used the ‘because they are women’ language.” (Op. 44 n.14.)

That reasoning does not furnish an independent state ground avoiding Question 2. The Court of Appeal treated the whole charge as curing the challenged special-verdict wording. Whether that analysis suffices under the federal rule Petitioners seek is therefore embedded in the question presented. Nor does the B-instruction ruling independently sustain the judgment challenged by Question 2: the special-verdict question does not depend upon entitlement to CACI Nos. 2521B and 2522B.

Finally, neither Question Presented requires this Court to reweigh evidence or disturb independent factual findings. If either federal standard differs from that reflected below, the state court can apply the governing rule to the preserved record on remand while retaining authority over California law and unresolved facts. Remaining application issues do not create an adequate-and-independent-state-ground bar. *See Michigan v. Long*, 463 U.S. 1032, 1038-42 (1983).

Howell v. Mississippi, 543 U.S. 440, 443-45 (2005), and *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969), do not suggest otherwise. Those decisions concern federal claims that had not been properly presented to the state courts. As III.A establishes, the preservation history here is materially different: the federal fair-trial and due-process substance was presented in the

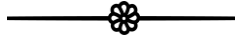
appellate briefing, the combined operation of the restrictions was expressly asserted, and the Fourteenth Amendment was expressly identified on rehearing in connection with the already-litigated instruction-and-special-verdict objection.

C. Both Questions Presented are Outcome-Relevant and can be Resolved on the Existing Record

Question 1. The Court of Appeals disposition of Petitioners' new-trial challenge makes the combined-effect question concrete. The court separately resolved Petitioners' challenges to the evidentiary rulings, trial management, and jury instructions. It then relied on those individual determinations in affirming denial of a new trial: because it had concluded that the trial court did not abuse its discretion in those rulings, it held that denial of a new trial on the same grounds was not an abuse of discretion. (App.48a-49a.) Thus, a different federal rule governing whether the interaction among those procedures must be considered can affect the judgment without requiring this Court to revisit the correctness of each state-law ruling.

Question 2. The connection to the judgment is direct. The operative hostile-environment instruction required Petitioners to establish that they were subjected to harassing conduct "because they are women." (9 AA 10587-10590; App.102a-105a.) The special verdict repeated the corresponding formulation as the liability question the jury was required to answer, and the jury returned negative findings. (9 AA 10519-10531.) Judgment was entered on the special-verdict findings. (App.17a-19a; App.51a-62a.)

The Court of Appeal affirmed the special-verdict ruling through its whole-charge analysis: “[b]ecause” it found the instruction proper, it rejected Petitioners’ contention that the verdict was defective for using the “because they are women” formulation. (App.44a-46a & n.14.) Accordingly, resolution of Question 2 can affect the judgment without factual reweighing: if the federal rule differs from the one reflected below, its application can occur on remand on the existing record.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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