

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MONTENEGRO CRUZ,)
)
 Petitioner,)
)
 v.) No. 21-846
)
 ARIZONA,)
)
 Respondent.)

Pages: 1 through 66
Place: Washington, D.C.
Date: November 1, 2022

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
www.hrccourtreporters.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -

JOHN MONTENEGRO CRUZ,)

Petitioner,)

v.) No. 21-846

ARIZONA,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, November 1, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:23 a.m.

APPEARANCES:

NEAL K. KATYAL, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

JOSEPH A. KANEFIELD, Chief Deputy Attorney General, Phoenix, Arizona; on behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	NEAL K. KATYAL, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	JOSEPH A. KANEFIELD, ESQ.	
7	On behalf of the Respondent	28
8	REBUTTAL ARGUMENT OF:	
9	NEAL K. KATYAL, ESQ.	
10	On behalf of the Petitioner	63
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:23 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 21-846, Cruz versus Arizona.

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE PETITIONER

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

In 2005, John Cruz was sentenced to death. The judge instructed jurors that, without a death sentence, Cruz would face "life imprisonment with a possibility of parole." The judge did so despite this Court's decision 11 years earlier in Simmons. Cruz's jury labored under a seriously wrong idea. Indeed, the jury foreman the very next day said: "We wanted a reason to be lenient, and many of us would have rather voted for life, but we were not given an option to vote for life in prison without the possibility of parole."

Cruz wasn't the only one. Twelve separate times, 12 separate times, the Arizona Supreme Court wrote decisions refusing to apply

1 Simmons. In 2016, this Court summarily reversed
2 all this in Lynch, fundamentally changing
3 capital trials in Arizona. Cruz then used Lynch
4 to seek post-conviction relief under Arizona
5 Rule 32.1(g). Yet, the Arizona Supreme Court
6 refused, saying Lynch didn't change the law; it
7 just changed the application of the law.

8 That interpretation of Rule 32 is not
9 an adequate and independent state ground for
10 three separate reasons. First, to be adequate,
11 an interpretation must be firmly established and
12 regularly followed. This hair-splitting
13 distinction between changes in the law and
14 applications of the law is entirely novel,
15 entirely hand-crafted. The state doesn't even
16 defend it.

17 Second, the decision below
18 discriminates against federal rights. It places
19 defendants like Cruz in a catch-22. To prevail
20 under federal law, they have to argue that Lynch
21 applied a settled rule, but that very argument
22 dooms their claims under state law. It also
23 discriminates against decisions of this Court by
24 giving them narrower effect. And, finally, the
25 decision below is not independent; it's

1 interwoven with federal questions.

2 The Arizona Supreme Court's analysis
3 of Rule 32 turned on its reading of this Court's
4 precedents. Simmons was the law of the land in
5 49 states, all except Arizona. Arizona is an
6 extreme outlier, and for that reason today, it
7 stands alone in this Court. None of the other
8 49 states, not a single one, is supporting them.

9 If I could start with the first point
10 about novelty.

11 JUSTICE THOMAS: Well, let's just talk
12 about what we're considering. I understand
13 Simmons and Lynch, but what I understand the
14 Arizona Supreme Court to be saying, it does not
15 -- under our rules, there's nothing more here,
16 that they simply interpreted their Rule 32. How
17 do we get from that interpretation of their rule
18 to a federal question -- federal issue?

19 MR. KATYAL: Right. Each of these
20 three arguments, Justice Thomas, are things this
21 Court has used before to get to the federal
22 issue. So, first, with respect to novelty, if a
23 state enacts a procedural rule that is only
24 about state law, but it is a barrier to federal
25 claims or is novel in some way, this Court time

1 and again, starting with Justice Holmes in 1904,
2 going to this Court's much more recent
3 decisions, have said that it's got to be firmly
4 established and regularly followed.

5 And that's so for two reasons. One
6 is, if it's a novel rule, it might be
7 discriminating against federal rights, and
8 that's a tell. The other is that you have to
9 provide fair warning to the defendant. And the
10 case law talks about both. And in case after
11 case, Your Honor, this Court has done exactly
12 that on novelty. So that's the first point.

13 The second is the other way -- the
14 second way you get to a federal issue is that
15 this Court polices, indeed, the Court in Walker
16 said it's regularly said that if an
17 interpretation discriminates against a federal
18 right, even if it's purely a matter of state law
19 -- take, for example, this Court's decision just
20 last year in Espinoza versus -- versus Montana.
21 That was purely interpreting a state -- a state
22 constitutional provision, but there was a
23 federal question lurking under that. And that
24 is true here as well because of the
25 discrimination.

1 And then the third is that it's
2 interwoven with federal law. It's not actually
3 a purely -- and I would fight the premise of
4 your question -- a -- a state interpretation --
5 it's not just a state interpretation.

6 And these are three separate
7 arguments. You can disagree with me on any one,
8 but they have to run the table and win all three
9 of them.

10 JUSTICE SOTOMAYOR: Well, counsel --

11 CHIEF JUSTICE ROBERTS: Counsel, you
12 phrased this and present it, for understandable
13 reasons, as hostility to a particular federal
14 rule. But you can also look at it as a neutral
15 rule, a procedural rule. I mean, the state
16 doesn't have to provide collateral review of
17 this particular claim, and they're -- they've
18 decided they're not going to. And you -- and
19 that doesn't exhibit hostility. It's just
20 shaping the availability of collateral review,
21 just as AEDPA does in the federal system.

22 MR. KATYAL: Absolutely, Your Honor,
23 it could be seen that way. But, here, of
24 course, this is a novel interpretation, and that
25 alone, even apart from whether it discriminates

1 or is neutral, that's enough to reject it under
2 this Court's precedents. And then, with respect
3 to whether or not this is even-handed, we
4 obviously don't think it is for the reasons our
5 brief says, we agree with you, Mr. Chief
6 Justice, that if it were truly a neutral rule
7 that withdrew from the field, for example, all
8 post-conviction review, that would be one thing.

9 But, here, Arizona holds out Rule 31.2
10 and says to defendants like Cruz, if there's a
11 significant change in the law, you can come and
12 bring your post-conviction proceeding. Cruz did
13 exactly that, and now it becomes a shell game
14 because then they say, oh, that rule was so
15 clearly established that it didn't -- it's not
16 actually a significant change in the law.

17 That's, of course, the opposite of
18 what the Arizona Supreme Court did in Cruz's
19 very case back in 2008. In 2008, when Cruz
20 brought this, they said -- they -- the -- they
21 said the reverse. And so, you know, the Arizona
22 Supreme Court has been essentially talking out
23 of both sides of its mouth.

24 You said in Simmons this is the rule
25 of the land. Cruz was convicted after Simmons.

1 You said it again in Lynch after the Arizona
2 Supreme Court in 12 published opinions refused
3 to apply Simmons. And now the Arizona Supreme
4 Court turns around and says, oh, because it's so
5 clearly established, now you can't have a 31.2
6 petition. And that's pulling --

7 JUSTICE ALITO: Mr. -- Mr. Katyal, you
8 --

9 MR. KATYAL: -- the chair -- chair out
10 from under the --

11 JUSTICE ALITO: Oh, I'm sorry. You --
12 you began with three points, and if I remember
13 correctly, the first two require us to analyze
14 the opinions of the Arizona Supreme Court as to
15 whether it's novel and -- and I -- but -- but
16 assume that it was always the rule in Arizona
17 that a significant change in the law, whether
18 federal or state, would be covered and that a
19 significant change in the law is different from
20 a significantly new application of the law.

21 Okay. Suppose that was always the
22 rule. Then what would be -- what's -- what is
23 left of your argument?

24 MR. KATYAL: Well, Your Honor, I -- it
25 would be hard for me to understand exactly what

1 they had said before. I can tell you what the
2 Arizona Supreme Court actually has said before
3 if you look at a case like Rendon, because in
4 Rendon, what the Arizona Supreme Court said --
5 and this is true in many different cases -- they
6 say the archetype of a significant change in the
7 rule -- in the law is overturning of precedent.
8 And, in Rendon, that's what happened. They --
9 they overturned an intermediate Arizona Supreme
10 Court precedent. This was just on one thing,
11 the definition of burglary.

12 And what that court said, the Arizona
13 Supreme Court said is, ha, that is something
14 that allows a 31.2(g) petition, and they said
15 this even though "it is not a new rule but
16 rather a corrected definition of the crime."

17 JUSTICE ALITO: Well, as I said, you
18 have arguments that require us to analyze what
19 they've done. And I've looked at that. We will
20 look at it again.

21 But assuming for the sake of argument,
22 this is a hypothetical, that the rule has always
23 been what the Arizona Supreme Court now says the
24 rule is, what is your remaining argument?

25 MR. KATYAL: Yeah. So -- so that

1 would make it -- take away the novelty because
2 that would be firmly established, regularly
3 followed, assuming that that's part of -- built
4 into your hypothetical -- it wasn't, but we can
5 assume that -- it would still discriminate, I
6 think, in practice and operation against federal
7 rights. And what this Court said in Walker is
8 that's the test, not whether it's neutrally
9 written or --

10 JUSTICE ALITO: Well, I meant to make
11 that part of my hypothetical too. So they say
12 that -- that there's no discrimination. We
13 treat changes in federal law the same way we
14 change -- we treat changes in state law.

15 MR. KATYAL: It's almost impossible,
16 Your Honor, to imagine that hypothetical
17 because, you know, like, basically, you know,
18 how can a decision be dictated by Arizona
19 Supreme Court precedent if a decision is
20 overruling Arizona Supreme Court precedent.

21 I mean, the way in which the court
22 below got to what it did is it said at Petition
23 Appendix page 7A that when we overturn precedent
24 that's generally the archetype of a significant
25 change in law.

1 And then they said, well, it's not a
2 significant change in law because Lynch was
3 always the law of the land. It didn't change
4 anything. Simmons was always the law of the
5 land.

6 That -- I think that rationale could
7 only apply to decisions of this Court. I think
8 it's a decision handmade, you know,
9 jerry-rigged, to use Justice Kagan's word from
10 the last argument, only for really a
11 circumstance like this in which the U.S. Supreme
12 Court is overturning something.

13 JUSTICE GORSUCH: Mr. Katyal --

14 MR. KATYAL: So I just don't think it
15 could be written neutrally.

16 JUSTICE GORSUCH: -- I -- I thought I
17 had understood you to respond to the Chief
18 Justice before your colloquy with Justice Alito
19 that if there were an independent and
20 adequate state ground, if they had such a rule,
21 then it would be barred. Is that right?

22 MR. KATYAL: If -- if there were --
23 what -- what's the --

24 JUSTICE GORSUCH: If the State of
25 Arizona had an independent and adequate rule

1 that it's consistently followed, then -- then
2 your claim would be barred?

3 MR. KATYAL: If -- if there truly was
4 one.

5 JUSTICE GORSUCH: Yeah.

6 MR. KATYAL: These are three reasons
7 why --

8 JUSTICE GORSUCH: No, I understand.

9 MR. KATYAL: Yes.

10 JUSTICE GORSUCH: But you -- you can
11 see that there's a world in which --

12 MR. KATYAL: Sure.

13 JUSTICE GORSUCH: -- Arizona wouldn't
14 have to supply this.

15 MR. KATYAL: Correct. Yes.

16 JUSTICE GORSUCH: And, in fact, the
17 federal district court found this argument
18 procedurally barred under 2244, right?

19 MR. KATYAL: Oh, oh, Mr. -- Justice
20 Gorsuch, I don't think that has anything to do
21 with it. There, they found that there was --

22 JUSTICE GORSUCH: But it's plausible
23 that it could be procedurally barred.

24 MR. KATYAL: In -- in federal habeas
25 court, maybe there's a federal habeas barrier.

1 We don't think that there is for reasons our
2 brief explains --

3 JUSTICE GORSUCH: Well -- well --

4 MR. KATYAL: -- but -- but --

5 JUSTICE GORSUCH: -- but 2244 speaks
6 of requiring a decision of this Court to be
7 declared retroactive by this Court.

8 MR. KATYAL: Well, we're --

9 JUSTICE GORSUCH: And the district
10 court found that there was no such decision in
11 this case.

12 MR. KATYAL: But, Justice Gorsuch, the
13 district court is a totally separate proceeding.

14 JUSTICE GORSUCH: I understand that.

15 MR. KATYAL: Here, your grant of
16 certiorari --

17 JUSTICE GORSUCH: I guess I'm just
18 wondering how we can fault Arizona for having a
19 rule -- if it were consistently followed that
20 would effectively parallel the federal rule.

21 MR. KATYAL: Well, Justice Gorsuch, I
22 don't think that whatever is going on in the
23 federal habeas bears on the jurisdiction of this
24 Court under 1257. They're two separate
25 proceedings.

1 And to answer the question presented,
2 which is simply whether or not there is an
3 adequate and independent state ground from the
4 petition of the -- from the -- from the Arizona
5 Supreme Court, I don't think matters to federal
6 habeas.

7 With respect to that, look, we don't
8 doubt that there could be waiver arguments that
9 are available even from direct -- even from
10 review of a state's post-collateral review
11 proceeding. We're not questioning any of that.

12 What we're saying here is that Cruz
13 did everything right. He preserved his argument
14 at every turn, starting from when he was --
15 starting from trial and when he was convicted
16 and then for --

17 JUSTICE GORSUCH: Well, what do we do
18 about that actually? I -- that -- that raises
19 another point in my mind, which is the trial
20 court, admittedly not the Arizona Supreme Court,
21 but the trial court here did find that your
22 client failed to present a jury instruction
23 along these lines to preserve this argument.

24 And so even if we were to find for you
25 and say there was no independent and adequate

1 state bar, all we'd be doing is sending it back
2 to the Arizona Supreme Court to find that he
3 waived the argument in the first place and we've
4 accomplished very little, if at all

5 MR. KATYAL: Well, that -- that was
6 just wrong under this Court's decisions in
7 Simmons and in Lynch. So, in Simmons, it
8 applied --

9 JUSTICE GORSUCH: But we wouldn't be
10 able to review that. That would just be a
11 waiver under state law, and --

12 MR. KATYAL: Oh --

13 JUSTICE GORSUCH: -- if the Arizona
14 Supreme Court were to affirm it --

15 MR. KATYAL: No.

16 JUSTICE GORSUCH: -- you think it's
17 wrong and you could appeal, I understand, but
18 that would be all state law, right?

19 MR. KATYAL: No, Justice Gorsuch.
20 That's exactly a federal question. This Court
21 in Simmons and in Lynch said --

22 JUSTICE GORSUCH: Waiver is a federal
23 question?

24 MR. KATYAL: Well, they -- the -- what
25 -- the reason that they're claiming waiver,

1 which is you didn't seek a jury instruction --

2 JUSTICE GORSUCH: Right.

3 MR. KATYAL: -- here, Cruz sought to
4 present evidence about his parole ineligibility,
5 and at pages 163 to 167 of the plurality in
6 Simmons and at 175 to 179 of Justice O'Connor's
7 concurrence, it says either suffices, seeking
8 evidence of parole ineligibility or a jury
9 instruction. It definitely can't be the case
10 that you couldn't or a federal court couldn't
11 review that. That is a purely federal matter.

12 JUSTICE GORSUCH: Last question, I
13 hope. In Beard, Justice Kennedy said that when
14 we -- when we approach the question of the
15 consistency of state courts' decision-making in
16 this area, adequate -- interpreting their own
17 laws, their own procedural rules, 32.1, whatever
18 it is, we have to give those state supreme
19 courts some leeway to develop their own
20 jurisprudence that we would expect to allow
21 ourselves and other federal courts.

22 What's your response to that?

23 MR. KATYAL: We -- we absolutely agree
24 with all of that, Justice Gorsuch. The test has
25 always been --

1 JUSTICE GORSUCH: So we should take
2 that as a given?

3 MR. KATYAL: -- firmly established,
4 regularly followed. That's what Justice Kennedy
5 says in that case. That's what their own brief
6 in opposition admits at page 11 is the standard.
7 There is no way you can get to regularly
8 followed and firmly established, this
9 application of the law concept. That's entirely
10 hair splitting.

11 And if you want to note just how hair
12 splitting it is, because you mentioned the trial
13 court proceedings, look at what these
14 prosecutors said to the trial court. This is
15 Joint --

16 JUSTICE GORSUCH: But I -- I -- I -- I
17 just -- on my question, I just -- you agree with
18 Justice Kennedy in Beard?

19 MR. KATYAL: Yes.

20 JUSTICE GORSUCH: Okay.

21 MR. KATYAL: I mean, so you could --
22 you know, so as long as it's predictable,
23 provides fair warning and firmly established,
24 absolutely. This is the opposite.

25 This is what the prosecutor said at

1 Joint Appendix page 307: "Lynch overruled a
2 well-established line of Arizona Supreme Court
3 opinions" holding Simmons did not apply in
4 Arizona. It was an unambiguous rule that the
5 defendants were not entitled to Simmons
6 instructions.

7 That's what they said then. Take a
8 look at now what they're saying at red brief,
9 page 1. They say the exact opposite. They say
10 Simmons was well-established.

11 JUSTICE JACKSON: Can I ask you, how
12 much of your -- the -- the firmly established
13 and regularly followed principle relies on bad
14 faith by Arizona?

15 Does it -- does it matter? You know,
16 you say novelty is one thing and you define it
17 in this way, and then discrimination, the result
18 is unfair. Does any of that turn on Arizona
19 doing this on purpose?

20 MR. KATYAL: No, no, not at all. So
21 it's purely about whether it's regularly
22 established and firmly -- firmly established and
23 regularly followed.

24 And the reason for that is it's kind
25 of almost like, you know, other doctrines in law

1 in which you're using it as a tell. You can't
2 actually figure out motivations. You're not
3 worried about that.

4 You just simply ask, is there fair
5 warning for the defendant? Is this a
6 predictable rule? This is the very opposite of
7 a predictable rule, and, indeed, it's so
8 unpredictable that after the prosecutor said
9 this in the trial court, the trial court on
10 post-conviction review said, quote, and this is
11 at Petition Appendix 15A, "The rule announced in
12 Simmons and Lynch is not a well-established
13 constitutional principle."

14 The Arizona Supreme Court's
15 consistently held otherwise in at least nine
16 separate opinions. So this is essentially --

17 JUSTICE GORSUCH: Mr. Katyal, I
18 thought -- I thought -- I'm sorry to interrupt,
19 but I -- I thought that -- that why they were
20 doing this was important. Whether we're looking
21 for hostility or just finality is kind of the
22 question.

23 And Justice Kennedy in Beard said that
24 what we should be looking for is a showing of a
25 purpose or pattern to evade constitutional

1 guarantees. I thought you agreed with that.

2 MR. KATYAL: Oh, he certainly does --
3 so that's essentially gravy, Justice Gorsuch.
4 So we don't need to show hostility. That's what
5 he's saying is one way in which you can show
6 that the novelty doctrine is enough. But it is
7 certainly not the only means.

8 And I think going all the way back to
9 Justice Holmes' opinion in Rogers in 1904 all
10 the way through all of the different cases,
11 sure, some of them, like the NAACP cases, do
12 talk about hostility, but it has never been a
13 requirement, and for one very simple reason,
14 half of the novelty doctrine is based on fair
15 warning to the defendant. Another part is based
16 on hostility to federal rights.

17 JUSTICE GORSUCH: Okay. Thank you.

18 MR. KATYAL: And so --

19 JUSTICE KAGAN: Could you show a
20 hostility in this case?

21 MR. KATYAL: Oh, absolutely. This is,
22 I think, the quintessential example, Justice
23 Kagan. Again, doesn't turn on it. It's
24 sufficient but not necessary.

25 And so, if you think about just what

1 the Arizona Supreme Court did here and, you
2 know, Cruz brings his direct review petition,
3 they say Simmons doesn't apply in 2008. Twelve
4 separate defendants bring their cases, all of
5 them, they say Simmons doesn't apply.

6 This Court then summarily reverses
7 that in Lynch in 2016, so then now they've said
8 twice, hey, Simmons does apply, this rule does
9 apply, and then the Arizona Supreme Court turns
10 on a dime and says, oh, actually, Simmons has
11 been the law all along, the exact opposite of
12 what they've been saying, the exact opposite of
13 what even the trial court on post-conviction
14 review in this case said. This is a very
15 unusual case, which is why I suspect Arizona
16 stands alone in this Court.

17 And to be sure, there are broader
18 arguments we're making about discrimination in
19 federal law and so on. We don't think you have
20 to reach any of that.

21 We think you can just simply say this
22 is a jerry-rigged interpretation for this case
23 only. There's not -- the opposite of regularly
24 followed and firmly established and leave it at
25 that.

1 JUSTICE SOTOMAYOR: Counsel --

2 JUSTICE ALITO: Mr. Katyal, whether
3 Arizona stands alone or not doesn't have much to
4 do with the question that we have to decide.
5 But why would we expect other states to file in
6 a case that involves the kind of stuff that
7 you've been talking about the interpretation of
8 a -- one particular state procedural rule?

9 MR. KATYAL: Well, because my friend
10 on the other side says, if you do this, it's
11 going to open federal court review to other
12 states and things like that.

13 And our only point here is to just
14 simply say, you know, no other state's worried
15 about it because I think this is a really unique
16 fact pattern. There are 27 states that have the
17 death penalty. Nothing about that. Sixteen
18 states have --

19 JUSTICE ALITO: Okay. Well, I -- I
20 don't --

21 MR. KATYAL: -- parole ineligibility.

22 JUSTICE ALITO: -- if it's a really
23 unique fact pattern, then I don't know what --
24 whether -- why it matters whether other states
25 are here or not.

1 To get back to the question I was
2 trying to address in my prior question, suppose
3 Arizona says or any state says that we will
4 limit this form of collateral review to
5 situations in which we, in our judgment, believe
6 that there has been a significant change in the
7 law, including federal law. So it's solely
8 their judgment as to whether there's been a
9 significant change or not. Is there anything
10 wrong with that?

11 MR. KATYAL: I think there could be
12 under this Court's precedents in Danforth and
13 Yates. We don't think you have to get there,
14 but I think those cases do set forth a minimum
15 amount -- a minimum floor of retroactivity. And
16 if the state post-conviction review proceeding
17 isn't open to them, to certain federal claims,
18 then I think it could present a problem under
19 this Court's decisions.

20 JUSTICE ALITO: So this is your
21 argument about independence?

22 MR. KATYAL: It's an argument -- I
23 think it would probably be more about adequacy,
24 Justice Alito, that basically the state is not
25 offering an adequate ground because that -- that

1 forum is only open to certain claims.

2 Now, again, our point is you don't
3 need to have post-conviction review, but if you
4 do so, it's got to be even-handed. It's got to
5 be done in advance with notice for a defendant.
6 Someone like Cruz did everything right, making
7 his objection at the trial, making it at
8 sentencing, making it after sentencing on direct
9 review, filing his post-conviction review
10 proceeding soon after this Court's decision in
11 Lynch. And yet they turn on a dime and say, oh,
12 no, now there's a new interpretation of 32.1.

13 And I think you should, if you might,
14 ask my friend on the other side, name one
15 precedent ever when the Arizona Supreme Court,
16 indeed, any court in Arizona, said 31.2(g) is
17 not met when precedent has been overturned.

18 They can't point to a single example.
19 We point to many the other way, including most
20 prominently the Rendon decision. And so --

21 JUSTICE ALITO: Mr. Katyal, before
22 your time, your regular time is up, why isn't
23 the situation that I posited the same as the
24 situation in Stewart versus Smith?

25 MR. KATYAL: I'm so sorry, Justice

1 Alito. I'm not familiar with Stewart versus
2 Smith.

3 JUSTICE ALITO: Okay.

4 MR. KATYAL: I don't think that was
5 briefed in this case.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas, anything further?

9 Justice Alito?

10 JUSTICE SOTOMAYOR: Just one question,
11 Mr. Katyal. I think underlying some of Justice
12 Alito's questions and Justice Gorsuch's
13 questions was a view, not a belief, that the
14 Arizona Supreme Court interpretation of Rule
15 32.1(g) isn't completely novel interpretation
16 but only a reasonable extension of that court's
17 Rule 32.1(g) jurisprudence to a new context.

18 Why do you think that's wrong?

19 MR. KATYAL: Because it's literally
20 the opposite of the rule that's been applied in
21 cases like Rendon, in which they say overturning
22 precedent is the archetypal example of a
23 significant change in law. This idea that
24 there's -- that application of the law is
25 somehow the distinction, whatever that is, it's

1 not regularly followed. It's certainly not
2 firmly established.

3 This rule, 31.2(g), has been around
4 for decades. Not a single court has ever
5 interpreted it this way. And it has been the
6 time-honored rule, Justice Sotomayor, of this
7 Court, starting with Justice Holmes in 1904 but
8 going to Ward versus Board, going to Patterson,
9 going to Flowers, going to Bouie, going to Ford
10 versus Georgia, in which Justice Thomas was on
11 that unanimous decision. All of these cases are
12 ones in which this Court says that's a novel
13 interpretation, you can't do it. Maybe going
14 forward you can, but certainly not to people
15 like Cruz, and we know it made a difference in
16 this case.

17 JUSTICE SOTOMAYOR: Now Stewart versus
18 Smith was briefed in the red -- was mentioned in
19 the red brief on page 16. Do you want to take a
20 look at it? After your --

21 MR. KATYAL: I'll have a rebuttal --

22 JUSTICE SOTOMAYOR: Okay.

23 MR. KATYAL: -- if I could.

24 JUSTICE SOTOMAYOR: Oh, you will.

25 Okay. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 Okay. Thank you, counsel.

3 Mr. Kanefield.

4 ORAL ARGUMENT OF JOSEPH A. KANEFIELD

5 ON BEHALF OF THE RESPONDENT

6 MR. KANEFIELD: Mr. Chief Justice, and
7 may it please the Court:

8 On May 26, 2003, the Petitioner
9 murdered Tucson Police Officer Patrick Hardesty
10 in the line of duty by shooting him five times
11 at point-blank range. He comes here today on
12 appeal of a successive state post-conviction
13 judgment to obtain a new penalty phase so that
14 he can request the parole ineligibility
15 instructions under *Simmons v. South Carolina*, a
16 case which predated his trial by over a decade.

17 The Arizona Supreme Court's holding
18 that Rule 32.1(g) precludes Petitioner's request
19 for successive post-conviction relief is
20 grounded in the core principle of finality
21 and is adequate and an independent state ground
22 for its judgment.

23 The holding is adequate because Rule
24 32.1(g) has been firmly established and
25 regularly followed. Under the rule, Arizona's

1 indisputable interest in finality of criminal
2 convictions can only yield to a claim based on
3 those rare decisions announcing a new rule of
4 law or a significant statutory or constitutional
5 amendment. Here, Petitioner did not make that
6 showing.

7 This Court's 2016 decision in Lynch
8 did not change the Simmons right. Instead, it
9 merely corrected the Arizona Supreme Court's
10 erroneous application of the Simmons rule in the
11 unique context of Arizona's sentencing and
12 parole statutes. Thus, the Arizona Supreme
13 Court held that Lynch was not a significant
14 change in the law under the rule, which is a
15 state law holding.

16 The Arizona Supreme Court's holding is
17 also independent because its significant change
18 analysis under the first prong of Rule 32.1(g)
19 does not require any determination on the merits
20 of Petitioner's federal law claim. This Court
21 looked only to whether Lynch significantly
22 changed existing law, which is a state
23 procedural question.

24 For these reasons, this Court should
25 find that the Arizona Supreme Court's ruling was

1 adequate and independent.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: If the Arizona
4 Supreme Court had decided Lynch, would it have
5 been a significant rule?

6 MR. KANEFIELD: No, Your Honor. It
7 would have --

8 JUSTICE THOMAS: A significant change?

9 MR. KANEFIELD: It -- it would have
10 been the same as this Court, same analysis.

11 JUSTICE THOMAS: Have there been
12 examples where the Arizona Supreme Court changed
13 one of its precedents or overruled one of its
14 precedents and then said it wasn't a significant
15 change?

16 MR. KANEFIELD: We haven't found any
17 specific example of where that's occurred, Your
18 Honor. But this -- that -- that -- doesn't say
19 --

20 JUSTICE JACKSON: So then how can you
21 so -- be so confident that if they had decided
22 Lynch, that wouldn't be a significant change? I
23 mean, if that's not the way the rule has been
24 applied in other situations, then -- then why
25 was the answer to Justice Thomas's first

1 question I know for sure that if Arizona had
2 decided Lynch, that would not count?

3 MR. KANEFIELD: Well, I guess we don't
4 know for sure, but we --

5 JUSTICE JACKSON: Okay.

6 MR. KANEFIELD: -- we can only
7 speculate, Your -- Your Honor. But I -- I --
8 this just doesn't come up that often. So I want
9 to make sure I'm -- I'm understanding the
10 Court's question.

11 There are situations where the Arizona
12 Supreme Court has applied the rule where a case
13 has interpreted a statute for the first time,
14 like the Shrum case, and said that that was not
15 a significant --

16 JUSTICE JACKSON: But what about the
17 -- so -- so what about the application of
18 32.(g)? In situations in which Arizona
19 announces a new legal rule, substantively, are
20 those situations in which 32.(g) has ordinarily
21 been applied because there was a significant --
22 there was a change in the law?

23 MR. KANEFIELD: Yes, Your Honor. I
24 guess the case that comes to mind is the Slemmer
25 case cited where -- it -- it -- it wasn't a

1 court decision. It was -- well, let me make
2 sure I'm getting this right. The Arizona
3 Supreme Court -- there was a subsequent decision
4 involving the burden-shifting self-defense
5 instruction where the court, an Arizona
6 appellate court, determined that it had been
7 getting it wrong, and the court did hold that
8 that was a -- a significant change because the
9 rule changed before --

10 JUSTICE JACKSON: But that -- why
11 isn't that this very situation if you take
12 Justice Thomas's hypothetical? I understood him
13 to say Arizona had been applying -- had been
14 rejecting the Simmons principle so that the law
15 in Arizona was that you don't get this jury
16 instruction, and then, hypothetically, if -- if
17 the Arizona court decided Lynch, suddenly
18 they're saying, okay, now you do get that
19 principle, why isn't that the case in which
20 32.(g) would apply?

21 MR. KANEFIELD: Because, Your Honor,
22 the rule only applies in significant changes,
23 and the -- and the Arizona Supreme Court has
24 made that very clear, that that requires a clear
25 break from the past, a transformative event.

1 And, yes, the archetype is overruling prior
2 precedent, but, here, the rule was the rule in
3 Simmons. It has never changed. This --

4 JUSTICE KAGAN: Well, but it wasn't --

5 JUSTICE BARRETT: But doesn't the --

6 JUSTICE KAGAN: -- the rule in Simmons
7 in Arizona. I mean, you know, maybe I'm just
8 being simple-minded about this, but at point A,
9 Simmons was not operative in Arizona, and in
10 point B, Simmons was operative in California. A
11 change in the law.

12 MR. KANEFIELD: Well, not a -- every
13 precedent is a change to some extent, but they
14 --

15 JUSTICE KAGAN: That's a big change.

16 MR. KANEFIELD: Yes. Well --

17 JUSTICE KAGAN: I mean, the right is
18 not there to be invoked. Now the right is there
19 to be invoked. And that happened as a result of
20 Lynch. Now it's true it should have happened
21 earlier, but in Arizona, Simmons could not be
22 invoked. The -- you know, the -- the defendant
23 would have been told too bad. Now the right can
24 be invoked. That's as big a change of law that
25 there is.

1 MR. KANEFIELD: Your Honor, I just
2 respectfully disagree. That's not the way
3 the -- the Arizona Supreme Court approaches the
4 interpretation of the significance for purposes
5 of Rule 32.1(g). It has to be the -- a change
6 to the underlying rule, not just a change to the
7 application, which Arizona clearly got it wrong.
8 This Court told the Arizona Supreme Court so.

9 I think the other thing I would point
10 out was just, obviously, the rule in Simmons
11 never changed, but the -- the --

12 JUSTICE KAGAN: The rule in Arizona
13 was that Simmons did not apply. Then the rule
14 in Arizona became Simmons did apply.
15 Significant change?

16 MR. KANEFIELD: Not -- not --

17 JUSTICE KAGAN: It sounds like a
18 significant change.

19 MR. KANEFIELD: It's -- it's not a
20 significant change. It's -- it's a -- it's a --
21 it was a misinterpretation. And maybe it would
22 help to look back at what happened in Simmons,
23 where the South Carolina law clearly said that
24 if you had a prior conviction, you were parole
25 ineligible. And this Court held in Simmons that

1 -- that -- the state law has to absolutely
2 prohibit the defendant's release on parole. So
3 that was clear. But, in Arizona, it wasn't --
4 it wasn't clear because --

5 JUSTICE JACKSON: So you're saying
6 it's a change, it's just not significant, we're
7 focused on the significant.

8 MR. KANEFIELD: Absolutely, Your
9 Honor. That -- that is what -- that's a
10 threshold to -- to -- coming into state habeas
11 court in Arizona, that there has --

12 JUSTICE JACKSON: So what are your
13 hallmarks for significant? So, as we're all
14 agreeing now, there's definitely a shift in
15 Arizona because now they're recognizing Simmons,
16 but in order to be significant for the purpose
17 of Rule 32.(g), what -- what do we have to see?
18 Or what does Arizona say they have to see?
19 Because, I mean -- yeah.

20 MR. KANEFIELD: So the -- the --
21 it's -- the Shrum case of 2009, Arizona Supreme
22 Court case which we cited, that's where the
23 court set forth what the -- how -- what the rule
24 is in interpreting that, and that's -- that --
25 there has to be a clear break from the past.

1 There has to be a transformative event. It has
2 to be a rare occurrence where the rules actually
3 change.

4 JUSTICE JACKSON: A clear break from
5 whose perspective? I mean, clearly, it's --
6 it's a clear break from the courts of Arizona's
7 perspective. Do you at least concede that?

8 MR. KANEFIELD: It's -- yes.

9 JUSTICE JACKSON: Okay.

10 MR. KANEFIELD: And the -- and the
11 example that the court give -- is -- gave below
12 is the Ring case from this Court. Before Ring,
13 jury aggravator -- death sentence aggravators
14 could be decided by a judge. After Ring, they
15 had to be decided or determined by a jury. That
16 was a significant change.

17 JUSTICE BARRETT: But, counsel, don't
18 you think this distinction -- I mean, as I
19 understand it, it's this application of law
20 versus the underlying law itself that drives
21 your determination that this wasn't a
22 significant change for purposes of 32.1(g).

23 It seems kind of artificial, and as I
24 understand it, you know, the -- the novelty of
25 it is you hadn't had it before. This was an

1 extension of the law, extension of interpreting
2 32.1(g). It just seems like hair splitting.

3 MR. KANEFIELD: Well, Your Honor, it's
4 not -- we just don't read this Court's
5 interpretation of novelty the same way. This
6 obviously is the first situation that it's been
7 presented to the Arizona Supreme Court in this
8 context.

9 I -- I think Justice Gorsuch is
10 pointing out how this Court said in Beard it's
11 got to -- you've got to give the state some
12 flexibility, especially when it's applying and
13 it's fleshing out its rule for the first time.

14 So, here, you've got a situation where
15 the rule in Simmons was never changed, but this
16 Court came in and summarily reversed the Arizona
17 Supreme Court and said you've got -- you've got
18 it wrong. You're -- you're looking at your
19 statutes the wrong way in light of what we said
20 in Simmons. So they clarified that going
21 forward.

22 But the underlying rule never changed.
23 So I -- I -- it -- it doesn't seem to be novel.
24 And one thing I'd point out --

25 JUSTICE SOTOMAYOR: How can you say

1 that, counselor? Up until this decision, all
2 prior Arizona's cases applying Rule 32.1(g)
3 asked whether there had been a significant
4 change in Arizona law.

5 And Mr. Katyal is right that it was
6 always was precedent overruled. And we even had
7 it in a federal case, State versus -- this is an
8 Arizona case, State versus -- I'm -- I'm
9 pronouncing it wrong, Poblete --
10 P-O-B-L-E-T-E -- federal law --

11 MR. KANEFIELD: Poblete.

12 JUSTICE SOTOMAYOR: How do you say it?

13 MR. KANEFIELD: Poblete.

14 JUSTICE SOTOMAYOR: Poblete. Okay. I
15 should have said it in Spanish to start with.
16 It is Poblete.

17 MR. KANEFIELD: I had it wrong too,
18 Your Honor.

19 JUSTICE SOTOMAYOR: That's what
20 happens when -- that's what happens when I try
21 to Americanize phrases.

22 (Laughter.)

23 JUSTICE SOTOMAYOR: Poblete. Federal
24 law changed Arizona's view, okay, changed
25 Arizona's law on the Padilla question. And

1 there Arizona applied 32.1(g). Here, however,
2 Arizona says, nah, it asks whether there's been
3 a significant change in Supreme Court -- Supreme
4 Court law, not on Arizona law.

5 How is that not a novel
6 interpretation? It's not a different context.
7 It's a different test altogether.

8 MR. KANEFIELD: Yes.

9 JUSTICE SOTOMAYOR: So, when you're
10 applying a new test, you're missing all the
11 issues of why novelty is important because we
12 want to give people fair notice, right, and how
13 could anyone have imagined the hair splitting
14 that Arizona went through right now. All it has
15 said in the past is, if our precedents have been
16 overturned, that's 32.(g).

17 MR. KANEFIELD: Well -- well, Your
18 Honor --

19 JUSTICE SOTOMAYOR: 1.(g) I mean. But
20 --

21 MR. KANEFIELD: Sorry. I didn't miss
22 --

23 JUSTICE SOTOMAYOR: Yeah. I guess the
24 bottom line is, how is that not merely something
25 radically different?

1 MR. KANEFIELD: I'd say that --

2 JUSTICE SOTOMAYOR: It's a new test,
3 it's not a new context.

4 MR. KANEFIELD: Your Honor, I just
5 respectfully disagree. I mean, we --

6 JUSTICE SOTOMAYOR: I know you
7 disagree, but explain it to me.

8 MR. KANEFIELD: Yes. The -- again,
9 the -- we see that test as simply a restatement
10 or an extension of the test that the Arizona
11 Supreme Court long ago said was how the court
12 was going to approach interpretation --

13 JUSTICE SOTOMAYOR: Show me one
14 Arizona case before this one where either the
15 Supreme Court of the United States or the
16 Supreme Court of Arizona had overruled a
17 precedent and it had not applied 32.1(g).

18 MR. KANEFIELD: I -- I can't point you
19 to that, Your Honor. I -- all I can is echo the
20 point made by Justice Gorsuch that in this
21 Court's decision in Beard and subsequently in
22 Walker that these -- at -- at some level, you've
23 got to give the Arizona Supreme Court a chance
24 to flesh out its own rule, and that's what it
25 was doing. This was a very unique situation.

1 You know, once it --

2 JUSTICE SOTOMAYOR: But it's the only
3 unique situation where, for seven cases, it
4 refused to apply our precedent where today there
5 is an amicus brief by the Arizona Capital
6 Representation Project that says that it's even
7 refusing to apply Lynch today. It's finding
8 every reason not to apply Lynch.

9 MR. KANEFIELD: Yeah.

10 JUSTICE SOTOMAYOR: At a certain
11 point, don't we say stop?

12 MR. KANEFIELD: Well, Your Honor, I --
13 I don't -- I disagree with that
14 characterization. The -- the Arizona Supreme
15 Court has absolutely applied Lynch, and we cite
16 to all the cases where they have. There --
17 there's -- and remember, there's factual issues
18 that underlie the Simmons claim. There has to
19 be a showing of future dangerousness.

20 And -- and so there's issues that
21 have -- that have to be vetted in these cases.
22 It's not -- it's not simply just you get a new
23 resentencing as a result of the Lynch case. So
24 every case is -- has to stand on its own facts
25 and is going to apply differently.

1 JUSTICE JACKSON: But can we go back
2 to -- to Justice Sotomayor's main point there,
3 which is I understand the concept of we have to
4 give states flexibility, this is a new
5 situation, in -- the idea of application versus
6 something else is kind of new and so we're
7 announcing it here for the first time.

8 But I wonder whether this isn't a
9 place where the bad faith part of it comes in,
10 that to the extent that you would have otherwise
11 had a presumption that you needed some time to
12 work out your interpretation of this rule, in
13 this very unique situation, why shouldn't we say
14 you don't really get that presumption because
15 your friend on the other side says 12 times the
16 court told you what the law was and you refused
17 to apply it?

18 MR. KANEFIELD: Well, Justice Jackson,
19 may -- maybe -- it might help by putting some
20 context into how this came about, because before
21 2002 -- before Ring, this was really a nonissue
22 in Arizona, so even though Simmons was decided
23 in 1994, until -- from 1994 to 2002, judges
24 made these determinations --

25 JUSTICE JACKSON: I'm sorry, what is

1 the "this"? This is -- you mean whether or not
2 you get to have this instruction?

3 MR. KANEFIELD: Well, before -- yes,
4 before it ever was an issue in Arizona,
5 because -- because judges made the determination
6 of -- of death and aggravators and sentencing,
7 right.

8 So then Ring comes out and now Arizona
9 now has to apply Ring. Juries are going to make
10 the -- the aggravator determination. So the
11 first time that the issue came up was actually
12 in this case itself. So this is -- now we're
13 in -- the crime was committed in 2003. His
14 trial was in 2005.

15 So the Arizona Supreme Court's trying
16 to figure out how the -- the -- the Simmons
17 claim applies here. It -- it was not properly
18 presented below. I'd respectfully disagree with
19 my friend --

20 JUSTICE JACKSON: So why doesn't that
21 undermine your claim then? I thought you were
22 saying ultimately that the reason why this is
23 not a -- a significant change is because this
24 was the way the law always was and so that's how
25 our rule -- why our 32(g) now bars him.

1 But you're suggesting with this part
2 of the story that Arizona wasn't really sure of
3 what the law was before, that they can't now
4 say, oh, it was so settled that you don't get
5 the benefit of collateral review because they
6 hadn't really sorted it out early on.

7 MR. KANEFIELD: Yes, Your Honor, I
8 understand the question, but the -- the -- I
9 mean, the Simmons rule is -- is clear. I mean,
10 the holding is clear that if the future
11 dangerousness is at issue, then the defendant
12 can ask for a parole ineligibility instruction
13 through either instruction or argument.

14 What was unclear was whether parole
15 was unavailable in Arizona. It -- because the
16 problem was the -- in the criminal sentencing
17 statutes, these are the statutes that the judges
18 and the -- and the prosecutors and the defense
19 counsel are looking at, it said at the time that
20 there were three options. There was either --
21 there was either the death penalty, there was a
22 natural life sentence, or there was life with
23 the possibility of release or parole after 25
24 years. It said that.

25 The -- the issue was in a separate

1 title, Title 41, the administrative section for
2 how parole is actually undertaken by the Arizona
3 Board of Executive Clemency, the legislature --
4 the Arizona legislature flipped off the switch.
5 So it's not even clear to us if -- if -- if
6 anyone was necessarily even aware of that early
7 on in the case.

8 So -- and then -- and then take -- you
9 have to remember, in Simmons, and -- and -- and
10 as I read this before, this Court, you know,
11 very clearly said that the state law has to
12 prohibit the defendant's release on parole, so
13 -- it didn't, though. It had that -- that --

14 JUSTICE JACKSON: I see. So you're
15 not at fault. It was confusing. You didn't
16 really know. It was possible that he wasn't
17 getting parole, or he would -- would get parole,
18 and so it may not apply.

19 MR. KANEFIELD: He might get it after
20 --

21 JUSTICE JACKSON: I understand.

22 MR. KANEFIELD: -- 25 years, but --
23 let's -- you know --

24 JUSTICE JACKSON: All right. So
25 forget the bad faith then. I mean, you were --

1 you were doing your best in all of this time.

2 MR. KANEFIELD: It was definitely not
3 bad faith.

4 JUSTICE JACKSON: Okay.

5 MR. KANEFIELD: Absolutely not bad
6 faith by the Arizona Supreme Court.

7 JUSTICE JACKSON: So then we come now
8 to today, and the Supreme Court makes -- this
9 Court makes very clear that in this situation he
10 is supposed to get it. I'm just still wondering
11 why the rule for collateral review does not
12 allow for that to be considered a change from --
13 a significant change from the time in which
14 Arizona was confused about whether he gets it or
15 not.

16 MR. KANEFIELD: I -- I understand.
17 It's just not the way the Arizona Supreme Court
18 approaches significance. I mean, this is a --
19 the Arizona -- remember, and this point was made
20 in some of the questioning to my colleagues,
21 that Arizona doesn't have to allow for this PCR
22 process to begin with, but they do in Rule
23 32.1(g). They allow for a successive PCR to
24 occur, and in that rare situation -- and I'm
25 quoting Justice Hurwitz's majority opinion in

1 the Shrum case -- it's got to be a rare
2 situation where the underlying rule of law has
3 changed.

4 It's not going to happen very often,
5 so it doesn't mean just because it -- it doesn't
6 happen very often or it has to be this -- this
7 -- the way -- the context in which it's come up
8 here, that it's -- that it's somehow inadequate.

9 JUSTICE JACKSON: I thought --

10 JUSTICE KAGAN: I mean, Mister --

11 JUSTICE JACKSON: -- we -- I thought
12 we agreed there was a change, there was just not
13 significance. So now we're saying it has to
14 change?

15 MR. KANEFIELD: Well, every -- every
16 appellate decision interpreting a statute is --
17 is a change in some respect. So that it's not
18 just whether there's a new case that maybe a
19 defendant would have benefited from had that
20 case been in existence at the time of his trial.
21 That's -- that happens all the time. They --
22 you know, the -- they are -- they -- they
23 finalize their direct appeal. They finalize
24 their as-of-right habeas. Maybe they're even
25 finalizing their federal habeas. But it doesn't

1 mean that a subsequent case, just because it
2 comes out and -- and may -- maybe it involved an
3 interpretation of statute that -- that would
4 have benefited the defendant, that that's a
5 significant change. That's just not how the
6 Arizona Supreme Court approaches that rule.

7 JUSTICE KAGAN: Mr. Kanefield --

8 MR. KANEFIELD: Yes.

9 JUSTICE KAGAN: -- bad -- bad faith or
10 not, I think Kafka would have loved this. Cruz
11 loses his Simmons claims on direct appeal
12 because the Arizona courts say point-blank
13 Simmons has never applied in Arizona. And then
14 he loses the next time around because the
15 Arizona courts say Simmons always applied in
16 California. I mean, tails you win, heads I
17 lose, whatever that expression is? I -- I mean,
18 how -- how can you run a railroad that way?

19 MR. KANEFIELD: I -- Your Honor, it's
20 the nature of successive habeas that he
21 absolutely had an opportunity. He was never
22 deprived of his ability to exercise his claim.
23 He didn't do it right. He didn't present -- he
24 didn't do like the defendant in Lynch did on
25 direct appeal, on habeas. He didn't even do it

1 in his federal habeas. And so --

2 JUSTICE KAGAN: Well, he didn't have a
3 claim in Arizona. I mean, Arizona had made
4 completely clear you don't have a Simmons claim.
5 Then, after Lynch, after this Court says we
6 don't know what Arizona is doing -- I mean, a
7 summary reversal is pretty -- that's a high --
8 that's a high bar. We don't know what Arizona
9 is doing. It's clearly violating our law. And
10 then Arizona says, well, we're still not going
11 to allow you to bring the claim because Simmons
12 always applied. I mean, they just said Simmons
13 never applied.

14 MR. KANEFIELD: Your Honor, I -- in --
15 in -- in this context, obviously, it applied to
16 Lynch, it applied to every defendant whose
17 appeal are pending on direct appeal
18 subsequently. It's -- this is a very unique
19 situation with this rule that the Arizona
20 Supreme Court has said in these rare
21 situations --

22 JUSTICE KAGAN: Well, I hope it's a
23 unique situation, honestly, because this kind of
24 -- it's not really consistent with the legal
25 system is that -- you know, you win no matter

1 what.

2 MR. KANEFIELD: But, Your Honor, I --

3 JUSTICE KAGAN: You win when -- when
4 they say they -- it never applied. You win when
5 you say it always applied. Whatever you say,
6 you win.

7 MR. KANEFIELD: But, Justice Kagan,
8 had he -- had he presented the claim properly
9 like Lynch -- he did it in a -- he -- he tried
10 -- whether he tried or not, we don't think he
11 did. They say he did. He -- he asked the judge
12 before the trial even began to presentence him,
13 before any evidence was heard. Well, that
14 obviously wasn't proper. And then -- and then,
15 during the sentencing phase, he -- he tried to
16 get testimony from the clemency -- chairman of
17 the Arizona Board of Executive Clemency, which
18 would have been totally speculative.

19 But, at the time when he needed to
20 raise this issue, when the jury -- actual jury
21 instruction was being drafted and presented,
22 there was no objection. And -- and the judge
23 instruct -- you know, that was the time to say,
24 Your Honor, this violates Simmons. There's --
25 we don't believe there's any parole eligibility

1 ever, despite what the statute says, because the
2 statute in Title 41 says otherwise. But nobody
3 did that. He didn't do that. So to imply --

4 JUSTICE SOTOMAYOR: I -- I'm sorry,
5 counsel, 12 other people did before Lynch, and
6 each and every one of them, at least one, and I
7 think multiple ones of them, told you you were
8 wrong. They all said you're misstating in
9 Simmons -- you're misstating the rule in this
10 state. And Arizona repeatedly refused to look
11 at that. It took Lynch finally before we
12 granted cert. Some of those other people had
13 asked for cert and didn't get it.

14 So you can't say that somehow Arizona
15 was sandbagged by Mr. Cruz. It had a rule that
16 Simmons didn't apply. It took us telling them
17 in Lynch all your reasons are wrong. We have
18 said why they were wrong before. Your state
19 law's clear. Now get it straight. Now Arizona
20 is given enough opportunity knowing everything
21 that's available to apply a rule it's always
22 said, when our laws are overruled, you get
23 32.1(g). And it's saying no.

24 So I -- I don't know where -- why what
25 Mr. Cruz did or didn't do before should inform

1 how we read what Arizona's doing under 32.1(g).

2 MR. KANEFIELD: Justice Sotomayor, I
3 -- I think it -- it just comes back to the
4 context the question present -- that the
5 Court asked us to -- it's not the question that
6 they presented. You asked us whether the
7 Arizona court's judgment -- the Arizona Supreme
8 Court's judgment below was independent and
9 adequate. So we approached the answer to that
10 question from this Court's jurisprudence in --
11 under adequacy, where there certainly is an
12 interest, a state interest, in finality.

13 And -- and, here, the -- there's
14 nothing to show that -- that -- the way the --
15 the way we read the adequacy cases from this
16 Court is that if the state courts are -- are
17 trying to deprive the defendant of exercising a
18 federal right or claim, then that's when this
19 Court will intervene and say that the state
20 rule, even though it's a valid procedural
21 rule --

22 JUSTICE SOTOMAYOR: What -- what --

23 MR. KANEFIELD: -- is inadequate.

24 JUSTICE SOTOMAYOR: -- don't you think
25 that all of the factors we've ever talked about

1 working together here do suggest that we should
2 find this inadequate?

3 MR. KANEFIELD: No.

4 JUSTICE SOTOMAYOR: And not
5 independent? I mean, there's pieces in this
6 that it's totally novel, no notice given that
7 there would be this new thing, this new test
8 created. Federal law seems to be discriminated
9 against because it's now a new test on what --
10 federal law has to be new in some substantial
11 way. There is some elements of bad faith here.
12 What's the third factor? I've forgotten it now,
13 but there's at least a third factor where
14 there's arguments being raised.

15 Wouldn't the combination of all of
16 this suggest that we shouldn't?

17 MR. KANEFIELD: I don't -- I just
18 disagree, Your Honor. I mean, one thing I would
19 point out, I failed to mention earlier, is to
20 the extent there's this idea that the Arizona
21 Supreme Court was doing something unusual by
22 coming -- by -- by using the application
23 language, one --

24 JUSTICE SOTOMAYOR: Well, it's
25 certainly a new test.

1 MR. KANEFIELD: Well, and so, if the
2 -- if you look at the Arizona Supreme Court's
3 opinion below paragraph 17, you will see that
4 Justice Montgomery cites to four federal habeas
5 cases where, post-Lynch, where defendants in
6 habeas asked their habeas proceedings to be
7 stayed so that they could file a successive PCR
8 in Arizona Supreme Court and raised the Rule
9 32.1(g) argument.

10 And in every case, the court said no,
11 that that's not -- Lynch is not a significant
12 change in the law. So three different federal
13 court judges in four different cases before the
14 Arizona Supreme Court held the exact same thing.
15 So this isn't just the Arizona Supreme Court --

16 JUSTICE SOTOMAYOR: Yeah, except that
17 Arizona got it wrong 12 times before Lynch.

18 JUSTICE KAVANAUGH: Mr. Katyal makes a
19 big point, that you don't have any amicus
20 support from other states. Do you want to
21 respond to that?

22 MR. KANEFIELD: Your Honor, we're not
23 aware of any other state that has a rule similar
24 to Rule 32.1(g), so it didn't surprise us -- you
25 know, I don't -- neither did we solicit other

1 states, which is common for Attorney Generals
2 offices to do, if we think that there was --
3 that would help the Court in some way, but we
4 don't -- we don't see the reason other than we
5 certainly would have enjoyed having some more
6 support.

7 We thought we got some pretty good
8 support from the professors who made some
9 excellent points about why taking the case in
10 this posture is sort of unusual rather than
11 letting it play itself out through the direct
12 appeal, state habeas, and then federal habeas,
13 but --

14 JUSTICE JACKSON: But, with respect to
15 other states, one thing I'm a little worried
16 about is that if we rule in your favor in this
17 case, that it will be giving other states
18 essentially a roadmap for defying this Court's
19 criminal law decisions because that, you know,
20 bad faith or no, that's what happened as a sort
21 of conceptual matter in this case, that we had
22 so many times in which the Supreme Court made
23 clear, you know, Simmons made clear that this is
24 what the law was.

25 So many times Arizona said we're not

1 following it. And we had to have Lynch in order
2 to really cinch the deal. And what I'm a little
3 worried about is that that ultimately, when we
4 read our rule, if we read our -- your rule in
5 the way that you're saying, amounts to Arizona
6 having said no one convicted between 1994 and
7 2016 is going to get the benefit of Simmons,
8 that that's sort of the ultimate way in which it
9 plays out.

10 And that is a little troubling because
11 why couldn't another state do the same thing
12 with respect to a criminal law rule that -- of
13 this Court that they don't like. They just read
14 their procedural rule in this way.

15 MR. KANEFIELD: Justice Jackson, I
16 think the way I'd answer that is just to remind
17 the Justice that the state doesn't even have to
18 have this post-habeas process. That's pretty
19 clear. My -- my colleague hasn't --

20 JUSTICE JACKSON: But, if they do --
21 if they do, can they read it, can they read the
22 rules related to it to deny federal criminal --
23 deny state defendants their federal rights as
24 announced by the Supreme Court?

25 MR. KANEFIELD: They -- they can't

1 deny federal rights. That's crystal clear. And
2 -- and I thought I made that point that -- that
3 Mr. Cruz was never denied his ability to
4 exercise his federal claim.

5 It's just in the context of a
6 successive PCR there has to be a significant
7 change before the court's going to allow, you
8 know, to -- to reopen a long final judgment --

9 JUSTICE KAGAN: Mr. Kanefield, can I
10 ask you about a footnote in your brief? So this
11 is on 27 at Footnote 1, and it says: The state
12 maintains that Lynch was wrongly decided. And
13 then you associate yourself with Justice
14 Thomas's dissent in that case, and it says:
15 Lynch perpetuated the Court's error in Simmons
16 by imposing a magic words requirement.

17 I -- I mean, I guess I was a little
18 bit shocked by that, that you're still arguing
19 that Lynch was wrongly decided, because, to me,
20 it suggests that the -- the state in its -- in
21 its many forms, many actors, is -- is just
22 insisting on not applying Lynch.

23 You know, first, you didn't apply
24 Lynch -- excuse me, not applying, you know,
25 Simmons or Lynch. You know, first, you don't

1 apply Simmons. We come in. We summarily
2 reverse you. We say, you know, here's -- here's
3 the deal. Simmons applies. That's what we say
4 in Lynch.

5 Then you contort your procedural rule
6 to say, oh, well, you know, there's a difference
7 between changes in law and changes in
8 application in law. And then, in this case,
9 you're still saying, like, Lynch is wrongly
10 decided. Simmons is wrongly decided. We can't
11 really -- we just really hate all this stuff.
12 It sounds like you're thumbing your nose at us.

13 MR. KANEFIELD: Justice Kagan,
14 absolutely no disrespect was intended by that
15 footnote to the Court, and I apologize if that's
16 the way it -- it came across.

17 I -- I think the state -- we've -- we
18 were surprised by the Lynch ruling, I think
19 because of the fact that this Court had to get
20 in -- a little bit into the weeds of Arizona,
21 interpreting Arizona statutes, even though it
22 was in the context of applying the Simmons rule.
23 And I think this may be a remnant of that, of --
24 of that confusion.

25 But understand we absolutely respect

1 the Lynch decision and the Arizona Supreme Court
2 has applied it. But we don't think that that
3 implies any kind of bad faith or any effort to
4 deprive a defendant, this defendant, of his
5 ability to exercise his federal rights.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. You said in response to a question
8 that Arizona courts may not deny federal rights.
9 You correctly answered yes.

10 MR. KANEFIELD: Yes, Mr. Chief
11 Justice.

12 CHIEF JUSTICE ROBERTS: But isn't the
13 issue here whether the Arizona -- Arizona can
14 limit the availability of collateral review to
15 particular types of claims? That's a very
16 different question, isn't it?

17 MR. KANEFIELD: It -- it can limit the
18 -- the successive claim to particular -- well, I
19 don't know how -- I want to make sure I say this
20 right. I want to make sure I'm answering your
21 question, Your Honor, Mr. Chief Justice. It
22 just has to --

23 CHIEF JUSTICE ROBERTS: Either one
24 works.

25 MR. KANEFIELD: -- it has to be -- it

1 has to be across the board. I mean, obviously,
2 we wholeheartedly agree that the Arizona Supreme
3 Court cannot promulgate a PCR rule in -- in a
4 way that treats the precedent from this Court
5 any different from the precedent of its own
6 court.

7 And so I think the -- the -- the
8 Petitioner is incorrect to read the way this
9 Court -- the Arizona Supreme Court applied its
10 rule in this context to -- to be -- to mean any
11 kind of disrespect or any kind of mistreatment.
12 It just found itself in a very unique situation
13 with the -- with the summary reversal in Lynch.
14 And -- and so I hope I answered your question.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 Justice Alito?

19 JUSTICE ALITO: I thought that the
20 point of the Chief's question -- maybe I -- I
21 didn't understand it -- was -- concerns the --
22 the distinction between your obligation to apply
23 federal retroactivity rules if you -- at least
24 federal retroactivity rules if you entertain the
25 claim. If you entertained this claim, you

1 couldn't apply a retroactivity rule different
2 from the federal retroactivity rule.

3 But you say that we don't have to
4 entertain it at all because of a procedural rule
5 that categorizes claims in a way that we choose
6 to adopt, correct?

7 MR. KANEFIELD: Yes, Your Honor.

8 Well, I -- again, if I'm not answering the
9 question, it's -- it's only because I don't
10 understand.

11 JUSTICE ALITO: Okay.

12 MR. KANEFIELD: So let -- let me just
13 -- can I just make a point, though, that Rule
14 32.1, there's three prongs to it. So the
15 Arizona Supreme Court never got past one. It
16 has to be a significant change. It has to
17 apply. And that's where the retroactivity
18 question would -- would -- would ordinarily be
19 addressed.

20 And then it has to probably change the
21 outcome. So even if we get past significance,
22 there's a very real possibility that -- that
23 Mr. Cruz will not survive the other components
24 of that rule.

25 JUSTICE ALITO: You could -- no -- no

1 one contests, I -- I assume, that you could
2 impose some sort of temporal limitation or
3 whatever -- whatever you choose, right? That
4 the --

5 MR. KANEFIELD: Yes, and that's what
6 -- that was what the -- sorry.

7 JUSTICE ALITO: No, go ahead.

8 MR. KANEFIELD: That's what the Court,
9 you know, essentially addressed in -- in Walker
10 versus Martin. And we see some parallels
11 because there, the -- the -- there was a note,
12 the time to bring habeas in California was
13 without substantial delay, so the Court had to
14 wrestle with what was substantial and what was
15 insubstantial, and there was arguments that it
16 wasn't being applied in a -- in a -- in a
17 uniform way. We see a lot of parallels to the
18 significance and insignificance distinction in
19 Rule 32.1(g). So the court has to be given the
20 opportunity to flesh that out in -- in -- in
21 case -- on a case-by-case determination.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 Justice Kagan? No?

25 Thank you, counsel.

1 Rebuttal, Mr. Katyal.

2 REBUTTAL ARGUMENT OF NEAL K. KATYAL

3 ON BEHALF OF THE PETITIONER

4 MR. KATYAL: Thank you. Four points.

5 First, my friend began by -- began his
6 argument by admitting that there's "no example"
7 of what Justice Barrett called a hair-splitting
8 application and interpretation. He later
9 conceded this was the "first time" this
10 interpretation of Rule 32.1 had ever been given.
11 That is the opposite of regularly followed and
12 firmly established every day of the week.

13 Rule 32 has been around for decades.
14 It's never once been interpreted this way. It's
15 always been interpreted as overturning
16 precedent. And you don't need to speculate
17 about this because the Arizona Supreme Court in
18 Rendon had a very similar circumstance, except
19 it involved state law. That was a burglary
20 statute. The law had always stayed the same.
21 The statute always stayed the same. What
22 changed was the interpretation of the statute.
23 That court found -- the Supreme -- Arizona
24 Supreme Court said obvious significant change in
25 the law.

1 Lynch works the same way, as Justice
2 Kagan said. At point A, the law is one thing;
3 at point B, it's another. At point A, 12
4 different criminal defendants are -- their death
5 sentences are affirmed. At point B, they should
6 now be reversed under this Court's decision in
7 Lynch.

8 Second, with respect to the question
9 about Stewart versus Smith, Justice Alito,
10 there's no novelty issue at all in that case, no
11 discrimination against federal law issue in that
12 case. That was just about a procedural rule
13 that just categorized a claim. It wasn't about
14 applying that law or applying that rule in any
15 way to federal law, which is, I take it, why my
16 friend never even mentioned it during his oral
17 argument.

18 Third, the jury instruction point that
19 he made. As I said to Justice Gorsuch, as a
20 matter of federal law, it's wrong under Simmons
21 and Lynch, and, also, it's wrong factually.
22 Cruz cited Simmons by name in his trial, Joint
23 Appendix page 54 and 55. And, also, there's
24 another cert petition pending with six more
25 criminal defendants from Arizona raising the

1 same issue, and his brief in opposition admits
2 that two of them don't even have the jury
3 instruction issue because they sought the jury
4 instruction. So I think this case is briefed
5 and decided, ready to -- you've got the merits
6 there.

7 And, finally and most importantly, I
8 want to pick up on what Justice Kagan said about
9 the Kafkaesque rule here. It is striking that
10 they still have not explained why they are so
11 resistant to giving Cruz his Simmon rights --
12 Simmons rights, rights that they now say he was
13 always entitled to. They're now calling them
14 well-established, but they've been arguing the
15 contrary for decades. In the end, this is about
16 one thing, making sure that Simmons rights
17 aren't extended to Cruz and people like him,
18 even though we know in this very case from the
19 jury foreman it would have made a massive
20 difference.

21 I know this argument gets technical
22 about all this stuff about application of rules
23 and stuff, but here's what the state's saying.
24 In plain English, they're saying that John Cruz
25 should be put to death even though, in fact,

1 because his claim was too good, that it was so
2 powerful, that it was well-established at the
3 time. That is not something the Arizona Supreme
4 Court has ever said anything like before. It is
5 the essence of novel. It is the essence of
6 discrimination against decisions of this Court.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.

9 (Whereupon, at 12:25 p.m., the case
10 was submitted.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Official

changes [6] 4:13 11:13,14 32:22 58:7,7 changing [1] 4:2 characterization [1] 41:14 Chief [17] 1:21 3:3,9 7:11 8:5 12:17 26:6 28:1,6 59:6,10,12,21,23 60:15 62:22 66:7 Chief's [1] 60:20 choose [2] 61:5 62:3 cinch [1] 56:2 circumstance [2] 12:11 63:18 cite [1] 41:15 cited [3] 31:25 35:22 64:22 cites [1] 54:4 claim [19] 7:17 13:2 29:2,20 41:18 43:17,21 48:22 49:3,4,11 50:8 52:18 57:4 59:18 60:25,25 64:13 66:1 claiming [1] 16:25 claims [7] 4:22 5:25 24:17 25:1 48:11 59:15 61:5 clarified [1] 37:20 clear [17] 32:24,24 35:3,4,25 36:4,6 44:9,10 45:5 46:9 49:4 51:19 55:23,23 56:19 57:1 clearly [7] 8:15 9:5 34:7,23 36:5 45:11 49:9 Clemency [3] 45:3 50:16,17 client [1] 15:22 collateral [6] 7:16,20 24:4 44:5 46:11 59:14 colleague [1] 56:19 colleagues [1] 46:20 colloquy [1] 12:18 combination [1] 53:15 come [5] 8:11 31:8 46:7 47:7 58:1 comes [6] 28:11 31:24 42:9 43:8 48:2 52:3 coming [2] 35:10 53:22 committed [1] 43:13 common [1] 55:1 completely [2] 26:15 49:4 components [1] 61:23 concede [1] 36:7 conceded [1] 63:9 concept [2] 18:9 42:3 conceptual [1] 55:21 concerns [1] 60:21 concurrence [1] 17:7 confident [1] 30:21 confused [1] 46:14 confusing [1] 45:15 confusion [1] 58:24 considered [1] 46:12 considering [1] 5:12 consistency [1] 17:15 consistent [1] 49:24 consistently [3] 13:1 14:	19 20:15 constitutional [4] 6:22 20:13,25 29:4 contests [1] 62:1 context [12] 26:17 29:11 37:8 39:6 40:3 42:20 47:7 49:15 52:4 57:5 58:22 60:10 contort [1] 58:5 contrary [1] 65:15 convicted [3] 8:25 15:15 56:6 conviction [1] 34:24 convictions [1] 29:2 core [1] 28:20 Correct [2] 13:15 61:6 corrected [2] 10:16 29:9 correctly [2] 9:13 59:9 couldn't [4] 17:10,10 56:11 61:1 counsel [12] 7:10,11 23:1 26:7 28:2 36:17 44:19 51:5 59:7 60:16 62:25 66:8 counselor [1] 38:1 count [1] 31:2 course [2] 7:24 8:17 COURT [138] 1:1,14 3:10,25 4:1,5,23 5:7,14,21,25 6:11,15,15 8:18,22 9:2,4,14 10:2,4,10,12,13,23 11:7,19,20,21 12:7,12 13:17,25 14:6,7,10,13,24 15:5,20,20,21 16:2,14,20 17:10 18:13,14 19:2 20:9,9 22:1,6,9,13,16 23:11 25:15,16 26:14 27:4,7,12 28:7 29:13,20,24 30:4,10,12 31:12 32:1,3,5,6,7,17,23 34:3,8,8,25 35:11,22,23 36:11,12 37:7,10,16,17 39:3,4 40:11,11,15,16,23 41:15 42:16 45:10 46:6,8,9,17 48:6 49:5,20 52:5,16,19 53:21 54:8,10,13,14,15 55:3,22 56:13,24 58:15,19 59:1 60:3,4,6,9,9 61:15 62:8,13,19 63:17,23,24 66:4,6 Court's [30] 3:15 5:2,3 6:2,19 8:2 16:6 20:14 24:12,19 25:10 26:16 28:17 29:7,9,16,25 30:2 31:10 37:4 40:21 43:15 52:7,8,10 54:2 55:18 57:7,15 64:6 courts [7] 17:19,21 36:6 48:12,15 52:16 59:8 courts' [1] 17:15 covered [1] 9:18 created [1] 53:8 crime [2] 10:16 43:13 criminal [7] 29:1 44:16 55:19 56:12,22 64:4,25 CRUZ [25] 1:3 3:4,11,13,23 4:3,19 8:10,12,19,25 15:12 17:3 22:2 25:6 27:15 48:10 51:15,25 57:3 61:23 64:	22 65:11,17,24 Cruz's [2] 3:16 8:18 crystal [1] 57:1	D D.C [2] 1:10,19 Danforth [1] 24:12 dangerousness [2] 41:19 44:11 day [2] 3:18 63:12 deal [2] 56:2 58:3 death [8] 3:12,13 23:17 36:13 43:6 44:21 64:4 65:25 decade [1] 28:16 decades [3] 27:4 63:13 65:15 decide [1] 23:4 decided [13] 7:18 30:4,21 31:2 32:17 36:14,15 42:22 57:12,19 58:10,10 65:5 decision [20] 3:15 4:17,25 6:19 11:18,19 12:8 14:6,10 25:10,20 27:11 29:7 32:1,3 38:1 40:21 47:16 59:1 64:6 decision-making [1] 17:15 decisions [9] 3:25 4:23 6:3 12:7 16:6 24:19 29:3 55:19 66:6 declared [1] 14:7 defend [1] 4:16 defendant [13] 6:9 20:5 21:15 25:5 33:22 44:11 47:19 48:4,24 49:16 52:17 59:4,4 defendant's [2] 35:2 45:12 defendants [8] 4:19 8:10 19:5 22:4 54:5 56:23 64:4,25 defense [1] 44:18 define [1] 19:16 definitely [3] 17:9 35:14 46:2 definition [2] 10:11,16 defying [1] 55:18 delay [1] 62:13 denied [1] 57:3 deny [4] 56:22,23 57:1 59:8 deprive [2] 52:17 59:4 deprived [1] 48:22 Deputy [1] 1:21 despite [2] 3:15 51:1 determination [5] 29:19 36:21 43:5,10 62:21 determinations [1] 42:24 determined [2] 32:6 36:15 develop [1] 17:19 dictated [1] 11:18 difference [3] 27:15 58:6 65:20 different [12] 9:19 10:5 21:10 39:6,7,25 54:12,13 59:16 60:5 61:1 64:4	differently [1] 41:25 dime [2] 22:10 25:11 direct [8] 15:9 22:2 25:8 47:23 48:11,25 49:17 55:11 disagree [7] 7:7 34:2 40:5,7 41:13 43:18 53:18 discriminate [1] 11:5 discriminated [1] 53:8 discriminates [4] 4:18,23 6:17 7:25 discriminating [1] 6:7 discrimination [6] 6:25 11:12 19:17 22:18 64:11 66:6 disrespect [2] 58:14 60:11 dissent [1] 57:14 distinction [5] 4:13 26:25 36:18 60:22 62:18 district [3] 13:17 14:9,13 doctrine [2] 21:6,14 doctrines [1] 19:25 doing [9] 16:1 19:19 20:20 40:25 46:1 49:6,9 52:1 53:21 done [3] 6:11 10:19 25:5 dooms [1] 4:22 doubt [1] 15:8 drafted [1] 50:21 drives [1] 36:20 during [2] 50:15 64:16 duty [1] 28:10	12,22,22 22:24 27:2 28:24 63:12 evade [1] 20:25 even [24] 4:15 6:18 7:25 10:15 15:9,9,24 22:13 38:6 41:6 42:22 45:5,6 47:24 48:25 50:12 52:20 56:17 58:21 61:21 64:16 65:2,18,25 even-handed [2] 8:3 25:4 event [2] 32:25 36:1 everything [3] 15:13 25:6 51:20 evidence [3] 17:4,8 50:13 exact [4] 19:9 22:11,12 54:14 exactly [4] 6:11 8:13 9:25 16:20 example [8] 6:19 8:7 21:22 25:18 26:22 30:17 36:11 63:6 examples [1] 30:12 excellent [1] 55:9 except [3] 5:5 54:16 63:18 excuse [1] 57:24 Executive [2] 45:3 50:17 exercise [3] 48:22 57:4 59:5 exercising [1] 52:17 exhibit [1] 7:19 existence [1] 47:20 existing [1] 29:22 expect [2] 17:20 23:5 explain [1] 40:7 explained [1] 65:10 explains [1] 14:2 expression [1] 48:17 extended [1] 65:17 extension [4] 26:16 37:1,1 40:10 extent [3] 33:13 42:10 53:20 extreme [1] 5:6	F face [1] 3:13 fact [5] 13:16 23:16,23 58:19 65:25 factor [2] 53:12,13 factors [1] 52:25 facts [1] 41:24 factual [1] 41:17 factually [1] 64:21 failed [2] 15:22 53:19 fair [5] 6:9 18:23 20:4 21:14 39:12 faith [9] 19:14 42:9 45:25 46:3,6 48:9 53:11 55:20 59:3 familiar [1] 26:1 fault [2] 14:18 45:15 favor [1] 55:16 federal [57] 4:18,20 5:1,18,18,21,24 6:7,14,17,23 7:2,
---	---	--	--	--	---	--

Official

<p>13,21 9:18 11:6,13 13:17, 24,25 14:20,23 15:5 16:20, 22 17:10,11,21 21:16 22: 19 23:11 24:7,17 29:20 38: 7,10,23 47:25 49:1 52:18 53:8,10 54:4,12 55:12 56: 22,23 57:1,4 59:5,8 60:23, 24 61:2 64:11,15,20</p> <p>field [1] 8:7 fight [1] 7:3 figure [2] 20:2 43:16 file [2] 23:5 54:7 filing [1] 25:9 final [1] 57:8 finality [4] 20:21 28:20 29: 1 52:12 finalize [2] 47:23,23 finalizing [1] 47:25 finally [3] 4:24 51:11 65:7 find [5] 15:21,24 16:2 29:25 53:2 finding [1] 41:7 firmly [13] 4:11 6:3 11:2 18: 3,8,23 19:12,22,22 22:24 27:2 28:24 63:12 First [17] 4:10 5:9,22 6:12 9:13 16:3 29:18 30:25 31: 13 37:6,13 42:7 43:11 57: 23,25 63:5,9 five [1] 28:10 flesh [2] 40:24 62:20 fleshing [1] 37:13 flexibility [2] 37:12 42:4 flipped [1] 45:4 floor [1] 24:15 Flowers [1] 27:9 focused [1] 35:7 followed [13] 4:12 6:4 11:3 13:1 14:19 18:4,8 19:13, 23 22:24 27:1 28:25 63:11 following [1] 56:1 footnote [3] 57:10,11 58: 15 Ford [1] 27:9 foreman [2] 3:18 65:19 forget [1] 45:25 forgotten [1] 53:12 form [1] 24:4 forms [1] 57:21 forth [2] 24:14 35:23 forum [1] 25:1 forward [2] 27:14 37:21 found [6] 13:17,21 14:10 30:16 60:12 63:23 four [3] 54:4,13 63:4 friend [6] 23:9 25:14 42:15 43:19 63:5 64:16 fundamentally [1] 4:2 further [1] 26:8 future [2] 41:19 44:10</p> <hr/> <p>G</p> <p>game [1] 8:13 gave [1] 36:11</p>	<p>General [1] 1:21 generally [1] 11:24 Generals [1] 55:1 Georgia [1] 27:10 gets [2] 46:14 65:21 getting [3] 32:2,7 45:17 give [6] 17:18 36:11 37:11 39:12 40:23 42:4 given [6] 3:20 18:2 51:20 53:6 62:19 63:10 giving [3] 4:24 55:17 65:11 GORSUCH [35] 12:13,16, 24 13:5,8,10,13,16,20,22 14:3,5,9,12,14,17,21 15:17 16:9,13,16,19,22 17:2,12, 24 18:1,16,20 20:17 21:3, 17 37:9 40:20 64:19 Gorsuch's [1] 26:12 got [16] 6:3 11:22 25:4,4 34: 7 37:11,11,14,17,17 40:23 47:1 54:17 55:7 61:15 65: 5 grant [1] 14:15 granted [1] 51:12 gravy [1] 21:3 ground [5] 4:9 12:20 15:3 24:25 28:21 grounded [1] 28:20 guarantees [1] 21:1 guess [5] 14:17 31:3,24 39: 23 57:17</p> <hr/> <p>H</p> <p>ha [1] 10:13 habeas [16] 13:24,25 14:23 15:6 35:10 47:24,25 48:20, 25 49:1 54:4,6,6 55:12,12 62:12 hair [4] 18:10,11 37:2 39:13 hair-splitting [2] 4:12 63:7 half [1] 21:14 hallmarks [1] 35:13 hand-crafted [1] 4:15 handmade [1] 12:8 happen [2] 47:4,6 happened [5] 10:8 33:19, 20 34:22 55:20 happens [3] 38:20,20 47: 21 hard [1] 9:25 Hardesty [1] 28:9 hate [1] 58:11 heads [1] 48:16 hear [1] 3:3 heard [1] 50:13 held [4] 20:15 29:13 34:25 54:14 help [3] 34:22 42:19 55:3 high [2] 49:7,8 hold [1] 32:7 holding [6] 19:3 28:17,23 29:15,16 44:10 holds [1] 8:9 Holmes [2] 6:1 27:7</p>	<p>Holmes' [1] 21:9 honestly [1] 49:23 Honor [26] 6:11 7:22 9:24 11:16 30:6,18 31:7,23 32: 21 34:1 35:9 37:3 38:18 39:18 40:4,19 41:12 44:7 48:19 49:14 50:2,24 53:18 54:22 59:21 61:7 hope [3] 17:13 49:22 60:14 hostility [7] 7:13,19 20:21 21:4,12,16,20 however [1] 39:1 Hurwitz's [1] 46:25 hypothetical [5] 10:22 11: 4,11,16 32:12 hypothetically [1] 32:16</p> <hr/> <p>I</p> <p>idea [4] 3:17 26:23 42:5 53: 20 imagine [1] 11:16 imagined [1] 39:13 implies [1] 59:3 imply [1] 51:3 important [2] 20:20 39:11 importantly [1] 65:7 impose [1] 62:2 imposing [1] 57:16 impossible [1] 11:15 imprisonment [1] 3:14 inadequate [3] 47:8 52:23 53:2 including [2] 24:7 25:19 incorrect [1] 60:8 Indeed [4] 3:17 6:15 20:7 25:16 independence [1] 24:21 independent [1] 4:9,25 12:19,25 15:3,25 28:21 29: 17 30:1 52:8 53:5 indisputable [1] 29:1 ineligibility [5] 17:4,8 23: 21 28:14 44:12 ineligible [1] 34:25 inform [1] 51:25 insignificance [1] 62:18 insisting [1] 57:22 Instead [1] 29:8 instruct [1] 50:23 instructed [1] 3:12 instruction [12] 15:22 17:1, 9 32:5,16 43:2 44:12,13 50:21 64:18 65:3,4 instructions [2] 19:6 28: 15 insubstantial [1] 62:15 intended [1] 58:14 interest [3] 29:1 52:12,12 intermediate [1] 10:9 interpretation [22] 4:8,11 5:17 6:17 7:4,5,24 22:22 23:7 25:12 26:14,15 27:13 34:4 37:5 39:6 40:12 42: 12 48:3 63:8,10,22</p>	<p>interpreted [5] 5:16 27:5 31:13 63:14,15 interpreting [6] 6:21 17:16 35:24 37:1 47:16 58:21 interrupt [1] 20:18 intervene [1] 52:19 interwoven [2] 5:1 7:2 invoked [4] 33:18,19,22,24 involved [2] 48:2 63:19 involves [1] 23:6 involving [1] 32:4 isn't [9] 24:17 25:22 26:15 32:11,19 42:8 54:15 59:12, 16 issue [13] 5:18,22 6:14 43: 4,11 44:11,25 50:20 59:13 64:10,11 65:1,3 issues [3] 39:11 41:17,20 itself [4] 36:20 43:12 55:11 60:12</p> <hr/> <p>J</p> <p>JACKSON [23] 19:11 30: 20 31:5,16 32:10 35:5,12 36:4,9 42:1,18,25 43:20 45:14,21,24 46:4,7 47:9,11 55:14 56:15,20 jerry-rigged [2] 12:9 22:22 JOHN [3] 1:3 3:11 65:24 Joint [3] 18:15 19:1 64:22 JOSEPH [3] 1:21 2:6 28:4 judge [5] 3:12,15 36:14 50: 11,22 judges [4] 42:23 43:5 44: 17 54:13 judgment [7] 24:5,8 28:13, 22 52:7,8 57:8 Juries [1] 43:9 jurisdiction [1] 14:23 jurisprudence [3] 17:20 26:17 52:10 jurors [1] 3:12 jury [14] 3:16,17 15:22 17:1, 8 32:15 36:13,15 50:20,20 64:18 65:2,3,19 JUSTICE [173] 3:3,10 5:11, 20 6:1 7:10,11 8:6 9:7,11 10:17 11:10 12:9,13,16,18, 18,24 13:5,8,10,13,16,19, 22 14:3,5,9,12,14,17,21 15: 17 16:9,13,16,19,22 17:2,6, 12,13,24 18:1,4,16,18,20 19:11 20:17,23 21:3,9,17, 19,22 23:1,2,19,22 24:20, 24 25:21,25 26:3,6,8,9,10, 11,12 27:6,7,10,17,22,24 28:1,1,6 30:3,8,11,20,25 31:5,16 32:10,12 33:4,5,6, 15,17 34:12,17 35:5,12 36: 4,9,17 37:9,25 38:12,14,19, 23 39:9,19,23 40:2,6,13,20 41:2,10 42:1,2,18,25 43:20 45:14,21,24 46:4,7,25 47:9, 10,11 48:7,9 49:2,22 50:3,</p>	<p>7 51:4 52:2,22,24 53:4,24 54:4,16,18 55:14 56:15,17, 20 57:9,13 58:13 59:6,11, 12,21,23 60:15,17,18,19 61:11,25 62:7,22,22,24 63: 7 64:1,9,19 65:8 66:7</p> <hr/> <p>K</p> <p>Kafka [1] 48:10 Kafkaesque [1] 65:9 KAGAN [21] 21:19,23 28:1 33:4,6,15,17 34:12,17 47: 10 48:7,9 49:2,22 50:3,7 57:9 58:13 62:24 64:2 65: 8 Kagan's [1] 12:9 KANFIELD [66] 1:21 2:6 28:3,4,6 30:6,9,16 31:3,6, 23 32:21 33:12,16 34:1,16, 19 35:8,20 36:8,10 37:3 38:11,13,17 39:8,17,21 40: 1,4,8,18 41:9,12 42:18 43: 3 44:7 45:19,22 46:2,5,16 47:15 48:7,8,19 49:14 50: 2,7 52:2,23 53:3,17 54:1, 22 56:15,25 57:9 58:13 59: 10,17,25 61:7,12 62:5,8 KATYAL [60] 1:19 2:3,9 3: 6,7,9 5:19 7:22 9:7,9,24 10:25 11:15 12:13,14,22 13:3,6,9,12,15,19,24 14:4, 8,12,15,21 16:5,12,15,19, 24 17:3,23 18:3,19,21 19: 20 20:17 21:2,18,21 23:2,9, 21 24:11,22 25:21,25 26:4, 11,19 27:21,23 38:5 54:18 63:1,2,4 KAVANAUGH [1] 54:18 Kennedy [4] 17:13 18:4,18 20:23 kind [9] 19:24 20:21 23:6 36:23 42:6 49:23 59:3 60: 11,11 knowing [1] 51:20</p> <hr/> <p>L</p> <p>labored [1] 3:16 land [4] 5:4 8:25 12:3,5 language [1] 53:23 last [3] 6:20 12:10 17:12 later [1] 63:8 Laughter [1] 38:22 law [75] 4:6,7,13,14,20,22 5: 4,24 6:10,18 7:2 8:11,16 9: 17,19,20 10:7 11:13,14,25 12:2,3,4 16:11,18 18:9 19: 25 22:11,19 24:7,7 26:23, 24 29:4,14,15,20,22 31:22 32:14 33:11,24 34:23 35:1 36:19,20 37:1 38:4,10,24, 25 39:4,4 42:16 43:24 44: 3 45:11 47:2 49:9 53:8,10 54:12 55:19,24 56:12 58:7, 8 63:19,20,25 64:2,11,14,</p>
--	--	---	---	---

Official

<p>15,20 law's [1] 51:19 laws [2] 17:17 51:22 least [5] 20:15 36:7 51:6 53:13 60:23 leave [1] 22:24 leeway [1] 17:19 left [1] 9:23 legal [2] 31:19 49:24 legislature [2] 45:3,4 lenient [1] 3:19 letting [1] 55:11 level [1] 40:22 life [5] 3:13,20,21 44:22,22 light [1] 37:19 limit [3] 24:4 59:14,17 limitation [1] 62:2 line [3] 19:2 28:10 39:24 lines [1] 15:23 literally [1] 26:19 little [6] 16:4 55:15 56:2,10 57:17 58:20 long [3] 18:22 40:11 57:8 look [10] 7:14 10:3,20 15:7 18:13 19:8 27:20 34:22 51: 10 54:2 looked [2] 10:19 29:21 looking [4] 20:20,24 37:18 44:19 lose [1] 48:17 loses [2] 48:11,14 lot [1] 62:17 loved [1] 48:10 lurking [1] 6:23 Lynch [49] 4:2,3,6,20 5:13 9:1 12:2 16:7,21 19:1 20: 12 22:7 25:11 29:7,13,21 30:4,22 31:2 32:17 33:20 41:7,8,15,23 48:24 49:5,16 50:9 51:5,11,17 54:11,17 56:1 57:12,15,19,22,24,25 58:4,9,18 59:1 60:13 64:1, 7,21</p> <p style="text-align: center;">M</p> <p>made [13] 27:15 32:24 40: 20 42:24 43:5 46:19 49:3 55:8,22,23 57:2 64:19 65: 19 magic [1] 57:16 main [1] 42:2 maintains [1] 57:12 majority [1] 46:25 many [7] 3:19 10:5 25:19 55:22,25 57:21,21 Martin [1] 62:10 massive [1] 65:19 matter [7] 1:13 6:18 17:11 19:15 49:25 55:21 64:20 matters [2] 15:5 23:24 mean [29] 7:15 11:21 18:21 30:23 33:7,17 35:19 36:5, 18 39:19 40:5 43:1 44:9,9 45:25 46:18 47:5,10 48:1,</p>	<p>16,17 49:3,6,12 53:5,18 57: 17 60:1,10 means [1] 21:7 meant [1] 11:10 mention [1] 53:19 mentioned [3] 18:12 27:18 64:16 merely [2] 29:9 39:24 merits [2] 29:19 65:5 met [1] 25:17 might [4] 6:6 25:13 42:19 45:19 mind [2] 15:19 31:24 minimum [2] 24:14,15 misinterpretation [1] 34: 21 miss [1] 39:21 missing [1] 39:10 misstating [2] 51:8,9 Mister [1] 47:10 mistreatment [1] 60:11 Montana [1] 6:20 MONTENEGRO [1] 1:3 Montgomery [1] 54:4 most [2] 25:19 65:7 motivations [1] 20:2 mouth [1] 8:23 much [3] 6:2 19:12 23:3 multiple [1] 51:7 murdered [1] 28:9 must [1] 4:11</p> <p style="text-align: center;">N</p> <p>NAACP [1] 21:11 nah [1] 39:2 name [2] 25:14 64:22 narrower [1] 4:24 natural [1] 44:22 nature [1] 48:20 NEAL [5] 1:19 2:3,9 3:7 63: 2 necessarily [1] 45:6 necessary [1] 21:24 need [3] 21:4 25:3 63:16 needed [2] 42:11 50:19 neither [1] 54:25 neutral [3] 7:14 8:1,6 neutrally [2] 11:8 12:15 never [13] 21:12 33:3 34:11 37:15,22 48:13,21 49:13 50:4 57:3 61:15 63:14 64: 16 new [19] 9:20 10:15 25:12 26:17 28:13 29:3 31:19 39: 10 40:2,3 41:22 42:4,6 47: 18 53:7,9,10,25 next [3] 3:4,18 48:14 nine [1] 20:15 nobody [1] 51:2 None [1] 5:7 nonissue [1] 42:21 nose [1] 58:12 note [2] 18:11 62:11 nothing [3] 5:15 23:17 52:</p>	<p>14 notice [3] 25:5 39:12 53:6 novel [11] 4:14 5:25 6:6 7: 24 9:15 26:15 27:12 37:23 39:5 53:6 66:5 novelty [11] 5:10,22 6:12 11:1 19:16 21:6,14 36:24 37:5 39:11 64:10 November [1] 1:11</p> <p style="text-align: center;">O</p> <p>O'Connor's [1] 17:6 objection [2] 25:7 50:22 obligation [1] 60:22 obtain [1] 28:13 obvious [1] 63:24 obviously [6] 8:4 34:10 37: 6 49:15 50:14 60:1 occur [1] 46:24 occurred [1] 30:17 occurrence [1] 36:2 offering [1] 24:25 Officer [1] 28:9 offices [1] 55:2 often [3] 31:8 47:4,6 Okay [15] 9:21 18:20 21:17 23:19 26:3 27:22,25 28:2 31:5 32:18 36:9 38:14,24 46:4 61:11 once [2] 41:1 63:14 one [29] 3:23 5:8 6:5 7:7 8: 8 10:10 13:4 19:16 21:5, 13 23:8 25:14 26:10 30:13, 13 37:24 40:13,14 51:6,6 53:18,23 55:15 56:6 59:23 61:15 62:1 64:2 65:16 ones [2] 27:12 51:7 only [15] 3:23 5:23 12:7,10 21:7 22:23 23:13 25:1 26: 16 29:2,21 31:6 32:22 41: 2 61:9 open [3] 23:11 24:17 25:1 operation [1] 11:6 operative [2] 33:9,10 opinion [3] 21:9 46:25 54: 3 opinions [4] 9:2,14 19:3 20:16 opportunity [3] 48:21 51: 20 62:20 opposite [9] 8:17 18:24 19: 9 20:6 22:11,12,23 26:20 63:11 opposition [2] 18:6 65:1 option [1] 3:21 options [1] 44:20 oral [6] 1:14 2:2,5 3:7 28:4 64:16 order [2] 35:16 56:1 ordinarily [2] 31:20 61:18 other [24] 5:7 6:8,13 17:21 19:25 23:5,10,11,14,24 25: 14,19 30:24 34:9 42:15 51: 5,12 54:20,23,25 55:4,15,</p>	<p>17 61:23 otherwise [3] 20:15 42:10 51:2 ourselves [1] 17:21 out [18] 8:9,22 9:9 20:2 34: 10 37:10,13,24 40:24 42: 12 43:8,16 44:6 48:2 53: 19 55:11 56:9 62:20 outcome [1] 61:21 outlier [1] 5:6 over [1] 28:16 overruled [5] 19:1 30:13 38:6 40:16 51:22 overruling [2] 11:20 33:1 overturn [1] 11:23 overturned [3] 10:9 25:17 39:16 overturning [4] 10:7 12:12 26:21 63:15 own [7] 17:16,17,19 18:5 40:24 41:24 60:5</p> <p style="text-align: center;">P</p> <p>P-O-B-L-E-T-E [1] 38:10 p.m [1] 66:9 Padilla [1] 38:25 PAGE [7] 2:2 11:23 18:6 19:1,9 27:19 64:23 pages [1] 17:5 paragraph [1] 54:3 parallel [1] 14:20 parallels [2] 62:10,17 parole [17] 3:14,22 17:4,8 23:21 28:14 29:12 34:24 35:2 44:12,14,23 45:2,12, 17,17 50:25 part [5] 11:3,11 21:15 42:9 44:1 particular [5] 7:13,17 23:8 59:15,18 past [5] 32:25 35:25 39:15 61:15,21 Patrick [1] 28:9 pattern [3] 20:25 23:16,23 Patterson [1] 27:8 PCR [5] 46:21,23 54:7 57:6 60:3 penalty [3] 23:17 28:13 44: 21 pending [2] 49:17 64:24 people [5] 27:14 39:12 51: 5,12 65:17 perpetuated [1] 57:15 perspective [2] 36:5,7 petition [7] 9:6 10:14 11: 22 15:4 20:11 22:2 64:24 Petitioner [9] 1:4,20 2:4, 10 3:8 28:8 29:5 60:8 63:3 Petitioner's [2] 28:18 29: 20 phase [2] 28:13 50:15 Phoenix [1] 1:22 phrased [1] 7:12 phrases [1] 38:21</p>	<p>pick [1] 65:8 pieces [1] 53:5 place [2] 16:3 42:9 places [1] 4:18 plain [1] 65:24 plausible [1] 13:22 play [1] 55:11 plays [1] 56:9 please [2] 3:10 28:7 plurality [1] 17:5 Poblete [6] 38:9,11,13,14, 16,23 point [26] 5:9 6:12 15:19 23:13 25:2,18,19 33:8,10 34:9 37:24 40:18,20 41:11 42:2 46:19 53:19 54:19 57: 2 60:20 61:13 64:2,3,3,5, 18 point-blank [2] 28:11 48: 12 pointing [1] 37:10 points [3] 9:12 55:9 63:4 Police [1] 28:9 polices [1] 6:15 posited [1] 25:23 possibility [4] 3:14,22 44: 23 61:22 possible [1] 45:16 post-collateral [1] 15:10 post-conviction [10] 4:4 8: 8,12 20:10 22:13 24:16 25: 3,9 28:12,19 post-habeas [1] 56:18 post-Lynch [1] 54:5 posture [1] 55:10 powerful [1] 66:2 practice [1] 11:6 precedent [16] 10:7,10 11: 19,20,23 25:15,17 26:22 33:2,13 38:6 40:17 41:4 60:4,5 63:16 precedents [6] 5:4 8:2 24: 12 30:13,14 39:15 precludes [1] 28:18 predated [1] 28:16 predictable [3] 18:22 20:6, 7 premise [1] 7:3 present [6] 7:12 15:22 17: 4 24:18 48:23 52:4 presented [6] 15:1 37:7 43: 18 50:8,21 52:6 presentence [1] 50:12 preserve [1] 15:23 preserved [1] 15:13 presumption [2] 42:11,14 pretty [3] 49:7 55:7 56:18 prevail [1] 4:19 principle [5] 19:13 20:13 28:20 32:14,19 prior [4] 24:2 33:1 34:24 38: 2 prison [1] 3:21 probably [2] 24:23 61:20</p>
---	--	--	---	---

Official

<p>problem [2] 24:18 44:16 procedural [10] 5:23 7:15 17:17 23:8 29:23 52:20 56:14 58:5 61:4 64:12 procedurally [2] 13:18,23 proceeding [5] 8:12 14:13 15:11 24:16 25:10 proceedings [3] 14:25 18:13 54:6 process [2] 46:22 56:18 professors [1] 55:8 prohibit [2] 35:2 45:12 Project [1] 41:6 prominently [1] 25:20 promulgate [1] 60:3 prong [1] 29:18 prongs [1] 61:14 pronouncing [1] 38:9 proper [1] 50:14 properly [2] 43:17 50:8 prosecutor [2] 18:25 20:8 prosecutors [2] 18:14 44:18 provide [2] 6:9 7:16 provides [1] 18:23 provision [1] 6:22 published [1] 9:2 pulling [1] 9:6 purely [5] 6:18,21 7:3 17:11 19:21 purpose [3] 19:19 20:25 35:16 purposes [2] 34:4 36:22 put [1] 65:25 putting [1] 42:19</p> <hr/> <p style="text-align: center;">Q</p> <p>question [30] 5:18 6:23 7:4 15:1 16:20,23 17:12,14 18:17 20:22 23:4 24:1,2 26:10 29:23 31:1,10 38:25 44:8 52:4,5,10 59:7,16,21 60:14,20 61:9,18 64:8 questioning [2] 15:11 46:20 questions [4] 5:1 26:12,13 30:2 quintessential [1] 21:22 quote [1] 20:10 quoting [1] 46:25</p> <hr/> <p style="text-align: center;">R</p> <p>radically [1] 39:25 railroad [1] 48:18 raise [1] 50:20 raised [2] 53:14 54:8 raises [1] 15:18 raising [1] 64:25 range [1] 28:11 rare [5] 29:3 36:2 46:24 47:1 49:20 rather [3] 3:20 10:16 55:10 rationale [1] 12:6 reach [1] 22:20</p>	<p>read [10] 37:4 45:10 52:1,15 56:4,4,13,21,21 60:8 reading [1] 5:3 ready [1] 65:5 real [1] 61:22 really [12] 12:10 23:15,22 42:14,21 44:2,6 45:16 49:24 56:2 58:11,11 reason [8] 3:19 5:6 16:25 19:24 21:13 41:8 43:22 55:4 reasonable [1] 26:16 reasons [8] 4:10 6:5 7:13 8:4 13:6 14:1 29:24 51:17 REBUTTAL [4] 2:8 27:21 63:1,2 recent [1] 6:2 recognizing [1] 35:15 red [3] 19:8 27:18,19 refused [5] 4:6 9:2 41:4 42:16 51:10 refusing [2] 3:25 41:7 regular [1] 25:22 regularly [13] 4:12 6:4,16 11:2 18:4,7 19:13,21,23 22:23 27:1 28:25 63:11 reject [1] 8:1 rejecting [1] 32:14 related [1] 56:22 release [3] 35:2 44:23 45:12 relief [2] 4:4 28:19 relies [1] 19:13 remaining [1] 10:24 remember [4] 9:12 41:17 45:9 46:19 remind [1] 56:16 remnant [1] 58:23 Rendon [6] 10:3,4,8 25:20 26:21 63:18 reopen [1] 57:8 repeatedly [1] 51:10 Representation [1] 41:6 request [2] 28:14,18 require [3] 9:13 10:18 29:19 requirement [2] 21:13 57:16 requires [1] 32:24 requiring [1] 14:6 resentencing [1] 41:23 resistant [1] 65:11 respect [8] 5:22 8:2 15:7 47:17 55:14 56:12 58:25 64:8 respectfully [3] 34:2 40:5 43:18 respond [2] 12:17 54:21 Respondent [4] 1:7,22 2:7 28:5 response [2] 17:22 59:7 restatement [1] 40:9 result [3] 19:17 33:19 41:23</p>	<p>retroactive [1] 14:7 retroactivity [6] 24:15 60:23,24 61:1,2,17 reversal [2] 49:7 60:13 reverse [2] 8:21 58:2 reversed [3] 4:1 37:16 64:6 reverses [1] 22:6 review [19] 7:16,20 8:8 15:10,10 16:10 17:11 20:10 22:2,14 23:11 24:4,16 25:3,9,9 44:5 46:11 59:14 rights [12] 4:18 6:7 11:7 21:16 56:23 57:1 59:5,8 65:11,12,12,16 Ring [6] 36:12,12,14 42:21 43:8,9 roadmap [1] 55:18 ROBERTS [10] 3:3 7:11 26:6 28:1 59:6,12,23 60:15 62:22 66:7 Rogers [1] 21:9 Rule [100] 4:5,8,21 5:3,16,17,23 6:6 7:14,15,15 8:6,9,14,24 9:16,22 10:7,15,22,24 12:20,25 14:19,20 19:4 20:6,7,11 22:8 23:8 26:14,17,20 27:3,6 28:18,23,25 29:3,10,14,18 30:5,23 31:12,19 32:9,22 33:2,2,6 34:5,6,10,12,13 35:17,23 37:13,15,22 38:2 40:24 42:12 43:25 44:9 46:11,22 47:2 48:6 49:19 51:9,15,21 52:20,21 54:8,23,24 55:16 56:4,4,12,14 58:5,22 60:3,10 61:1,2,4,13,24 62:19 63:10,13 64:12,14 65:9 rules [7] 5:15 17:17 36:2 56:22 60:23,24 65:22 ruling [2] 29:25 58:18 run [2] 7:8 48:18</p> <hr/> <p style="text-align: center;">S</p> <p>sake [1] 10:21 same [11] 11:13 25:23 30:10,10 37:5 54:14 56:11 63:20,21 64:1 65:1 sandbagged [1] 51:15 saying [15] 4:6 5:14 15:12 19:8 21:5 22:12 32:18 35:5 43:22 47:13 51:23 56:5 58:9 65:23,24 says [20] 8:5,10 9:4 10:23 17:7 18:5 22:10 23:10 24:3,3 27:12 39:2 41:6 42:15 49:5,10 51:1,2 57:11,14 Second [4] 4:17 6:13,14 64:8 section [1] 45:1 see [9] 13:11 35:17,18 40:9 45:14 54:3 55:4 62:10,17 seek [2] 4:4 17:1 seeking [1] 17:7</p>	<p>seem [1] 37:23 seems [3] 36:23 37:2 53:8 seen [1] 7:23 self-defense [1] 32:4 sending [1] 16:1 sentence [3] 3:13 36:13 44:22 sentenced [1] 3:11 sentences [1] 64:5 sentencing [6] 25:8,8 29:11 43:6 44:16 50:15 separate [9] 3:24,24 4:10 7:6 14:13,24 20:16 22:4 44:25 seriously [1] 3:17 set [2] 24:14 35:23 settled [2] 4:21 44:4 seven [1] 41:3 shaping [1] 7:20 shell [1] 8:13 shift [1] 35:14 shocked [1] 57:18 shooting [1] 28:10 shouldn't [2] 42:13 53:16 show [5] 21:4,5,19 40:13 52:14 showing [3] 20:24 29:6 41:19 Shrum [3] 31:14 35:21 47:1 side [3] 23:10 25:14 42:15 sides [1] 8:23 significance [5] 34:4 46:18 47:13 61:21 62:18 significant [39] 8:11,16 9:17,19 10:6 11:24 12:2 24:6,9 26:23 29:4,13,17 30:5,8,14,22 31:15,21 32:8,22 34:15,18,20 35:6,7,13,16 36:16,22 38:3 39:3 43:23 46:13 48:5 54:11 57:6 61:16 63:24 significantly [2] 9:20 29:21 similar [2] 54:23 63:18 Simmon [1] 65:11 Simmons [63] 3:16 4:1 5:4,13 8:24,25 9:3 12:4 16:7,7,21 17:6 19:3,5,10 20:12 22:3,5,8,10 28:15 29:8,10 32:14 33:3,6,9,10,21 34:10,13,14,22,25 35:15 37:15,20 41:18 42:22 43:16 44:9 45:9 48:11,13,15 49:4,11,12 50:24 51:9,16 55:23 56:7 57:15,25 58:1,3,10,22 64:20,22 65:12,16 simple [1] 21:13 simple-minded [1] 33:8 simply [7] 5:16 15:2 20:4 22:21 23:14 40:9 41:22 single [3] 5:8 25:18 27:4 situation [15] 25:23,24 32:11 37:6,14 40:25 41:3 42:</p>	<p>5,13 46:9,24 47:2 49:19,23 60:12 situations [6] 24:5 30:24 31:11,18,20 49:21 six [1] 64:24 Sixteen [1] 23:17 Slemmer [1] 31:24 Smith [4] 25:24 26:2 27:18 64:9 solely [1] 24:7 solicit [1] 54:25 somehow [3] 26:25 47:8 51:14 Someone [1] 25:6 soon [1] 25:10 sorry [7] 9:11 20:18 25:25 39:21 42:25 51:4 62:6 sort [4] 55:10,20 56:8 62:2 sorted [1] 44:6 SOTOMAYOR [28] 7:10 23:1 26:10 27:6,17,22,24 37:25 38:12,14,19,23 39:9,19,23 40:2,6,13 41:2,10 51:4 52:2,22,24 53:4,24 54:16 62:22 Sotomayor's [1] 42:2 sought [2] 17:3 65:3 sounds [2] 34:17 58:12 South [2] 28:15 34:23 Spanish [1] 38:15 speaks [1] 14:5 specific [1] 30:17 speculate [2] 31:7 63:16 speculative [1] 50:18 splitting [4] 18:10,12 37:2 39:13 stand [1] 41:24 standard [1] 18:6 stands [3] 5:7 22:16 23:3 start [2] 5:9 38:15 starting [4] 6:1 15:14,15 27:7 state [49] 4:9,15,22 5:23,24 6:18,21,21 7:4,5,15 9:18 11:14 12:20,24 15:3 16:1,11,18 17:15,18 23:8 24:3,16,24 28:12,21 29:15,22 35:1,10 37:11 38:7,8 45:11 51:10,18 52:12,16,19 54:23 55:12 56:11,17,23 57:11,20 58:17 63:19 state's [3] 15:10 23:14 65:23 STATES [15] 1:1,15 5:5,8 23:5,12,16,18,24 40:15 42:4 54:20 55:1,15,17 statute [8] 31:13 47:16 48:3 51:1,2 63:20,21,22 statutes [5] 29:12 37:19 44:17,17 58:21 statutory [1] 29:4 stayed [3] 54:7 63:20,21 Stewart [4] 25:24 26:1 27:17 64:9</p>
--	---	---	--	---

Official

<p>still ^[6] 11:5 46:10 49:10 57:18 58:9 65:10</p> <p>stop ^[1] 41:11</p> <p>story ^[1] 44:2</p> <p>straight ^[1] 51:19</p> <p>striking ^[1] 65:9</p> <p>stuff ^[4] 23:6 58:11 65:22, 23</p> <p>submitted ^[2] 66:8,10</p> <p>subsequent ^[2] 32:3 48:1</p> <p>subsequently ^[2] 40:21 49:18</p> <p>substantial ^[3] 53:10 62:13,14</p> <p>substantively ^[1] 31:19</p> <p>successive ^[7] 28:12,19 46:23 48:20 54:7 57:6 59:18</p> <p>suddenly ^[1] 32:17</p> <p>suffices ^[1] 17:7</p> <p>sufficient ^[1] 21:24</p> <p>suggest ^[2] 53:1,16</p> <p>suggesting ^[1] 44:1</p> <p>suggests ^[1] 57:20</p> <p>summarily ^[4] 4:1 22:6 37:16 58:1</p> <p>summary ^[2] 49:7 60:13</p> <p>supply ^[1] 13:14</p> <p>support ^[3] 54:20 55:6,8</p> <p>supporting ^[1] 5:8</p> <p>Suppose ^[2] 9:21 24:2</p> <p>supposed ^[1] 46:10</p> <p>SUPREME ^[74] 1:1,14 3:25 4:5 5:2,14 8:18,22 9:2,3, 14 10:2,4,9,13,23 11:19,20 12:11 15:5,20 16:2,14 17:18 19:2 20:14 22:1,9 25:15 26:14 28:17 29:9,12,16, 25 30:4,12 31:12 32:3,23 34:3,8 35:21 37:7,17 39:3, 3 40:11,15,16,23 41:14 43:15 46:6,8,17 48:6 49:20 52:7 53:21 54:2,8,14,15 55:22 56:24 59:1 60:2,9 61:15 63:17,23,24 66:3</p> <p>surprise ^[1] 54:24</p> <p>surprised ^[1] 58:18</p> <p>survive ^[1] 61:23</p> <p>suspect ^[1] 22:15</p> <p>switch ^[1] 45:4</p> <p>system ^[2] 7:21 49:25</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table ^[1] 7:8</p> <p>tails ^[1] 48:16</p> <p>talked ^[1] 52:25</p> <p>talks ^[1] 6:10</p> <p>technical ^[1] 65:21</p> <p>temporal ^[1] 62:2</p> <p>test ^[10] 11:8 17:24 39:7,10 40:2,9,10 53:7,9,25</p> <p>testimony ^[1] 50:16</p> <p>there's ^[28] 5:15 8:10 11:12 13:11,25 22:23 24:8 25:</p>	<p>12 26:24 35:14 39:2 41:17, 17,20 47:18 50:24,25 52:13 53:5,13,14,20 58:6 61:14,22 63:6 64:10,23</p> <p>they've ^[5] 7:17 10:19 22:7, 12 65:14</p> <p>third ^[4] 7:1 53:12,13 64:18</p> <p>THOMAS ^[8] 5:11,20 26:8 27:10 30:3,8,11 60:17</p> <p>Thomas's ^[3] 30:25 32:12 57:14</p> <p>though ^[8] 10:15 42:22 45:13 52:20 58:21 61:13 65:18,25</p> <p>three ^[9] 4:10 5:20 7:6,8 9:12 13:6 44:20 54:12 61:14</p> <p>threshold ^[1] 35:10</p> <p>thumbing ^[1] 58:12</p> <p>time-honored ^[1] 27:6</p> <p>title ^[3] 45:1,1 51:2</p> <p>today ^[5] 5:6 28:11 41:4,7 46:8</p> <p>together ^[1] 53:1</p> <p>took ^[2] 51:11,16</p> <p>totally ^[3] 14:13 50:18 53:6</p> <p>transformative ^[2] 32:25 36:1</p> <p>treat ^[2] 11:13,14</p> <p>treats ^[1] 60:4</p> <p>trial ^[14] 15:15,19,21 18:12, 14 20:9,9 22:13 25:7 28:16 43:14 47:20 50:12 64:22</p> <p>trials ^[1] 4:3</p> <p>tried ^[3] 50:9,10,15</p> <p>troubling ^[1] 56:10</p> <p>true ^[3] 6:24 10:5 33:20</p> <p>truly ^[2] 8:6 13:3</p> <p>try ^[1] 38:20</p> <p>trying ^[3] 24:2 43:15 52:17</p> <p>Tucson ^[1] 28:9</p> <p>Tuesday ^[1] 1:11</p> <p>turn ^[4] 15:14 19:18 21:23 25:11</p> <p>turned ^[1] 5:3</p> <p>turns ^[2] 9:4 22:9</p> <p>Twelve ^[2] 3:23 22:3</p> <p>twice ^[1] 22:8</p> <p>two ^[4] 6:5 9:13 14:24 65:2</p> <p>types ^[1] 59:15</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S ^[1] 12:11</p> <p>ultimate ^[1] 56:8</p> <p>ultimately ^[2] 43:22 56:3</p> <p>unambiguous ^[1] 19:4</p> <p>unanimous ^[1] 27:11</p> <p>unavailable ^[1] 44:15</p> <p>unclear ^[1] 44:14</p> <p>under ^[22] 3:17 4:4,20,22 5:15 6:23 8:1 9:10 13:18 14:24 16:6,11 24:12,18 28:15, 25 29:14,18 52:1,11 64:6, 20</p>	<p>underlie ^[1] 41:18</p> <p>underlying ^[5] 26:11 34:6 36:20 37:22 47:2</p> <p>undermine ^[1] 43:21</p> <p>understand ^[15] 5:12,13 9:25 13:8 14:14 16:17 36:19, 24 42:3 44:8 45:21 46:16 58:25 60:21 61:10</p> <p>understandable ^[1] 7:12</p> <p>understanding ^[1] 31:9</p> <p>understood ^[2] 12:17 32:12</p> <p>undertaken ^[1] 45:2</p> <p>unfair ^[1] 19:18</p> <p>uniform ^[1] 62:17</p> <p>unique ^[9] 23:15,23 29:11 40:25 41:3 42:13 49:18,23 60:12</p> <p>UNITED ^[3] 1:1,15 40:15</p> <p>unpredictable ^[1] 20:8</p> <p>until ^[2] 38:1 42:23</p> <p>unusual ^[3] 22:15 53:21 55:10</p> <p>up ^[6] 25:22 31:8 38:1 43:11 47:7 65:8</p> <p>using ^[2] 20:1 53:22</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>valid ^[1] 52:20</p> <p>versus ^[14] 3:4 6:20,20 25:24 26:1 27:8,10,17 36:20 38:7,8 42:5 62:10 64:9</p> <p>vetted ^[1] 41:21</p> <p>view ^[2] 26:13 38:24</p> <p>violates ^[1] 50:24</p> <p>violating ^[1] 49:9</p> <p>vote ^[1] 3:21</p> <p>voted ^[1] 3:20</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waived ^[1] 16:3</p> <p>waiver ^[4] 15:8 16:11,22,25</p> <p>Walker ^[4] 6:15 11:7 40:22 62:9</p> <p>wanted ^[1] 3:18</p> <p>Ward ^[1] 27:8</p> <p>warning ^[4] 6:9 18:23 20:5 21:15</p> <p>Washington ^[2] 1:10,19</p> <p>way ^[37] 5:25 6:13,14 7:23 11:13,21 18:7 19:17 21:5, 8,10 25:19 27:5 30:23 34:2 37:5,19 43:24 46:17 47:7 48:18 52:14,15 53:11 55:3 56:5,8,14,16 58:16 60:4, 8 61:5 62:17 63:14 64:1, 15</p> <p>weeds ^[1] 58:20</p> <p>week ^[1] 63:12</p> <p>welcome ^[1] 30:2</p> <p>well-established ^[5] 19:2, 10 20:12 65:14 66:2</p> <p>whatever ^[7] 14:22 17:17 26:25 48:17 50:5 62:3,3</p>	<p>Whereupon ^[1] 66:9</p> <p>whether ^[23] 7:25 8:3 9:15, 17 11:8 15:2 19:21 20:20 23:2,24,24 24:8 29:21 38:3 39:2 42:8 43:1 44:14 46:14 47:18 50:10 52:6 59:13</p> <p>wholeheartedly ^[1] 60:2</p> <p>will ^[8] 3:3 10:19 24:3 27:24 52:19 54:3 55:17 61:23</p> <p>win ^[6] 7:8 48:16 49:25 50:3,4,6</p> <p>withdrew ^[1] 8:7</p> <p>without ^[3] 3:13,21 62:13</p> <p>wonder ^[1] 42:8</p> <p>wondering ^[2] 14:18 46:10</p> <p>word ^[1] 12:9</p> <p>words ^[1] 57:16</p> <p>work ^[1] 42:12</p> <p>working ^[1] 53:1</p> <p>works ^[2] 59:24 64:1</p> <p>world ^[1] 13:11</p> <p>worried ^[4] 20:3 23:14 55:15 56:3</p> <p>wrestle ^[1] 62:14</p> <p>written ^[2] 11:9 12:15</p> <p>wrongly ^[4] 57:12,19 58:9, 10</p> <p>wrote ^[1] 3:25</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yates ^[1] 24:13</p> <p>year ^[1] 6:20</p> <p>years ^[3] 3:16 44:24 45:22</p> <p>yield ^[1] 29:2</p> <p>yourself ^[1] 57:13</p>
---	---	--	--